IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL CASE NO. 134 OF 2002

MARGRESSON JOSEPH DALOTTA .....PLAINTIFF
VERSUS
1. NBC LIMITED.....1ST DEFENDANT
2. COMRADE AUCTION MART LTD.....2ND DEFENDANT
3. MAWONU ENTERPRISES LIMITED.....3RD DEFENDANT

RULING

KALEGEYA, J:

Mr. Mnyele, Advocate, for Margresson Joseph Dalotta, Plaintiff, as per chamber summons filed in this court, is praying for orders –

"(a) That the applicant herein may be allowed to withdraw the suit against 1st and 2nd defendants, with liberty to file a new suit.

(b) The honourable court may be pleased to order that since the 1st defendant in the counter claim has admitted the liability and judgment entered against him, the suit against the guarantor is incompetent and misconceived and should be struck out.

(c) The first defendant, in the main suit/plaintiff in the counter claim be ordered to execute the decree against the 1st defendant in the counter claim.

(d) Costs of this application may be provided for."

The application is supported by Mr. Mnyele's affidavit, which, brief as it is, deserves to be quoted in full,

"1. I am the advocate of the High Court and Courts subordinate thereto, save for Primary Courts, having the conduct of this case for the plaintiff, hence conversant with the facts I am about to depone to.

2. That on 26th day of July, 2002 the third defendant admitted both the claim against him in the plaint and in the counter claim where he is a 1st Defendant. Judgment on admission was entered.

3. Following that judgment the plaintiff suit has become meaningless and the plaintiff is no longer interested to maintain it.

4. Further since the principal debtor has admitted the claim and the judgment and decree has been passed

against it, the plaintiff is no longer liable in his capacity as a guarantor.

5. *That I what I have stated above is true to the best of my own knowledge."*

The same is resisted by Mr. Mutafya, Advocate.

For ease of appreciation of the controversy, let us appraise ourselves with undisputed facts upon which it is based.

Before going into substance however, let me make this brief observation on the entitling of the matter, to remove confusion. The 1st suit (I am using the word "1st" because there is a counter – claim) started with four Defendants. Subsequently, IMMA ADVOCATES, who were the 2nd Defendants, were withdrawn and the matter proceeded against the three Defendants. Thus, in the main suit, the Defendants remained – NBC Ltd; Comrade Auction Mart Ltd and Mawonu Enterprises Ltd marked as 1st, 2nd and 3rd Defendant, respectively.

Now, for the facts. In February, 1998, the Plaintiff (NBC Ltd) extended a loan facility of shs.13 million to the 3rd Defendant (Mawonu Enterprises Ltd) and, to use the Plaintiffs' words contained in para.6 of the Plaint,

"the Plaintiff...guaranteed the said loan and provided his house, situated on Plot No. 410 HD Block 46 Kijitonyama, Dar es Salaam as a security of the said loan"

The borrower (3rd Defendant) having failed to service the loan, sometime in or about April, 2002, the 1st Defendant (NBC Ltd) instructed the 2nd Defendant (Comrade Auction Mart Ltd) to auction the Mortgaged property, which process however aborted as the reserved price was not obtained. On 4th April, 2002, the Plaintiff issued "*Notice of the Revocation of the Guarantee*", and 21 days later, on 25th April, 2002, proceeded to file the present suit. The gist of the Plaintiff's action can be discerned from the wording of para. 12 of the Plaint which is as follows:-

"

.....

12. *The plaintiff avers that the said sale and intended sale is void, illegal and contrary to the law on the following grounds:-*

    (a) *The Plaintiff had already revoked the guarantee and the 1st defendant had been made aware of the said guarantee.*

    (b) *The intended sale did not follow the procedures outlined in the Land Act 1999.*

(c) The notice given by the 2nd defendant of which the Plaintiff became aware of on 15th April, 2002 had not expired.

(d) The 1st Defendant and its agents have not been diligent enough to follow – up and make sure that the 4th defendant pays the loan."

and prayed for orders as follows:

"(a) A declaratory order that any sale of the Plaintiff plot situated in plot No. 410 Block 46,Kijitonyama Area, Kinondoni Municipality is void, illegal and contrary to the law as per paragraph 10 of the Plaint.

(b) The 3rd Defendant be ordered to pay the whole loan to the 1st Defendant.

(c) The 3rd Defendant be ordered to pay all the cost of this suit.

(d) Any other reliefs that this honourable court may deem it fit to grant."

