IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR-ES-SALAAM SUB-REGISTRY)

AT DAR-ES-SALAAM

CIVIL CASE NO. 150 OF 2021

EURO COMMERCIALS LIMITED ..... PLAINTIFF

VERSUS

BANK OF AFRICA (T) LIMITED ..... 1st DEFENDANT

NAMPULA AUCTION MART AND CO. LTD ..... 2nd DEFENDANT

EMMANUEL MBUGA ..... 3rd DEFENDANT

YUSUFU AMIRI MBARAKA ..... 4th DEFENDANT

JUDGMENT

11/09/2023 & 12/02/2024

NKWABI, J.:

Like most amours, when they start, up to their climax, are characterised by sweet names like; darling, sweetie, honey, baby and the like. But when they dwindle and descend to catastrophic failure, bad names emerge and called. The plaintiff and the 1st defendant's business relationship passed through all those stages.

The plaintiff coaxed the defendant for a loan. After executing the facility letter (asset financing) worth 200,000,000/= on 17th March 2020 coupled with specific debentures, the plaintiff open-handedly received the loaned money and happily started using the loaned money. The facility letter had a life span of 12 months. She was, however, required to repay the loan

together with interest within specified times (equal quarterly instalments). She failed. The 1st defendant acted upon with view of exercising her right of recovery of the loan together with interest. It is when the magnificent business relationship between the parties morosely crashed. They have thus, submitted themselves to the authority of this Court to determine their rights and obligations.

According to the plaintiff, the 1st defendant illegally seized (contrary to the terms of the facility letter, the specific debentures and legal procedures of attachment) a mobile crane with registration Number T 977 DCU. After the seizure, the plaintiff paid T.shs 7,000,000/= on 13th October, 2020 with a promise to clear the arrears by end of October 2020. However, on 16th October, 2020 the 2nd defendant issued the plaintiff with a notice of intention to sell the crane in question. A notice of appointment of a receiver was issued on 21st October, 2020. The plaintiff further avers in the plaint that by end of October 2020 she had paid T.shs 95,404,922.52 being more than 48% of the facility letter.

Despite the claim of hardship in business in paragraph 15 of the plaint, in paragraph 22 of the very plaint, the plaintiff avers that the crane would earn her T.shs 3,465,000/= per day which translate to Tanzania shillings one billion one hundred forty-three million four hundred and fifty

thousand from 10th October, 2020 (the date of seizure of the crane) to 9th September 2021. To cut a long story short, the plaintiff claims for the following reliefs and/or orders:

i. A declaration that the seizure of the mobile crane was illegal.

ii. A declaration that the purported sale of the mobile crane was illegal.

iii. An order for the defendants to return the mobile crane in good service and working condition as it was before it was unlawfully seized or in the alternative for compensation for the replacement of the said mobile crane with similar specifications which has a replacement value of T.shs 500,000,000/=.

iv. The defendants to pay the plaintiff damages jointly and severally for the loss of revenue to the tune of T.shs 1,143,450,000/= which loss continues to accrue on a daily basis.

v. Payment of general damages by the defendants to the plaintiff as to be assessed by this Court.

vi. Interest on (iv) above at commercial rate of 27% from the date of accrual of the cause of action to the date of judgment.

vii. Interest on the decretal sum at the Court's rate from the date of judgment to the date of payment in full.

viii. Costs of the suit, and any other relief the Court deems fit and just to grant.

In the written statement of defence, the 1st defendant disputes the value of the crane, the daily earnings of the crane in that they are exaggerated with intention of enriching the plaintiff and added that the value of the crane which was certified by the government valuer was at T.shs 104,000,000/=. It was stated that the seizure of the crane was lawful and the plaintiff was hiding the crane. The 1st defendant prayed the suit be dismissed with costs.

On the side of the 1st defendant, raised a counter-claim calling for the reliefs about to be specified:

i. The defendants in the counter-claim to pay T.shs 124,507,685/16 being outstanding debt as of September 2021.
ii. Interest at 22% of the above sum from October to the date of judgment.
iii. Interest at Court's rate at 12% from the date of judgment to payment of the decretal sum.
iv. General damages.
v. Alternatively in event the defendants will not pay the above sum or what will be awarded by the Court within 14 days from the

date of judgment, then cranes with registration numbers T 230 DDL Todan – Fun ATF60-4, T152 CDG and T 181 DDT be sold at public auction to recover the decretal sum failure of which then the 2nd and 3rd defendants should be personally responsible.

vi. Any other reliefs this honourable Court deems fit to grant.

