

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

COMMERCIAL CASE NO.26 OF 2008

AFRICAN BANKING CORPORATION (T) LIMITED.....PLAINTIFF

VERSUS

SCANDINAVIAN EXPRESS SERVICES LIMITED.....DEFENDANT

Date of Hearing: 10th August 2009, 15th March 2010, 19th October 2010 & 15th September 2011

Date of last Order: 15/09/2011

Date of closing submissions: 22/11/2011

Date of Judgment: 02/03/2012

JUDGMENT

MAKARAMBA, J.:

This judgment arises from a suit the Plaintiff filed in this Court some four years ago, on the 14th day of April 2008, to be exact, claiming against the Defendant for the following:-

- (a) *Payment of TZS 755,068,121.86 being the outstanding balance due and owing the Plaintiff;*
- (b) *An order that should the Defendant fail to pay the decretal amount the Defendant should surrender the mortgaged motor vehicles to receiver/manager;*

- (c) Interest on the amount claimed at the rate of 13% per annum from 26th September 2007 to the date of Judgment;*
- (d) Interest on the decretal amount at the Court rate from the date of Judgment to full and final satisfaction of the decree;*
- (e) Costs of and incidental to the suit; and*
- (f) Any other relief the Court may deem fit, just and equitable to grant*

In their defence the Defendants vehemently disputed all of the Plaintiff's claims and raised a counter claim against the Plaintiff praying for judgment and decree as follows:-

- a) Payment of Tanzanian Shillings Three Hundred and Ninety Million, Five Hundred Thousands only. (TZS 390,500,000/=) as specific damages;*
- b) Payment of general damages in terms of loss of commercial goodwill;*
- c) Recovery of the seized bus or in the alternative payment of the total sum of Tanzanian Shillings One Hundred Eighty Million Only (TZS 180,000,000/=) being the value of the bus;*
- d) Payment of Tanzanian Shillings One Million Five Hundred Thousands (TZS 1,500,000/=) per day for loss of bus earning from the date of filing this suit to the date of payment or recovery of the bus;*
- e) Costs of the counter claim to be provided for; and*
- f) Any other reliefs this Honourable Court may deem appropriate to grant.*

The Plaintiff in this suit is a limited liability company incorporated in Tanzania under the Companies Act, No.12 of 2002. It carries on the business of banking and its registered office is in Dar es Salaam, the "business capital" of Tanzania. The Defendant in this suit, a limited liability company also registered under the Companies Act, No.12 of 2002, does the business of transporting passengers. The dispute arose out of an interest bearing loan, Capital Finance Limited extended to the Defendant, pursuant to a Loan Agreement dated the 31st day of December, 2002. Capital Finance Limited by a Deed of Assignment dated the 30th day of June 2004, assigned to the Plaintiff, the loan owing by the Defendant.

The Loan Agreement dated the 31st day of December, 2002 which Capital Finance Limited extended to the Defendant was secured by amongst others, a Chattels Mortgage on buses with registration numbers TZT 2886/T900 ALZ, TZT 2885/T899 ALZ, TZT 2884/T902 ALZ, TZT2883/T747 ANP, TZT2882/T904 ALZ, TZT2881/T324 ANP, and TZT2822/T898 ALZ. The Plaintiff claims that the Defendant has failed to repay the loan as agreed to under the Loan Agreement. Consequently, as on the 26th day of September, 2007, the amount due and owing to the Plaintiff was to the tune of TZS 755,068,121.86. This amount which comprises the principal amount, interest thereon and other charges thereon as per the Loan Agreement is the one the Plaintiff is now claiming from the Defendant in this suit.

On the 8th day of October 2007, the Plaintiff appointed M/s. Martha Renju as the Receiver/Manager with instructions to take possession of the

assets charged under the ~~Chattels~~ Mortgage so as to recover the outstanding loan owing to the Plaintiff by the Defendant. The Plaintiff claims that despite demand from the Receiver/Manager, the Defendant has refused to permit the Receiver/Manager to take possession of the mortgaged motor vehicles and recover the outstanding loan amount due according to Chattels Mortgage. This is what has brought the parties to this Court.