The 1st Defendant proceeded to file a counter – claim against the Plaintiff (Dalotta) in the 1st suit and the 3rd Defendant (Mawonu

Enterprises Ltd). As this is a suit on its own, the NBC Ltd became the Plaintiff while Mawonu Enterprises Ltd and Margresson Joseph Dalotta became the 1st and 2nd Defendants respectively. Among others, the said Plaintiff prayed for judgment and decree as follows:

> *"(i) Payment by the borrower and the mortgagor the outstanding balance of Tshs.15,627,238/=.*
>
> *(ii) Interest on (i) above at the rate of 21% per annum from 28th February, 2002 up to the date of judgment.*
>
> *(iii) Interest on the decretal sum at the court's rate from the date of judgment till final settlement, and or in the alternative;*
>
> *(iv) Sale and Vacant possession of the properties over* ***Plot No. 410, Block "46", Area 16, Kijitonyama Area, Dar es Salaam City.***
>
> *(v) Costs.*
>
> *(vi) Any other relief as the Honourable Court may deem just to grant."*

The written statement of defence which contained the said counter claim was filed on 17/5/2002.

On 26/7/2002, the Court (Bwana J i/c) recorded the following judgment against Mawonu Enterprises Ltd (who as already indicated is the 3rd Defendant in the 1st suit and 1st Defendant in the Counter – claim):

"Taamamu M. Onesmo, the Managing Director of the third defendant company has admitted liability in the sum of shs.15,627,238/- being the total sum (principal and interest) outstanding as at 30 April 2002. He agrees to pay the said sum to the first defendant within a prescribed period of four months from September 2002. He is also willing to pay for costs of this suit. This means then that the plaintiff's case against the third defendant is completed with this judgment in admission. It proceeds against the first and second defendants.

Therefore judgment on admission is entered in terms of Order XIIR 4 of the CPC. The third defendant to pay the first defendant the sum of shs.15,627,238/-, the outstanding sum as at 30 April 2002. Any subsequent payment made by the third defendant thereafter but before today to be offset from that sum. From 30 April to the date hereof, the interest to be charged is 21% per annum as per contract terms. Thereafter the interest chargeable shall be the court interest of 7% per annum.

The above sum together with costs of this suit, to be payable in four equal monthly instalments with effect from September 2002. In default, the usual default clause to apply. The plaintiff's case against first and second defendants to be mentioned on 31 October 2002".

Now, against that background, Mr. Mnyele prays for leave to withdraw the 1st suit against the 1st and 2nd Defendant with liberty to re – institute, and goes further to make prayers pegged on the counter – claim – that the suit against the 2nd Defendant (Margresson Joseph Dalotta) in the counter – claim is superfluous as Mawonu Enterprises have already admitted the claim and judgment entered accordingly; that the court should direct the Plaintiff (NBC Ltd) to execute the decree upon the judgment debtor; that as it has not been proved that execution has failed no action can proceed against the 2nd Defendant as he was *"not a guarantor but merely offered a security"* and that in the event those prayers are refused then the suit against the said Margresson should be stayed until NBC Ltd satisfies the court that execution has failed.

Responding, Mr. Mutafya, starts by challenging the citing of S. 68 (1) CPC in the chamber summons, and rightly branding it as misplaced to which Mr. Mnyele subsequently conceded. He goes further to pose no objection to the 1st part of the prayer for leave to withdraw the 1st suit but puts up stiff resistance on the other part, of leave to re – institute, urging that that can only be granted if there is a sufficient reason which has not been offered at all; that as to the prayers touching the counter – claim, and as this is a separate suit, the same cannot be granted because only the Plaintiff can pray for withdrawal of the suit and that the question whether or not Margresson was a guarantor is a question which can only be determined during the trial.

In rejoinder, among others, Mr. Mnyele insisted, also rightly, that citing a wrong provision of the law in a pleading does not affect the substance of

the application and more so in this case, having cited S. 95 CPC; that the 1st suit and the counter claim are intertwined and inseparable although he appreciates that legally they are separate actions; that he has not applied to withdraw the counter – claim, only that he is stating the principle of law that where one Defendant admits fully the claim, the claim against the other Defendant is barred.

Let us turn to the merits.