After the mediation process, which had the view of mending the parties' bond had crumbled to the ground, this Court framed the issues for consideration and determination as below:

1. Whether there were justifiable reasons for the seizure and auction of crane with registration Number T. 977 DCU.
2. Whether the procedure of seizure and auction of the said crane were complied with.
3. Whether the 3rd defendant was lawfully appointed as receiver manager.
4. Whether the 4th defendant is a bona fide purchaser of the crane.
5. Whether the 3rd defendant was legally sued in personal capacity.
6. Whether by instituting this suit/case the plaintiff is in abuse of Court process.
7. What reliefs are parties entitled to.

I propose to deal with one issue, after the other. I straight forward commence with the 1st issue which is whether there were justifiable reasons for the seizure and auction of crane with registration Number T. 977 DCU. On the 1st issue, the counsel for the plaintiff urges me to decided it in the negative, because, the demand notice (exhibit P.4) was issued by the 1st defendant before the expiry of the exemption time which was granted under exhibit P.6. Further, the plaintiff managed to pay T.shs 47,943,673 to settle the amount in full as per exhibit P.8 which are deposit slips. It is elaborated that the defaulted amount was paid in full in a short period within a month from the seizure of the crane in dispute before the end of October, 2020 while the crane was seized on 10th October, 2020.

On his side, the counsel for the 1st and 3rd defendants maintained that what the plaintiff did was to pay arrears and not the whole loan and interests. Mr. Mbuga added that it was not paid under the agreed quarterly equal instalment.

With intense respect to Mr. Opanda, learned counsel for the plaintiff, I disagree with him and the plaintiff. The instalment was due for repayment ever since July 2020. The request for extension time for two months (exhibit P.5) is dated 24/06/2020 and was received by the 1st defendant on 24/06/2020, so the same was to expire by September 2020 as testified

by DW.1, but impounding the crane was done on 10th October, 2020 after notice of default and demand to repay the instalment had been supplied to the plaintiff. Exhibit P.6 which is a notification letter by the bank addressed to the plaintiff said the July instalment was deferred to be paid in September. Demand notice to pay the instalment was issued in September while the crane was impounded in October. The plaintiff had not paid the instalment in time according to the agreement. In the circumstances, the impounding of the crane on 10th October, 2020 was legal and the 1st defendant was entitled to impound it because the grace period extended had expired by 16th September 2020, recourse being had to the date the facility letter was executed which is on 17th March 2020. My stand point is backed by the decision in **Abdalla Yussuf Omar v People's Bank of Zanzibar & Another** [2004] T.L.R. 399 CAT where it was held that and I quote:

> *We are also of the settled view that because the appellant failed to honour the terms of the payment under clause 6 of the loan agreement, Exhibit P4, the bank was justified in exercising its power of sale of the mortgaged property under Clause 7 of the said loan agreement."*

In the evidence of the plaintiff and in cross-examination of DW.1, the plaintiff tends to show that the crane that was seized was not used to

secure the loan of T.shs 200,000,000/= rather it was a debenture to secure a loan of 60,000,000/=. That was admitted by DW.1 in cross-examination. But this line of evidence and cross -examination does not come into assistance of the plaintiff because in the plaint, there is no any mention of the debenture of T.shs 60,000,000/=. The plaintiff is bound by his pleadings. In essence, the case of the plaintiff is spurious, unless it acknowledges the defence of the 1st defendant that the Crane in question is covered under the general debenture which is touted by the 1st defendant. Else, that is inappropriate. My position is backed by the decision in **Barclays Bank (T) Ltd v. Jacob Muro,** Civil Appeal No. 357 of 2019 CAT:

> *"We feel compelled, at this point, to restate the time-honoured principle of law that parties are bound by their own pleadings and that any evidence produced by any of the parties which does not support the pleaded facts or is at variance with the pleaded facts must be ignored."*

See also **James Funke Gwagilo v. A.G.** [2004] T.L.R. 161.