The Plaintiff engaged the legal services of learned Counsel Messrs **Sikira and Mshukuma**. The Defendant was represented by **Mr. Maige**. At the close of the trial, the Learned Counsel for the parties prayed to file their closing submissions, which prayer this Court dully granted. In my judgment I have given due consideration to the Counsels' closing submissions.

On the first day of the hearing of this suit, the following issues were framed by the learned Counsel for the parties and were recorded by this Court for the determination of this suit, namely:-

- 1. Whether or not there was breach of the terms of the loan agreement between the parties;*
- 2. Whether or not the appointment of receiver manager was lawful?;*
- 3. Whether the appointment of receiver manager occasion any lose;*
- 4. To what reliefs are the parties entitled*

In support of its case, the Plaintiff produced three witnesses, **M/S DUA MBAPILA RWEHUMBIZA**, an employee of African Bank Corporation Tanzania Ltd. serving in the capacity of Head of Legal Department, Compliance Manager and the Company Secretary who testified as **PW1**. **M/s. MARTHA KAVENI RENJU**, an Advocate instructed to undertake recovery in relation to Scandinavia Express Ltd., the Defendant herein, testified as **PW2**. **M/s EUGENIA SHAYO**, a Legal Officer at African Bank Corporation testified as **PW3**.

On its part the Defendant called two witnesses for the defence, **MR. EVARIST RWOBOGORA MWASA**, the Director of Operations and Security responsible for supervising all security guards at Scandinavia Express Ltd. who testified as **DW1**, and **MR. MOHAMED ABDULLAR**, the Managing Director of Scandinavia Express Ltd. who testified as **DW2**.

In his testimony, **PW-1, M/S DUA MBAPILA RWEHUMBIZA RWEHUMBIZA** said that he has been with African Bank Corporation Tanzania Ltd (ABC) for three years since September 2006, and that Scandinavia Express Ltd (the Defendant) was their former client. PW1 testified further that initially the facility was advanced by Capital Finance Limited to the tune of TZS 1,000,000,000/= (one billion) and that it was secured by two personal guarantees of the shareholders of Scandinavia Express Ltd. PW1 tendered in this Court the Loan Agreement between Scandinavia Express Services Limited and Capital Finance Limited, dated 31st day of December 2002 which this Court admitted and marked as **Exhibit P1**.

It was the further testimony of PW1 that the Defendant was supposed to repay the loan on a monthly basis within Forty Eight (48) months. PW1 stated further that the Defendant has defaulted to repay the loan since 2003 and that Capital Finance Ltd. has assigned its debts and obligations to AFRICAN BANKING CORPORATION including the loan advanced to Scandinavia Express Ltd. PW1 tendered in Court the Deed of Assignment dated the 30th day of June 2004. This Court admitted it but only for identification purposes and marked it as "**ID P1.**" PW1 testified further that the loan was also secured by the chattels mortgage between Scandinavia Express Services Limited and Capital Finance Limited which was secured by the purchased buses and was sealed on the 17th day of April 2003. PW1 tendered in evidence the Chattels Mortgage, **Exhibit P2.** PW1 testified further that in late 2007 a Receiver Manager was engaged by way of appointment to attempt to recover the said loan. PW1 tendered in this Court the Deed of Appointment of the Receiver Manager in respect of Scandinavia Express Services Limited and the Notice of Appointment of the Receiver/Manager, **Exhibit P3** collectively.

PW1 told this Court further that, on the 11th day of October, 2007, the appointed Receiver Manager managed to reposes only one bus. PW1 stated further that as on the date of the appointment of the Receiver Manager, the outstanding amount which was to be paid by the Defendant was supposed to be TZS 755,000,000/=, but as of now the total outstanding amount the Plaintiff is now claiming against the Defendant stands at **TZS. 755,068,121.86**, plus interest thereof.

