

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MWANZA
AT MWANZA**

LAND CASE NO. 25 OF 2021

NDONO INVESTMENT LIMITED PLAINTIFF

VERSUS

NATIONAL MICROFINANCE BANK PLC 1ST DEFENDANT

ADILI AUCTION MART LIMITED 2ND DEFENDANT

MWANZA HUDUMA COMPANY LIMITED 3RD DEFENDANT

RULING

21st June & 23rd September, 2022

Kahyoza, J.

Ndono Investment Limited, (Ndono) sued the **National Microfinance Bank PLC**, (the Bank), Adili Auction Mart Limited (the Auctioneer) and Mwanza Huduma Limited (Mwanza Huduma) claiming among other things, for a declaration that sale of the plaintiff's petrol station on Plot No. 49 Block A Nyangh'mango- Miswingi was null and void for being illegal and that selling of the plaintiff's collateral before restructuring the loan was unlawful.

Mwanza Huduma, raised a preliminary objection that the plaint does not disclose a cause of action against her or if any the same is misplaced. This ruling therefore, seeks to answer the issue whether the plaint raised a

cause of action against Mwanza Huduma. Mwanza Huduma's advocate, who also represents the Bank and the auctioneer, submitted that the Plaintiff did not disclose a cause of action against Mwanza Huduma as well against the Bank and the auctioneer. It is appropriate to argue that the Bank and the auctioneer raised a preliminary objection orally during the hearing of Mwanza Huduma's preliminary objection, that the Plaintiff did also not disclose a cause of action against them.

I will commence with undisputed matters of law or facts; **one**, that it is mandatory that a suit must disclose a cause of action, that is a plaintiff must show why parties are at issue; and **two**, a court cannot set to hear a case when parties are not at issue. A cause of action in short, means every facts which will be necessary for the plaintiff (Ndonso) to prove if traversed, in order to support his right to judgment. A cause of action has no relation whatsoever to the defence that may be set up by the defendant, nor does it dependent on character of the relief prayed for by the plaintiff. See **Mohammad Khali Khan V. Malibub Ali Mian** (AIR) 1949 PC 28 AT 86. The position in **Mohammad Khali Khan V. Malibub Ali Mian** (supra) was adopted in the case of **Mukibi V. Bharsar** 1967 E.A 477 and **John Byombalirwa V Agency Martine (T) Limited** [1983] T.L.R. 1, where it was held that in order to decide on whether there is a cause of action, the

court needs to look at the plaint to determine if it discloses a cause of action or not.

Ndono's advocate replied that, the preliminary objection that, the plaint did not disclose a cause of action was not a pure point of law as it was a mixture of law and facts, hence it violated the celebrated principle in the case of **Mukisa Biscuits V. West and Distributors** [1969] E.A. 696. I wish to say at outset that I distance myself with that view. My position is that a preliminary objection that plaint discloses no cause of action is in four walls with the principle in **Mukisa Biscuits'** case. It is a principle in **Mukisa's case** that, a preliminary objection consists 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.

It is established that if a plaint does not disclose a cause of action the remedy is to strike it out. A decision whether the plaint discloses a cause of action is based on the facts of in the Plaint. The facts in the Plaint are regarded as proved against the plaintiff. Parties are bound by their pleadings. The plaintiff in this case cannot be heard to argue, that the facts in the plaint to which the preliminary objection is based are not proved. The Court observed in **John Byombalirwa's** case (supra) that *the question whether a plaint discloses a cause of action must be determined upon perusal of the*

plaint alone, together with anything attached so as to form part of it and upon the assumption that any express or implied allegations of facts in it are true.

I hold that the preliminary objection that the plaintiff does not raise a cause of action, which is wholly based on facts disclosed in the plaintiff passes a test in **Mukisa Biscuit's** case. That is from Plaintiff's side, facts in the plaintiff are true facts. For that reason, when a court is asked to consider whether the plaintiff discloses a cause of action is called upon to look at the facts in the plaintiff to find out whether they established the Plaintiff's right which the defendant has breached.

I now consider the issue whether the plaintiff has a cause to sue the defendants. A cause of action simply put, is a cause or a reason to sue. As the record bears testimony. It is Mwanza Huduma who raised a preliminary objection. The bank, and the auctioneer did not specifically raise a preliminary objection they joined the wagon at the hearing when their advocate who happened to be Mwanza Huduma's advocate submitted that all the defendants contend that the plaintiff does not disclose a cause of action. I wish to state that the bank and the auctioneer ambushed Ndonso by raising a preliminary objection at the hearing stage. Such a practice undermines the spirit of the adversarial system which demands a party to know the adverse

party's case to prepare. I discourage the practice and condemn it. All the same, I will proceed to determine the preliminary objection since Ndonu's advocate replied to the submission.