That being my slant in totality in regard to the first issue, I decided the 1st issue in the affirmative.

The next issue for my consideration and determination is whether the procedure of seizure and auction of the crane was complied. On this issue, the plaintiff and her counsel maintain that the procedures stipulated under Exhibit P. 2 and P.3 were not complied with for failure to appoint a receiver manager. Mr. Opanda contended that the 2nd defendant is the broker and auctioneer appointed by the 1st defendant to impound and sale of the crane as per exhibits P.10, P. 11, P. 12, P. 13 and P. 18. It is added that the receiver manager was appointed by the 1st defendant as an afterthought to salvage their illegal and irregular act. It is also complained that there is no any reminder demand notice contrary to clause 8.2 of the facility letter. The counsel for the plaintiff lamented that the public auction was advertised on 30/05/2021 and the auction was conducted on 01/06/2021 while the publication ought to have taken 14 days before the auction citing the decision of this Court in **Registered Trustees of Africa Inland Church of Tanzania v. CRDB & 2 Others,** Commercial Case No. 7 of 2017 and **Access Bank Tanzania Ltd v. Mkandala Gabriel Mkandala & Another,** Land Appeal No 10 of 2022, HC. I am pressed by the counsel for the plaintiff to answer this issue in the negative.

Mr. Mbuga, Counsel for the 1st and 3rd defendants was of the view that the crane was just a normal security under the debenture. As to the 14 days notice, he stated that that ought to be done in respect of immovable property. It is further maintained that notices were issued vide newspapers exhibit P. 13, 14, 16, 17 and 21. He cited the case of **Simon Abel Mbatian v. NBC,** Land Case No. 72 of 2017, HC. Rumanyika, J., as he then was, underscored that:

> *"... I think where there is, like in the present case proof of an unjustified default, the mortgaged property shall be attached, auctioned and sold even without a formal notice to the defaulter in this case the borrower because given the terms and conditions of the loan every party to it, ..."*

I subscribe to the position in the case of **Simon** (supra). That position is even supported by the terms and conditions not only in the facility letter but also in the debentures. I also accept the arguments as stated by Mr. Mbuga. It appears the plaintiff wilfully turned a blind eye to them. He cannot be supported by this Court. With exhaustive respect to the counsel for the plaintiff, I answer the 2nd issue in the affirmative.

Now, I move to consider the 3rd and 5th issues which were argued together by the counsel for the plaintiff. The issues are thus, whether the 3rd

defendant was lawfully appointed as receiver manager and whether the 3rd defendant legally sued by the plaintiff in personal capacity. It is remarked by the counsel for the plaintiff that by the time of seizure of the crane in dispute there was no issue of the 3rd defendant as a receiver manager. It is beefed up that the 3rd defendant is sued in personal capacity for his act of purporting to be a receiver manager. Further it is submitted that there is not notice issued by the 1st defendant to the plaintiff or even BRELA on the appointment. Mr. Opanda referred me to **John Thomas v. KAM Commercial Service & 2 Others,** Land Appeal No. 261 HC to the effect that he who alleges must prove. Thus, pressed Mr. Opanda, there is no doubt that the 3rd defendant was not legally and proper appointed as receiver manager. So, the 3rd Defendant was properly sued in his personal capacity.

Mr. Mbuga held the opinion that the 3rd defendant was appointed while the process of effecting contractual obligations against the plaintiff was ongoing. He does not find any faulty in the situation. I think the position held by Mr. Mbuga is correct regard being had to the decision in **Simon's** case (supra) where it was held that:

"... however, unprocedural might be, ... the plaintiff should have not used the illegality as a sword he should use it only as a shield against the 1st defendant."

My view is also fortified by the decision in **Mohamed Iddrisa Mohamed v. Hashim Ayoub Taku** [1993] T.L.R. 280 where it was held that:

"Where a party to the contract has no good reason not to fulfil an agreement, he must be forced to perform his part, for an agreement must be adhered to and fulfilled."