The second witness for the defence to take the stand was PW-2, **M/s. MARTHA KAVENI RENJU. PW2** testified that she is the advocate who was instructed to undertake loan recovery in relation to Scandinavia Express Ltd. following being appointed Receiver Manager on the 8th day of October 2007, her main duty being to enforce the loan's security. PW1 told this Court further that she took a pre-implementation procedure by issuing Notice to the Registrar about her appointment. PW2 testified further that on the 25th day of October 2007, she (PW2) managed to reposes only one bus out of the fourteen buses. PW2 stated further that, she entered the Scandinavian Express Ltd yard along Nyerere Road peacefully, and that she (PW2) wrote a letter to the Managing Director of Scandinavia Express Ltd. informing the Company of the carrying out of the exercise of repossessing the buses. PW2 testified further that only one bus was repossessed, but for the rest, the employees of the Defendant blocked the entrance gate using a bus, which forced her to stop the exercise of repossessing the buses. PW2 told this Court further that the matter was then reported to the police and to the Bank. The toured bus was parked at a secure and safe place at the Scania Yard along Pugu Road and that it is still parked there and the Plaintiff is still paying for parking fees daily. PW2 insisted that they had been seizing only what they were entitled to. PW2 told this Court further that they however, have notified the Bank about failure to accomplish their task. PW2 testified further that she was then instructed to file legal action. PW2 testified further that she has attempted to dispose the seized bus without any success due to the fact that the original documents of the bus

are still in the possession of the Defendant, and further that his employee and YONO AUCTION MART were working together.

Testifying as **PW-3, M/s EUGENIA SHAYO** who is employed as Legal Officer and Compliance officer by African Banking Corporation (T) Ltd. explained her duties as advising the bank on legal documents and security protection and that Scandinavia Express Ltd was among its clients who requested a loan in 2002. PW3 testified further that initially Capital Finance Ltd. had extended Scandinavia Express Ltd a loan of Tanzanian Shillings one billion (TZS 1,000,000,000/=), which loan was then inherited by African Banking Corporation Ltd. in 2004. The loan was supposed to be repaid in four years in equal installments on a monthly basis frequency. PW3 testified further that the loan was secured by Chattels Mortgage over seven buses as well as guaranteed indemnity by MUNIR ABUDALLAH and MOHAMED ABUDALLAH and that it was agreed that in case the Company has failed to repay the loan, the guarantors will pay. PW3 testified further that the Defendant's Company successfully repaid the first loan as required and the Bank then granted the Defendant the second loan, which the Defendant failed to honour, despite being given a two months' grace period. PW3 testified further that the Bank notified the guarantors orally and in writing on the outstanding amount. PW3 testified further that thereafter the Bank issued a Demand Notice dated 15th day of October 2007 for the payment of TZS 755,068,121.86, **Exhibit P4**. PW3 testified further that despite being served with the Demand Notice, the Defendant did not respond positively to the Plaintiff. The Deed of Assignment between Capital Finance Limited and ABC (T) Limited which initially this Court had

admitted as ID "P1" together with the Personal Guarantee and Indemnity Deed, were both admitted by this Court and marked as **Exhibit P5** collectively.

In cross examination PW3 told this Court further that M/s Martha Renju was appointed as Receiver in 2007 and that she filed all the necessary documents with the Registrar of Companies, copies which were served to the guarantors. PW3 testified further that the Receiver tried to repossess the mortgaged buses without any success for she managed to repossess only one bus which she could not be able to sell it because the original documents of the bus were in the possession of Scandinavia Express Ltd. and that to this date the Bank has not been able to recover the money. PW3 told this Court further that the Bank had several meetings with the Defendants, and made several correspondences trying to convince them to repay the loan and the Bank having been dissatisfied with the Defendant's proposal did not accept it. PW3 told this Court further that she (PW3) aware of the Bankruptcy proceedings instituted in respect of Scandinavia Express Ltd. and that the Plaintiff applied to be joined as Third Party as the Plaintiff was also supporting those proceedings. PW3 testified further that she (PW3) did not know if with the pending bankruptcy proceedings it was possible for Scandinavia Express Ltd. to proceed paying the debt. PW3 told this Court that she (PW3) was aware of the payment proposal by the Defendant suggesting to the Bank as to how the Defendant can pay to the Bank the outstanding amount. PW3 told this Court further that the said proposal was for payment of a total sum of TZS.