I will examine first if the Complaint disclosed the cause of action against Mwanza Huduma. It is an established principle that is even an infinitesimal fraction of the cause of action is sufficient. This position was taken by the famous author Sarkar in his book **On Code of Civil Procedure**, 11th Ed. 2007 at page 221. I wish to emphasize here that holding that a plaintiff has a cause of action is different from holding that he has a right.

Mwanza Huduma's advocate submitted that Ndonu has no cause of action or disclosed no cause of action against Mwanza Huduma. A brief account of facts is important to appreciate the genesis of the preliminary objection. Indisputably, the Ndonu borrowed from the bank and mortgaged her property as collateral for loan. Ndonu defaulted to repay the loan. He applied for restructuring the loan payment, the bank did not answer. The Bank appointed the auctioneer who sold one of the collaterals to Mwanza Huduma. Ndonu is contesting the sale contending that it was null and void for being illegal.

It against the facts narrated above, Mwanza Huduma's advocate submitted that the complaint does not disclose a cause of action or if it does it

is misdirected. He submitted that according to section 135(4) of the Land Act, [Cap. 113 R.E. 2019], a remedy for a person complaining against the manner the mortgagee disposed the collateral has a right to sue for damages and not for nullification of the sale. He submitted that Ndonu was suing for nullification of sale of the collateral for that reason Ndonu's cause of action was misplaced.

Mwanza Huduma's advocate added that the bank had justification to sell Ndonu's property. He argued that Ndonu pleaded in the plaint that she borrowed from the bank and mortgaged her property including Plot No. 49 Nyang'homango as collateral, and defaulted to repay the loan. Thus, the Bank had right to sell the property. To bolster his position, he cited the case of **General Tyres E.A. Limited v. HSBC Bank** [2006] TLR 60, where it was held that the bank has a duty to recover a loan from the borrower. The bank's advocate contended that the Bank did not violate Ndonu's right by recovering the loan advanced to him. He also cited the case of **Yusuf Mwita Marwa v. NMB and Nsombo Co. Limited (H/C)** Land case No. 09 of 2017 where it was held that *"by selling the mortgaged property the plaintiff the mortgagor has not indicated that any law or term of contract was violated"*.

Ndono's advocate, Mr. Mujungu vehemently refuted the argument that the Plaintiff, disclosed no cause of action. He submitted that it is an established principle that in the cases for recovery of land, the seller must be joined with the buyer. To support the position, Ndono's advocate cited the case of **Jumma B. Kadak V. Laurent Mkande** [1983] TLR 103. He submitted that as long as Mwanza Huduma was a buyer it was proper to join him as a necessary party.

Ndono's advocate submitted that he had a cause of action against the bank on the ground that the bank while exercising her power to sell violated her duty to obtain the best price. He added that Section 135 of the land Act cited by the Bank's advocate entitles the mortgagor whose property was sold the mortgagee while exercising his power to sell to claim for damages but it does not bar such a person to apply for declaration of that the sale was a nullity. He argued further, that the case of **General Tyre E.A. Limited**, cited by Mwanza Huduma's advocate, was irrelevant as facts are different. He contended that the case **Yusuf Mwita Marwa** (Supra) was distinguishable as the Ndono contends that the Bank violated her duty to obtain the best price.

In his rejoinder, the Bank and Mwanza Huduma's advocate, Dr. Mwasondola, reiterated that Ndono did not disclose a cause of action against

the Bank and Mwanza Huduma. He conceded that the Bank has a duty to obtain the best price. He argued that Ndonu did not plead facts in the plaint showing that the bank violated the duty to obtain the best price.

It is settled as shown above, that to decide the issue whether the plaint disclosed the cause of action, a court is entitled to look at the plaint alone, together with anything attached. It is also established that a cause of action is a set of facts which if controverted, the plaintiff may be called upon to prove. Hence, if the law presumes the existence of certain facts or if it provides that certain facts will not constitute a cause for institution a suit, a person shall cannot be called upon to prove those facts or base is claim on such facts, respectively. Section 135 of the Land Act, protects a buyer of mortgaged land from mortgagee or receiver, from suits except in case of fraud, misrepresentation, or other dishonest conduct on part of the mortgagor of which that buyer has actual or constructive notice. Ndonu's advocate submitted that Ndonu's cause of action against all the defendants, was that the Bank while exercising her right to sell the collateral violated duty to obtained the best price. There is no doubt that the bank has a duty to obtain the best price reasonably obtained at the time of sale. Whether the Bank obtained the best price is a question of evidence but whether the bank

failed to obtain the best price because of fraud or misrepresentation or any other dishonest conduct is a fact which must be pleaded and later proved.