As intimated earlier on, indeed, citing a wrong provision of the law or even omitting it let alone wrong entitling does not affect the substance of the application, provided what is sought is clearly portrayed in the body of the application – in this case, the chamber summons and the accompanying affidavit **(CA) VIP Engineering and Marketing Ltd and Said Salim Bakharesa, Civil Application No. 47 of 1996, DSM Registry; Fortunatus Lwanyantika Masha v Dr. William Shija and another, Civil Application No. 6 of 1997 (CA – Mwanza Registry); Hamed Rashid Hamed v Mwanasheria Mkuu na Wenzake Watatu, Civil Application No. 9 of 1996 (CA – Zanzibar Registry)**

The question should always be whether the defect goes to the core of the matter – that is whether it affects the validity of the application.

Section 68 (1) CPC was clearly, irrelevantly cited in the chamber summons (as it concerns a totally different matter). This is applicable, where, the court, for purposes of preventing ends of justice from being defeated, can issue a warrant to arrest a defendant who would be called

upon to show cause why he should not furnish security for his appearance. That said however, as submitted by Mr. Mnyele, S. 95 CPC cited suffices and in any case, what is sought is clearly brought out. The said S. 68 (1) CPC should be disregasrded.

Next we move to Mr. Mnyele's first prayer. I find no problem with his application to withdraw as the law clearly permits such course. O. XXIII, Rule 1 provides:

> *"1. (1)* ***At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim.***
>
> *(2)* ***Where the court is satisfied –***
>
> ***(a) that a suit must fail by reason of some forms defect, or***
>
> *(b)* ***that there are other sufficient grounds*** *for allowing the plaintiff to institute a fresh suit for the subject – matter of a suit or part of a claim,*
>
> *it* ***may,*** *on such terms as it thinks fit,* ***grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit*** *in respect of the subject – matter of such suit or such part of a claim.*
>
> (3) *Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in sub –*

rule (2), he shall be liable for such costs as the court may award and shall be precluded from instituting any fresh suit in respect of such subject – matter or such part of the claim." (emphasis mine).

As vividly shown, Rule 1 (1) provides unlimited latitude to a Plaintiff to withdraw a suit. My problem however lies with the 2nd part of the prayer – that is, leave to re – institute. With greatest respect to Mr. Mnyele, and as soundly submitted by Mr. Mutafya, for a party to secure that leave, he must satisfy the court, in terms of O. XXIII, Rule 1 (2) CPC, that either there is a formal defect which would make the action fail or there is any other sufficient ground. Mr. Mnyele has not alleged any such defect and neither has he bothered to flat any sufficient ground. One reason of quoting the whole body of his affidavit was to portray this picture. Paragraphs 3 and 4 thereof speak loud of the reason for withdrawal – *"the suit has become meaningless and the Plaintiff is no longer interested to maintain it"* as he thinks he is no longer liable as a guarantor. Now, whether or not that is correct is none of our business at this stage. What is obvious is that he is no longer interested in the suit. The type of withdrawal he seeks therefore is the one covered under O. XXIII, Rule 1 (1) and not Rule 1 (2) CPC. The prayer to withdraw the 1st suit against the 1st and 2nd Defendant is accordingly granted with no leave to re – institute.

We turn to the other prayers. As rightly conceded by both Counsel, a counter – claim is a cross suit and what was done here is within the parameters of the law (O. VIII, Rule 9 and 10 CPC).

Having said so, with respect, I find Mr. Mnyele's prayers (b) and (c) in the chamber summons, as quoted, not only novel but also surprising.

Starting with prayer "c", I fail to imagine the court, either suo motu or by being moved by a party who is not a decree holder, as is the case here, issuing an order that execution process should be commenced. I am of the settled view that the only proper party to apply for execution is the decree holder. A side party, in a fitting situation, can only apply for other orders which possibly may relate to botherations, interferences or breaches of legally recognized rights caused by the non – execution and not otherwise.

As regards prayer (b), again with respect, I cannot go with what Mr. Mnyele is trying to impress. The decision he relies upon, **Total Oil Products (East Africa) Ltd vs Nuauto Ltd and others [1968] EA 611** cannot assist him.

A head note to the said Kenyan case states:

> *"a judgment on a guarantee which is joint but not several, recovered against some but not all of the joint guarantors, bars recovery (subject to certain exceptions not relevant here) against the remaining joint guarantor or guarantors on the same guarantee."*

In that case, the Plaintiff had sued the borrower as well as the three guarantors. Judgment was entered against one of the guarantors on default.

When the matter came up for hearing as against the remaining two guarantors an objection was successfully taken up by them that the judgment obtained against the other guarantor had destroyed the Plaintiff's cause of action against them as joint guarantors.