150,000,000/= while the Plaintiff is claiming more than TZS 700,000,000/=.

Testifying for the defence, **DW-1, MR. EVARIST RWOBOGORA MWASA**, the Director of Operations and Security told this Court that his duties were to supervise all security guards working at the Defendant's company and that he knows African Banking Corporation Tanzania Ltd and Capital Finance Limited. DW1 told this Court further that the African Bank Corporation Ltd inherited debts from the Capital Finance limited, which means that initially, Scandinavia Express Ltd. requested and was advanced with a loan from African Bank Corporation Ltd. In his testimony, DW1 acknowledged that the Defendant is indebted to the Plaintiff and that he (DW1) was aware of the contract between the Plaintiff and the Defendant and that the loan was supposed to be paid within 48 months and that the loan was not paid in full.

DW1 testified further that in 2005, there was winding up proceedings that were instituted in Court, and therefore the Defendants stopped to repay the debt waiting for the outcome of the winding up proceedings. DW1 testified further that the winding up proceedings were instituted in this Court while the contract was still in force and that they were instituted in Court without any notice to the Defendant. DW1 testified further that the Court decided that the Defendants and its creditors should come together to see how they can the Plaintiff's debt. DW1 testified further that the Defendants and its creditors, convened meetings and agreed on how the Defendant could pay the debt. DW1 tendered in Court the Proposal to reschedule repayment of the loan portfolio together with annexure which

were admitted and marked as **Exhibit D1** collectively. DW1 testified further that under clause 3:2 and 3:8 of Exhibit D1, the Defendant was supposed repose the buses by making repairs or take them on "as it is" basis. DW1 testified further that the Plaintiff did not respond to that proposal.

DW1 testified further that on the 25th day of October 2007, without notice, Ms. Martha Reju entered into the Defendant's premise with police and OCD from Buguruni police station and that they (M/s Martha Renju and her accompanies) blocked the entrance gate and seized one bus with registration **No. T 899 ALZ**, a Marcopolo, Scania make. DW1 testified further that the security guard reacted to them because there was no any prior notice for such act. DW1 testified further that Ms. Martha Renju together with her employees caused damage to the Defendant's premises including blocking of the main gate and some of spare parts were taken. DW1 testified further that the value of the seized bus was TZS 180,000,000/= and the total value of the spare parts that got lost was TZS 389,500,000/=. DW1 testified further that the spare parts which were lost in the process include power steering and box. DW testified further that the Defendant is praying for specific damages to the tune of TZS 289,000,000/= being loss in profits incurred since the seizure of the bus as it stopped to work and it was generating TZS 1,500.000/= per day. DW1 testified further that the Defendants also pray that this Court should freeze the interest rate since the Defendant stopped making business the Plaintiff having interfered with the contract.

In cross examination DW1 told this Court that he has been working with Scandinavia Express Ltd. since 2006 and that after the bus was seized by force the matter was reported to the police and they were issued with RB. DW1 testified further that the bus was in good condition. DW1 testified further that he (DW1) did not know the value of the lost spare parts because he is not an expert on spare parts for buses. DW1 told this Court further that his department was not involved in the loan transactions and that he is not good in interpreting terms of contract. DW1 told this Court further that, unless otherwise the Plaintiff accepted their proposal, they could not afford to repay the debt.

