

**IN THE HIGH COURT OF TANZANIA
(MTWARA DISTRICT REGISTRY)
AT MTWARA
LAND CASE NO. 03 OF 2021**

ALLY ISSA CHILINDIMA PLAINTIFF

VERSUS

**1. BANK OF AFRICA (T) LIMITED
2. MAULIDI HUSSEIN SALUM DEFENDANTS
3. JOHN MAENGO**

Date of Hearing: 31/05/2022

Date of Ruling : 17/06/2022

RULING

MURUKE, J.

Ally Issa Chilindima (the Plaintiff) entered loan agreement loan from the 1st Defendant (the bank) to secure TShs.150,000,000/= (Tanzania shillings one hundred and fifty millions only) in October 2015, in order to run his business. He was to pay TShs.6,006,631.88 (Tanzania shillings six million and six hundred and thirty one and eighty cents only) per month within 36 months which make total repayment of Tshs.216,238,747.99.

To obtain such loan, he mortgaged his Plot number 282, Block "K" located at Lichungu Newala as a Residential Houses estimated value for the suit property is TShs.157,000,000/= (Tanzania shilling one hundred and fifty seven million only), second premise is a business Plot (godown) located as Plot number 1295 Block "W" Majengo Area, Newala estimated value for the suit premise is TShs.306,000,000/=.

Plaintiff managed to pay the loan up to the maximum percent and the only amount remained for repayment was TShs.89,418,245.90.

The Bank notified the Plaintiff for the default to repay his loan and asked him to repay the remained amount of Plaintiff asked first Defendant to make an extension of time for repayment of loan and rectifying amount for repayment for each month. aspect both the plaintiff and the first respondent decided to renew their contract in 2019 for the loan agreement of TShs.89,418,245.90. The Plaintiff managed to pay the renewed loan up to the maximum percent and the only amount remained for repayment was Tshs.82,872,237.25.

Plaintiff and the Bank reached mutual agreement that repayment of the renewed amount of Loan should come to an end on 14th June, 2022.

After payment of instalments his loan was consolidated restructured, but failed to pay. The First Defendant issued demand notices to the Plaintiff reminding him on his obligations under the facilities but in vain. Thereafter, the First Defendant served the Plaintiff with a 60 days" statutory notice of default requiring him to remedy the situation failure of which the bank will exercise her rights under the mortgage deeds. The plaintiff did not act on the notice of default, as such the 1st Defendant appointed **Harvest Tanzania Limited** to auction plaintiff properties to recover the outstanding loan amount. However, on the date of auction, the same was postponed/cancelled as the reserved price was not fetched. To date, the said properties have not been sold. The Plaintiff field this suit together with Misc. Land Application No.20 of 2021, praying for injunctive order against the First Defendant and its agents. The

application for injunction was dismissed on 25th November 2022 by this Court for lack of sufficient cause.

When this suit came up for mention on 22nd February 2022, this court *suo moto* raised a preliminary objection on the point of law and ordered parties to address in writing on whether the plaintiff has cause of action against the first defendant.

The pertinent question to be answered herein is what is a cause of action is and whether the Plaintiff has cause of action against First Defendant. Cause of action is not defined in our statutes but there are number of judicial decisions and various Books of prominent Authors who have defined it. **Mulla** in his book titled **The Code of Civil Procedure, Volume 2, (17th Edition 2007, at page 127 paragraph 5** defined cause of action to mean:-

“Every fact which is necessary to establish to support a right or obtain judgement. Or every fact which will be necessary for the Plaintiff to prove if traversed”. It can also be defined as bundle of essential facts which is necessity to prove before you can succeed in the suit.

In the case of **Mashado Game Fishing Lodge Ltd and Two others versus Board of Trustees of Tanganyika National Parks (T/A Tanapa), [2002] TLR 319, at page 319** of the ruling defined the term cause of action as follows,

“A person is said to have a cause of action against another where that person has a right and the other person has infringed or breached that right with the result that the person with the right suffers material loss or any other loss... since the third plaintiff has no right which could be infringed by the defendant, the third defendant has no cause of action against the defendant; Plaintiff in respect of second and third Defendant is rejected.”

