

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

COMMERCIAL CASE NO. 73 OF 2004

**TWIGA BANCORP LTD.....PLAINTIFF
VERSUS
SONGORO MARINE TRANSPORT LIMITED.....1ST DEFENDANT
SALEHE MOHAMED SONGORO2ND DEFENDANT
MOZA SONGORO.....3RD DEFENDANT**

R U L I N G

KALEGEYA, J:

In his written statement of Defence Mr. Galati, Advocate, for Defendants raised a preliminary objection,

“That the suit is bad in law as it was instituted in breach of s. 126 (2) of Act No. 4 of 1999”.

Mr. Galati’s quarrel is based on the Plaintiffs’ failure to issue requisite notice to the Defendants. That being the case, with respect, he made reference to the wrong section as it was repealed and replaced. The whole of part of the Land Act No. 4 of 1999 was repealed and replaced by Act No. 2 of 2004. The current s. 126, which prescribes remedies of a mortgagee provides: -

“126. Where the mortgagor is in default, the mortgagee may exercise any of the following remedies –

- (a) *appoint a receiver of the income of the mortgaged land;*
- (b) *lease the mortgaged land or where the mortgaged land is of a lease, sub – lease the land;*
- (c) *enter into possession of the mortgaged land; and*
- (d) *sell the mortgaged land, but if such mortgaged land is held under customary right of occupancy, sale shall be made to any person or group of persons referred to in section 30 of the Village Land Act, 1999.*

I am convinced that Mr. Galati had s. 127 in mind. The said section runs as under:

127. (1) Where there is a default in the payment of any interest or any other payment or any part thereof or in the fulfillment of any condition secured by any mortgage or in the performance or observation of any covenant, express or implied, in any mortgage, the mortgagee shall serve on the mortgagor a notice in writing of such default.

(2) The notice required by subsection (1) shall adequately inform the recipient of the following matters:

- (a) the nature and extent of the default;*
- (b) that the mortgagee may proceed to exercise his remedies against the mortgaged land; and*

(c) *that, after the expiry of thirty days following receipt of the notice by the mortgagor, the mortgagee may exercise the right to sell the mortgaged land.*

(3) *The Minister may, by regulations prescribe the form and content of a notice to be served under this section and where the notice to be served under this section has been so prescribed, a notice served under subsection (1) shall be in that form and shall be void if it is not in that form.”*

Submitting in support of the preliminary objection, Mr. Galati simply reiterated the contents thereof and urged that the suit should be dismissed.

On the other hand, Mr. Daffa, Advocate, for Plaintiffs urged, making reference to **cc 236 of 2001, NBDC vs Tanganyika Cheap Stores & others**, that the preliminary objection is both a point of law and fact and therefore it is not a preliminary objection legally worth the title.

The above apart, he further submitted that the mortgagors are also guarantors and Directors and that even if the question of mortgage is disregarded they will still be covered under the other two elements. He insisted that the preliminary objection be dismissed.

In rejoinder, Mr. Galati, urged further that the case cited is distinguishable; that if a notice had been issued they would have attached it to the reply and that reading the plaint, the suit is based on mortgage.

With respect to Mr. Galati, this preliminary objection should not waste a lot of our breath. I don't subscribe to his proposition that reading the plaint one would conclude that the suit is based on mortgage. Para 1 to 4 are the usual general paragraphs in a plaint on parties addresses and status in the matter. Para. 5 and 6 allege that the Plaintiffs, on 28/3/2003 and 6/9/2003 extended an overdraft facility to 1st Defendant in the sum of shs.200 million at an interest rate of 17% p.a. expiring on 31/3/2003, and temporary excess of shs.20 million respectively, the latter being payable on or before 30/9/2003; that they however secured an extension of time up to 30/4/2004 (para.7); that securities were, a debenture on Company's assets (para.8); personal guarantees of the 2nd and 3rd Defendants (para.9) and a legal mortgage of property on Plot No. 99 Block No. 10, Capri Point, Mwanza City, in the name of the 2nd Defendant (para.10) and finally that by 2/9/2004 the outstanding liability stood at Tshs.277,984,234.63 (para.11). Para 12 simply states that despite several demands the Defendants have not settled the liability while para.13 is the usual para. on jurisdiction. Then follows the prayers' paragraph in the following wording: -

WHEREFORE the Plaintiff prays for judgment and decree against the Defendants jointly for: -

- (a) Payment of a total of Tshs.277,984,234.63 as per paragraph 12 hereinabove.*

- (b) *Interest on the amount in (a) above at the rate of 17% per annum from 2nd September, 2004 to the date of judgment.*
- (c) *Interest on the decretal amount at the court's rate from the date of judgment to the date of payment.*
- (d) *Costs of this suit.*
- (e) *Any other and further reliefs that this Honourable court may deem fit and just to grant."*

Is Mr. Galati suggestion that a mere mention of the mortgage as one of the securities in para.10 makes it a suit wholly pegged on mortgage! I take this para. to be simply purposed at adding to the general history of the facilities and how they were secured. That it is so, the Plaintiffs purposely avoided seeking any prayer based on mortgage as portrayed above. A party is the one who decides which form should his suit take. If he has various remedies and for reasons known to himself he picks on some and leaves others, neither the opposite party nor the Court can force him to claims he decided to forgo.

Unfortunately for Mr. Galati he does not have sufficient arsenals to back – up the otherwise technical knock-out he fronted, as demonstrated. The above disposes the matter and I see no ground of considering other arguments raised including the NBDC case.

The above said however, I should point out that the plaint has one glaring defect which I think Mr. Galati did not discover otherwise he would not have closed his eyes to it. The said plaint is not dated as per requirements of O. VI, Rule 15 (3) CPC. This is a very commonly element overlooked by many parties and Advocates. The law required that a pleading shall be dated and the place where it was so dated indicated. The present plaint simply states,

“Dated at Dar es Salaam thisday of2004”

The omission also repeats itself in the reply to the written statement of defence. The law uses the word “*shall*” and therefore it is mandatory. If it were not for GN 228 of 1971 which amended O. VII, Rule 11 CPC by adding a proviso thus,

“Provided that where a plaint does not disclose a cause of action or where the suit appears from the statement in plaint to be barred by any law and the court is satisfied that if the plaintiff is permitted to amend the plaint, the plaint will disclose a cause of action or, as the case may be, the suit will cease to appear from the plaint to be barred by any law, the court may allow the plaintiff to amend the plaint subject to such conditions as to costs or otherwise as the court may deem fit to impose.”

I would have dismissed the plaint and reply for incompetency. Exercising my discretion under the quoted proviso, however, I hereby resist from so acting and instead I order that the Plaintiffs amend the lacking parts

accordingly and in long hand immediately after delivery of this ruling. Otherwise, the preliminary objection stands dismissed with costs.

L.B. KALEGEYA
JUDGE

To be delivered by the DRCC on 12/4/2005 at noon.

L.B. KALEGEYA
JUDGE

Court: Ruling delivered in presence of Mr. Galati for the Defendants and Mr. Daffa for the Plaintiff this 12th day of April 2005.

A.R. Mruma
DRCC
12/4/2005

Court: Counsel are asked on the status of the pleadings:

Mr. Daffa: Despite the fact that I am supposed to amend the plaint, pleadings are complete.

Court: The conference is converted into a first pre – trial and scheduling conference, and the matter is fixed for speed track 1.

Mr. Galati: We suggest mediation on 11th May 2005.

Mr. Daffa: That is by consent.

Order: By Consent Mediation before Judge on 11th May 2005.



A.R. MRUMA

DRCC

12/4/2005

1,458 words