Testifying as **DW-2, Mr. MOHAMED ABDULLAH** told this Court that he (DW2) is the Managing Director of Scandinavia Express Ltd. who also signed the contract and that his duty was to oversee the company's direction and decision. DW2 testified further that the Plaintiff has filed this case against the Defendant on the loan for **TZS 100,000,000/=** which was to be repaid within 48 months. DW2 testified further that the Defendant continued to pay until the problem cropped up in 2005 and thus the repayment stopped after African Banking Corporation instituted another case for winding up proceedings against the Defendant. DW2 testified further that in 2006 this Court ordered the Defendant to sit down with creditors for nine months to work on payment modality, which Scandinavia did, and prepared a payment proposal which was presented before the creditors. DW2 testified further that unfortunately, the Receiver Manager used Police to enter into the Defendant's yard by force, thus managed to reposes only one bus. DW2 testified further that the Defendant has

incurred some loss including the entrance gate broken by the Receiver/Manager thus causing damage amounting to TZS 4,350,000/=; the Plaintiff's bus with registration number T 899 ANZ valued at TZS 180,000,000/= which the Receiver/Manager seized and which was generating TZS 1,500,000/= per day, and therefore up and until the time of filing this suit, a total of 193 days had passed thus resulting into a total of TZS 289,500,000/= being lost profits; some of the spare parts which were stolen included four electronic controls valued at TZS 5,700,000/= each, making a total of TZS 22,800,000/=; six steering pumps valued at 1,980,000/= each thus amounting to TZS 11,880,000/ in total; two pieces of steering box worth TZS 10,500,000/= totaling TZS 21,000,000/=; four alternators valued at TZS 1,610,000/= each amount of TZS 6,440,000/= in total; fourteen side mirrors valued at TZS 175,000/= each totaling TZS 2,450,000/=; three (3) windscreens valued at TZS 2,100,000/= each totaling TZS 6,300,000/=; two pieces of propeller shaft each worth TZS 850,000/= making a total of TZS 1,700,000/=; and seven pieces of self starter each worth TZS 3,440,000/= making a total of TZS 24,080,000/=.

DW2 testified further that the Defendant drafted a proposal on how to pay the debt, which the Plaintiff however, did not accept. Instead they decided to use force and the Receiver/Manager had entered into the Defendant's premises without any prior notice that's why the Defendant's security guards resisted. DW2 told this Court further that, he (DW2) did not recognize the notice of appointment issued by African Bank Corporation to Ms. Martha Renju to be the receiver since they were not copied with such letter. Since violence arose after the Receiver forced her entrance into

the Defendant's premises, some of the Defendant's customers started to doubt the Defendant's services as the violence lasted for more than seven hours and their customers were of the view that Scandinavia Express Ltd. has not been fairly treated. DW1 prayed for damages for the downgrading of the name of the Defendant's company, which had good reputation over all of East Africa. DW2 told this Court further that they are not entitled to pay the outstanding balance because the buses have not been working for a long time, and that the Defendants are no longer interested in continuing working with such buses. DW2 testified further that it is the African Banking Corporation who caused the buses to stop working and that on the eventful day he (DW2) was not physically present on the premises. DW1 told this Court that it could be better if the Plaintiff could realize the mortgaged buses.

Let me, having summarized the testimonies of the witnesses, turn now to consider the issues as framed and recorded by this Court for determination of this suit.

The first issue is *whether or not there was breach of the terms of the loan agreement between the parties*. On the evidence on record, Exhibit P1, it is not in dispute at all that a loan agreement was concluded on 31st day of December 2002 between Scandinavia Express Ltd., the Defendant herein and Capital Finance Limited. Furthermore, it is also not in dispute that the debt owed by Scandinavian Express Ltd to Capital Finance Limited was assigned to African Banking Corporation Tanzania Ltd on 30th day of June 2004 as per **Exhibit P5**. The evidence on record shows that the Defendant requested for a term loan of TZS 200,000,000/= for the