According to the pleadings it is the First Defendant who's right has been infringed by Plaintiff for failure to repay the loan advanced in good faith.

There is no any right of Plaintiff which has been infringed or breached by First Defendant rather it is the Plaintiff who has breached the agreed terms of loan agreement which resulted into infringement of First Defendant's right of recovering her money. The Plaintiff has not disclosed any cause of action which can be proved to entitle him with a decree against the First Defendant as he is not disputing the following facts:-

- i. That he was advanced credit facility by First Defendant, in terms of paragraph 5 of plaint.
- ii. That he pledged his landed properties to wit Certificate of Title No.6695MTW, Plot No.1295 Block "W" situated at Majengo Area, Newala and Certificate of Title No.34460MTW Plot No.282, Block "K" situated at Lichungu Newala as security to the loan, *see paragraph 6 of plaint.*
- iii. That he defaulted the instalment payment and requested for restructuring, which was granted, and he also defaulted to repay the restructured amount interms of paragraph of the plaint.

There is no any document attached to the plaint to suggest that the properties has been sold. This being a recovery suit, there is no way plaintiff can obtain the Decree in his favour after admitting the debt and default. Thus no any averments in the plaint which disclosed the cause of action against First Defendant. To this court the plaint is defective for failure to comply with Order VII rule 1 (e)of Civil Procedure Code, Cap.33 R.E 2019. The said Order VII rule 1 (e) of Civil Procedure Code, provides for particulars which shall be contained in the plaint, it provides as follows:-

1. The plaint shall contain the following particulars –

- a. N/A
- b. N/A
- c. N/A
- d. N/A
- e. the facts constituting the cause of action and when it arose, Emphasis ours.

Also, Order VII r 11 of Civil Procedure Code Cap.33 R.E 2019, provides for the effect of filing a plaint which does not disclose the cause of action and that if it shall be rejected, same is reproduced as follows:-

Order VII r 11 of Civil Procedure Code.

"The plaintiff shall be rejected in the following cases-

(a) where it does not disclose a cause of action"

Emphasis ours.

The wording used in both Order VII rule 1 (e) and Order VII rule 11 of Civil Procedure Code Cap.33 R.E 2019, is "**shall**" which as per section 53 (2) of Interpretation of Laws Act Cap 1 R.E of 2019, it implies that the function so conferred must be performed. Therefore, as per the above cited case of **Mashado Game Fishing Lodge Ltd**, and provision of Order VII rule 1(e) and VII rule 11 of Civil Procedure Code. The plaint in this instant matter is totally defective for contravening mandatory provision of law by failing to disclose cause of action.


The Book of Mulla titled as **The Code of Civil Procedure, Volume 2, (17th Edition) 2007**, at page 429 and 430, which has discussed Order 7 of Indian Code of Civil Procedure which most of its provisions are in *pari material* with our civil Procedure Code. The Book talks on the duty of Court to examine a plaint before issuance of summons and to ascertain whether any cause of action has been pleaded and whether any reliefs

have been claimed against Defendants. The book also discussed on the imperative duty of court to strike out pleadings in appropriate cases at any stage if no cause of action remains and that the pleading which does not disclose cause of action should not waste the time of court.

Not only properties in dispute has not been sold as claimed by plaintiff thus lack of cause of action by plaintiff, but,


“also failure to pay the loan instalments as in terms of the agreement gives a cause of action to the bank to seek recovery of loan amount.”




Z. G. Muruke
Judge
10/06/2022

Ruling delivered in the presence of Prisila Mapinga for the first defendant and Nyambi Ismail representative of the plaintiff who is reported sick.




Z. G. Muruke
Judge
17/06/2022