Well, that may have been the Kenyan position following the Common Law of England position ruling then, as the Indian Law of Contract Act, 1872 did not apply because the guarantee was executed on July, 31, 1963 (as per judgment, supra, page 612, F) I am of the settled view that the situation in our jurisdiction is different.

First, facts in that case are different from facts in this case on one main factor. The question therein concerned the lender (Plaintiff) and guarantors. The one who admitted the debt in that case was not the borrower as is the case here but a guarantor. The basis of the decision was that the guarantors' liability was not severally but jointly and pegged on same cause of action.

It is obvious that though both the borrower and guarantor bind themselves to meet the same liability to the Lender (Creditor) the bases of their liabilities differ. Thus, the causes of action also differ. Under our Law of Contract Ordinance, the Kenyan action would not lead to same results, because in the absence of any contract to the contrary, Co-sureties are liable to contribute equally (S. 90). That apart, in my view, I find it incomprehensible that admission of the liability by one guarantor discharges the rest. Why? Assuming they are so discharged as was the case in the Kenyan case, what would happen if the said guarantor, for any reason, fails to meet the liability? Should the other guarantors, who may possibly be financially sound, be left scot

– free? What of the creditor's rights? I would buy the reasoning if at all it was referring to the actual settlement of the liability due but not merely an admission of the liability.

Suffice to say that the Kenyan case is different from the present case and that apart, we also have a specific law which governs the Lender/guarantor relationship: the Law of Contract Ord. Under S. 80 of the said law,

> *"The liability of the surety is co – extensive with that of principal debtor, unless it is otherwise provided by the contract".*

Thus, Mr. Mnyele cannot be heard to say or even suggest that judgment on admission by the borrower (principal debtor) extinguishes the cause of action which the Creditor has against the surety.

And, I should hastily clarify here. Although the judgment on admission makes reference and prescribes specific orders on some matters expressly sought in the Counter – claim (i.e. the exact liability due and when – **shs.15,627,238/=, as of 30/4/2002; interest of 21% p.a.; interest on decretal sum at court rate and costs)** the only closest prayers in the 1st suit are prayers (b) and (c) – that 1st **Defendant be ordered to pay the whole loan** (which was not specified) **and costs**. Unfortunately, I did not get the advantage of accessing the exact words of the said Taamamu M. Onesmo when admitting the claim and upon which the judgment on admission was based. However, reading from the contents thereof, it is a judgment passed on admissions in respect of the said 1st suit and not the counter – claim. That being the case then, in terms of S. 80 of The Law of Contract Ordinance, the

suit against Margresson J. Dallota in the Counter – claim is still intact and particulary, regard being had to prayer (iv) – vacant possession and sale of his property, which, Mr. Mnyele, even in this application still challenges. And, I should add – Mr. Mnyele's argument that the two suits are intertwined and inseparable is not correct because, as shown, the respective prayers are not a reprica of each other. Margresson's liability would stand discharged upon the principal debtor paying the outstanding liability to the creditor and not upon mere admission as Mr. Mnyele would want us to believe. In any case, as he ell knows, being armed with a decree and holding the proceeds of a decree are two different things.

As for the prayer to stay the proceedings, interesting as it may seem, I am afraid, also there are no grounds to sustain the same. What I understand to be an implication of this prayer is that the matter should proceed to trial only in the event the 1st Defendant fails to satisfy the decree. As already stated, in terms of S. 80 of The Law of Contract Ordinance, the liability between these parties is co-extensive. The cause of action at the Plaintiff's disposal does not get extinguished until the whole liability is discharged.

In conclusion, the prayer by the Plaintiff to withdraw the 1st suit against the 1st and 2nd Defendants (NBC Ltd and Comrade Auction Mart Ltd) is granted. The prayer for leave to re – institute as is also the case with the rest of the prayers stand dismissed with costs.

L.B. KALEGEYA

JUDGE

Delivered

L.B. KALEGEYA

JUDGE

4/9/2003

Mr. Matongo: – Present for the Respondent

Order: Final pretrial and scheduling conference in respect of the Counter – claim on 20/10/2003 at 8.30 a.m. Defendants to be notified.

L.B. KALEGEYA

JUDGE

4/9/2003

I Certify that this is a true and correct
of the original order signed by me
.....
Registrar
Commercial Court
Dar es Salaam
Dated 5/9/03