purposes of purchasing passenger buses from Scania (T) Ltd. as it described under clause **3:01** of **Exhibit P1**. The loan attracted interests at the rate of 10% and was supposed to be repaid in 48 equal monthly installments in the currency of disbursements with effect from the date of the loan disbursements as per Clause **3:05** of **Exhibit P1**. On the late payment, it was agreed that, the Defendant shall pay the penalty interest at the rate of 3% per annum, and such penal interest "*shall accrue on and from the day after the due date to the day the amounts so overdue are received by the lender.*" The loan was secured by a chattels mortgage on the new buses as well as the additional seven unencumbered buses as per **Exhibit P2**. The loan was also secured by the personal guarantees of the borrowers for the full value of the loan as stated under **Exhibit P5**. In his testimony PW1 told this Court that, the Defendant has defaulted to repay the loan. PW3 told this Court that the Defendant was supposed to repay the loan within four years but failed to do so despite later being granted a grace period of two months. PW1 told this court further that, the Defendant has defaulted to repay the loan as agreed which is why the Plaintiff decided to issue a Demand Notice to the Defendant claiming for the payments of TZS 755,068,121.86. In his testimony, DW1 acknowledged that the Defendant is still indebted to the Plaintiff. In his testimony DW1 stated further that the Defendant was supposed to repay the loan within 48 months but did not manage to pay in full. DW1 also told this Court that sometimes the Defendant's contract was interfered by the Plaintiff when the Plaintiff instituted the winding up proceedings against the Defendant's company in this Court, which caused the Defendant to

stop from continuing repaying the loan waiting for the outcome of such proceedings. This line of testimony also finds concurrence in the testimony of DW2, the Managing Director of Scandinavia Express Ltd who told this Court that previously the Defendant repaid the loan accordingly until in 2003 when problems ensued between the two and the fact of the Plaintiff instituting in this Court winding up proceedings which cause the Defendant to stop repaying the loan on a monthly basis as agreed between them.

On the evidence on record and as per the testimonies of the witnesses, PW1, PW2, PW3, DW1 and DW2, this Court finds that the Plaintiff and the Defendants had entered into a term loan as exemplified by **Exhibit P1**. This Court also finds that it was a term of the loan agreement that the Defendants were to repay the said loan within 48 monthly on equal monthly installments basis. The evidence on record has convincingly established and without leaving any doubt that up and until the date of the filing of this suit, the Defendant has failed to repay the full amount of the loan as agreed. This failure in my view amounts to a breach of the terms of the loan contract. On his part the Defendant attempted to come up with a defence that the Defendant had stopped from continuing paying the loan due to the act of the Plaintiff of instituting in this Court a winding up proceedings against the Defendant. In my considered opinion and with due respect to the Defendant, the existence of the winding up proceedings did not amount to a waiver of the obligations owed to the Defendants under the loan agreement of paying the loan in full. Dismissing **Miscellaneous**

Commercial Case No.36 of 2005, Hon. Lady Justice Kimario, as she then was reasoned that:

"the winding order will kill the Respondent (the Defendant in this Case). The problem of employment will be increased and possibly that of crime also. The order will not be for public interest."

In that case Hon. Kimario, J. continued to state that, *"however, it has held that the Respondent is heavily indebted."* Considering the reasons stated by Hon. Kimario, J. while dismissing the petition for winding up the Defendant's Company, the defence raised by the Defendant, that of trying to hide behind the winding up proceedings to avoid its obligations to repay the loan therefore lacks any merits and therefore crumbles like a sack of full of unprocessed rice destroyed by rats.

For the foregoing reasons the first issue *whether or not there was breach of the terms of the loan agreement between the parties is to be* answered in the affirmative.

I now turn to consider the second issue, ***whether or not the appointment of receiver manager was lawful?*** In his testimony, PW1 told this Court that, the Receiver Manager was appointed in late 2007 as per the Notice and the Deed of Appointment, **Exhibit P3**, on record. In her testimony, PW2, the Receiver/Manager told this Court that she had was appointed as Receiver/Manager on the 8th day of October 2007. In his testimony PW3, also recognized that PW2, M/s Martha Renjo was appointed as Receiver/Manager in 2007 and that she has filed all the

necessary documents with the Registrar of Companies and copied them to the guarantors. On his side, DW2 told this Court that they (Defendants) did not recognize the appointment of Ms. Martha Renju to be a Receiver/Manager since the Defendant was not copied with such notice or any other necessary documents related with her appointment. This allegation raises an issue that relates to the legal consequences (if any) of failure by the Receiver/Manager to furnish the intended company for which the powers of the receiver/manager are to be exercised with the notice and/or the necessary documents evidencing the appointment of the Receiver/Manager.