I hold that the 3rd defendant was lawfully appointed receiver manager, because the facility letter and the debenture allow the 1st defendant to enforce his rights even at a later time and the delay cannot be deemed to be waiver of such right, thus, the 3rd defendant was wrongly sued in his own capacity, my position is supported by the decision in **The Registered Trustees of SOS Children's Villages Tanzania v. Igenge Charles & 9 Others,** Civil Application No. 426/08 of 2018, CAT (unreported). Consequently, the 3rd is answered in the affirmative while the 5th issues is answered in the negative.

Next, I turn to determine the 4th issue which is whether the 4th defendant is bona fide purchase of the crane. The counsel for the plaintiff is of a

stand that the 4th defendant is not a bona fide purchaser because no certificate of sale is issued to him. Further, the deposit slip does not indicate the crane with registration Number T. 977 DCU. Mr. Opanda too criticized the advertisements of the auction. He even claims the advertisement is confusing thus rendering the entire process of auction null and void. Moreover, there is no proclamation of sale, claimed Mr. Opanda.

The counsel for the 4th defendant is of the firm view that the 4th defendant had all reason to believe that the plaintiff was indebted. The advertisements of the auction and the auction was conducted in a smooth environment and the 4th defendant acted in good faith amplified Mr. Mayenga.

I agree with the 4th defendant that the plaintiff has failed to prove that the 4th defendant acted with ill motive or that had collusion with the 1st defendant or the 2nd defendant. It was for the plaintiff to prove that the 4th defendant was not a bona fide purchaser. He resentfully failed to prove that the payment was paid for other things than purchase of the crane. I hold that the 4th defendant is a bona fide purchaser. Luck of certificate of sale does not make the 4th defendant not a bona fide purchaser of the crane in question. Indeed, there was proclamation of sale. See the

persuasive decision in **African Continental Bank Ltd & Others v. Ihekwoaba & Others** [2001-2003] 12 N.B.L.R. (Supreme Court of Nigeria) held that:

1. *"Undervalue alone is not enough to vitiate the exercise of a mortgagee's power of sale. It must be shown that the sale was made at a fraudulent or gross undervalue. Indeed, it is well established that if a mortgagee exercises his power of sale bona fide for the purpose of realizing his debt and without collusion with the purchaser, the court will not interfere even though the sale be very disadvantageous, unless the price is so low as in itself to be evidence of fraud."*

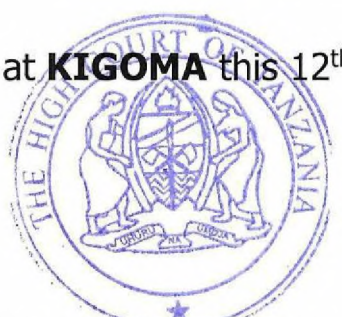
To conclude on the 4th issue, I answer it in the affirmative.

Both parties to the suit abandoned to discuss the 6th issue which they helped this Court to frame. I am enjoined, according to the law, to determine it. After I have considered the rest of the discussed issues. I find that this issue is irrelevant and thus it is worth to be ignored just as the counsel of both parties have ignored it.

Finally, I push on to consider and determine the issue as to what reliefs are parties entitled to. Since the plaintiff has cheerlessly failed to prove her case, the plaintiff's case is dismissed with costs. On the other hand, as regards the counter-claim, the defendants therein are liable to pay arrears of the loan in full together with its interest. It was not only admitted by the defendant therein, it was also not challenged in evidence by the 1st defendant in the counter-claim. In the event the plaintiff in the counter-claim fails to recover from the 1st defendant in the counter-claim, has the right to recover from the 2nd and 3rd defendants as had personal guarantee of the loan. Thus, the reliefs in the Courter-claim are granted save for the claim for general damages.

It is so ordered.

DATED at **KIGOMA** this 12th day of February 2024.



J. F. NKWABI

JUDGE

Mr. Gideon Phares Opanda, advocate drew submissions for the plaintiffs. He appeared too for the defendants in the counter-claim.

Mr. Jonathan George Mbuga, advocate drew submissions for the 1st and 3rd defendants. He appeared too for the plaintiff in the counter-claim.

Mr. Sylivatus Sylvanus Mayenga, advocate for the 4th defendant.