The law is uncertain that, fraud or misrepresentation as a cause of action must be pleaded. It cannot be presumed. Rule 4 of Order VI of the **Civil Procedure Code**, [Cap. 33 R.E. 2022] makes it mandatory for a party seeking to rely on fraud, misrepresentation to state particulars substantiating the allegations. Since Ndono did plead facts demonstrating allegation of fraud or misrepresentation, it cannot be argued that Ndono has a cause of action based on fraud or misrepresentation. Rule 4 of order VI of the CPC states-

*"In all cases in which the party pleading relies on any misrepresentation fraud, breach of trust, willful default, or undue influence and in all other cases in which particulars may be necessary to substantiate any allegation such particulars (with dates and items if necessary) **shall be stated in the pleading.**"*
(Emphasis added)

Ndono did not only not provide particulars of fraud or misrepresentation, but also, did not allege that the bank failed to obtain the best price because of fraud or misrepresentation. Ndono has therefore no cause of action against Mwanza Huduma, the purchaser.

In case, a mortgagor challenges the mortgagee or receiver's sale of his property on a cause other than that fraud or misrepresentation, the mortgagor's remedy is to claim for damages as provided under section 135(4) Land Act. Section 135 (4) of Land Act does not give the mortgagor a cause of action against the purchaser, in this case Mwanza Huduma. It reads:-

"A person prejudiced by an authorized improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that property".

I am of the firm view that Ndonu's plaint does not disclose a cause of action against Mwanza Huduma, the purchaser of the collateral. Consequently, the holding in the case **Juma B. Kadale** (Supra) that in suit of recovery of Land the seller must be joined with the buyer does not apply where the seller is the mortgagee or receiver exercising the power of sale.

I therefore, uphold the preliminary objection that the Ndonu's plaint does not disclose a bundle of facts which give Ndonu the legal right for redress against Mwanza Huduma. I strike out the suit against Mwanza Huduma with costs.

The last issue to consider is whether the plaint discloses a cause of action against the Bank and the auctioneer, who is the Bank's agent. Ndonu's

advocate submitted that the Ndono has a cause of action against the first defendant as the first defendant while exercising her power to sell violated his duty to obtain the best price.

The Bank's advocate conceded that it was true that the Bank, the mortgagee had duty under section 133 of the Land Act, while exercising the power to sell to obtain the best price. He contended that the plaintiff did not pleaded facts demonstrating that the Bank failed to obtain the best price as Ndono did not know the amount accrued from the sale.

I agree with the advocate of both parties that mortgagee has while exercising his power to sell, a duty to obtain the best price reasonably obtainable at the time of sale. Section 133 of the Land Act, imposes that duty upon the mortgagee in no uncertain terms. I keenly perused the Plaintiff to find out whether Ndono pleaded that the Bank breached its duty to obtain the best price. I found, like the Bank's advocate, that, Ndono did not plead facts showing *prima facie* that the Bank breached her duty to obtain the best price. Ndono pleaded under paragraph 17 that she did not know how much was accrued from the sale. It is vividly clear that if a person does know how much was accrued from the sale he cannot complain that the best price was not obtained from that sale. Paragraph 17 of the Plaintiff reads-

*"17. That, the said notice to vacate under paragraph 16 is illegal as the sale of the alleged property is tainted with illegality **ab initio** and it does not disclose how the property has been sold and **how much was paid.**" (emphasis added).*

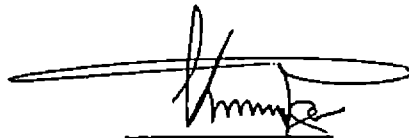
Given the facts pleaded under paragraph 17 it is clear as daylight that Ndono does not seek to rely on the contention that the Bank breached the duty to obtain the best price available while exercising his power to sell.

Ndono alleged that *the sale of the alleged property is tainted with illegality **ab initio** and it does not disclose how the property has been sold and how much was paid.* I am alive of the position of the law that a slightest cause of action is sufficient. Is the allegation that the sale was illegal *ab initio* enough to establish the cause of action. The answer is negative. I agree with the Bank's advocate that the mortgagor's right in case, a mortgagee disposes the collateral illegally or procedurally, is to sue for damages. The mortgagor must plead facts he wishes to rely upon to establish that the mortgagee sold his collateral illegally or procedurally. Ndono has not pleaded such facts. I therefore find that Ndono's mere allegation that the *sale of the alleged property is tainted with illegality **ab initio** and it does not disclose how the property has been sold and how much was paid* did not raise the cause of action against the Bank. Since

Ndono's plaint disclosed no cause of action against the Bank, she cannot have a cause of action against the Bank's agent, that is the auctioneer.

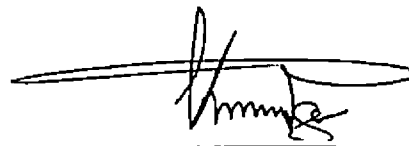
In the end, I allow the preliminary objection that Ndono Investment Limited has no cause of action against Mwanza Huduma Limited, National Microfinance Bank PLC and Adili Auction Mart Limited. The suit is struck out with costs.

It is ordered accordingly.



John R. Kahyoza.
Judge.
23/09/2022

Court: Ruling delivered in the virtual presence of Mr. Mujungu for Plaintiff and Dr. Mwaiondola the defendants' advocate. B/C Jackline present.



John R. Kahyoza.
Judge.
23/09/2022