The law in this country in so far as the appointment of Receiver/Manager can be found in the Companies Act, No.12 of 2002 and the Civil Procedure Code, Cap.33 R.E 2002 respectively. Under Order XXXVIII Rule 1(1)(a) of the Civil Procedure Code the Court is vested with powers to appoint receivers either before or after the decree of the Court. Under the Companies Act, the obligation of a court-appointed administrative receiver to publish notice of his appointment and to send such notice to all the creditors of the company within 28 days of his appointment is stipulated under section 420 of the that Act. Section 420 (1) (a) of the Act, requires the Receiver to publish the notice of appointment in a prescribed manner.

In the instant case, the Defendant has not complained of non publication by the Receiver/Manager of the notice of appointment. The allegation by the Defendant zero in on failure by the Receiver/Manager to notify the Defendant. In any event, even if we were to assume for a while

that the Plaintiff violated the provisions of section 420 of the Companies Act, which is not the case, as that provision does not cover the present situation, the only available remedy for such contravention would be penal sanction by the Court ordering the Plaintiff to pay a fine the amount of which is at the discretion of the Court.

As per the testimony of PW1, M/s Martha Renju, the Receiver/Manager was engaged by way of appointment vide the Deed of Appointment of the Receiver Manager in respect of Scandinavia Express Services Limited and the Notice of Appointment of the Receiver/Manager, **Exhibit P3** collectively. This mode of appointment will bring this situation perfectly under the rubric of section 106 of the Companies Act, No.12 of 2002, which provides as follows:

*"If a person obtains an order for the appointment of a receiver or manager of the property of a company, **or appoints such a receiver or manager under any powers contained in any instrument, he shall, within seven days from the date of the order or of the appointment under the said powers, give notice of the fact to the Registrar,** and the Registrar shall enter the fact in the register of charges."* (The emphasis is of this Court).

The above legal position was further amplified by Hon. Luanda, J., as he then was in **Misc. Commercial Case No.2 of 2007, between SADDOCK DOTTO MAGAI AND JITESH JAYANTILAL LADWA & ANOTHER.** PW3 told this Court that the Receiver/Manager has already filed the notice of her appointment with the Registrar of Companies. This therefore put to rest the allegation by the Defendant was not served with

notice of the appointment of the Receiver/Manager. In so far as the Receiver/Manager gave notice to the Registrar of Companies by filing the notice of her appointment with the Registrar of Companies, which fact the Defendant did not controvert, the Receiver/Manager complied fully with the provisions of section 106 the Companies Act which obligates a receiver or manager of the property of any company "under any powers contained in any instrument" to give notice to the Registrar of the Companies. The law does not require notice to be given to the company the property of which the Receiver/Manager is to exercise such powers over.

There is no evidence on record showing that the Defendant took any action trying to object to the appointment of the Receiver/Manager even after Ms. Martha Renju had entered into the Defendant's premise in exercise of her powers as Receiver/Manager. This go to point very strongly to the fact that the Defendant was well aware of such appointment and acquiesced to the same. The Defendant is therefore stopped from denying that fact.

For the foregoing reasons, this Court finds that the appointment of Receiver/Manager was according to the law and hence lawful. This settles the second issue whether or not the appointment of receiver manager was lawful.

Let me now consider the third issue, *whether the appointment of Receiver/Manager occasioned any lose*. PW2 has told this Court that, she was appointed as Receiver/Manager purposely to enforce the Plaintiff's rights under the mortgaged chattels. The list of the Mortgaged Chattels as per Schedule 1 of the Chattels Mortgage, **Exhibit P2** comprises of a total

of fourteen (14) buses with registration numbers TZQ 8212; TZQ 8185; TZQ 8188; TZN 6865; TZN 6866; TZP 4282; TZP 4288; TZT 2822; TZT 2881; TZT 2882; TZT 2883; TZT 2884; TZT 2885; and TZT 2886. PW2 also told this Court that out of the fourteen buses listed in Schedule 1 of Exhibit P2, she managed to reposes only one bus. The testimony of PW2 that she managed to seize only one bus has been corroborated with the testimonies of PW1, PW3, DW1 and DW2. PW2 also told this Court that she has failed to sell the only one bus she managed to seize because she did not have the original documents of that bus, which are still in the possession of the Defendant.

The Defendant on his part has alleged to have suffered loss as a result of the following. First, that the bus was seized and therefore it stopped generating profits which the Defendant put at the tune of TZS 1,500,000/= per day. Secondly, that the Receiver/Manager entered into the Defendant's premise by force hence thus breaking the entrance gate which resulted in causing damage of TZS 4, 350,000/=. Thirdly, that some of the spare parts were stolen by the employees of the Receiver/Manager including, four electronic control valued at TZS 5,700,000/= each to the total value of TZS 22, 800,000/=; six steering pumps valued at 1,980,000/= totaling TZS 11,880,000/=; two pieces of steering box worth TZS 10,500,000/= totaling TZS 21,000,000/=; four alternators valued at TZS 1,610,000/= each constituting a total amount of TZS 6,440,000/=; fourteen side mirrors valued TZS 175,000/= each totaling TZS 2,450,000/=; and 3 windscreens valued at TZS 2,100,000/= each totaling TZS 6,300,000/=; two pieces of propeller shaft each worth TZS. 850,000/=

making a total of TZS 1,700,000/= and seven pieces of self starter each worth TZS 3, 440,000/= making a total of TZS. 24,080,000/=.

It is perplexing to this Court that despite the efforts of the Defendant to come up with menu list of lost items with price tags, the Defendant did not both to produce at the trial to prove if really he owned or possessed such items which he now claims got lost in the ensuing forceful entry into his premise by the Receiver/Manager and her employees. This Court has not had any benefit of a police report produced by the Defendant concerning such alleged stolen spare parts. Furthermore, there was no any direct proof that the Receiver/Manager's employees were directly involved in stealing and/or causing loss of the purported spare parts. The only piece of evidence on record is that the Receiver/Manager managed to reposes only one bus and which unfortunately she even failed to take because of the missing original documents for that bus which she said are still in the possession of the Defendant, which fact the Defendant did not adduce any evidence to controvert.

For the foregoing reasons the third issue *whether the appointment of Receiver/Manager occasioned any loss* is to be answered in the negative.

Let me now consider the last issue which is *to what reliefs are the parties entitled*.

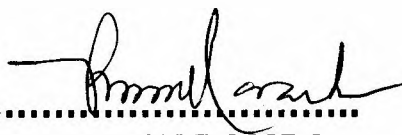
The Defendant filed with his defence a Counter-claim claiming recovery of the bus that was seized by the Receiver/Manager, specific and general damages. In my view, the Defendants has miserably failed to prove the counter-claim on a balance of probabilities. It is therefore dismissed. This Court is satisfied that the Plaintiff in the main suit has

successfully managed to prove its case on a balance of probabilities. The result is that the Defendants shall pay the outstanding amount of the loan in full and in case of the Defendants failing to pay the outstanding balance of the loan due in full, shall surrender the mortgaged motor vehicles to the Receiver/Manager.


In the whole and for the foregoing reasons, Judgment and Decree is hereby entered against the Defendant. The Plaintiff shall be entitled to the following reliefs:-

- (a) *The Defendant shall pay the Plaintiff **TZS.755,068,121.86** (Say Seven Hundred Fifty Five Million Sixty Eight Thousand One Hundred Twenty One Shillings and Eighty Six Cents) being the outstanding balance due and owing to the Plaintiff;*
- (b) *The Defendant shall pay interest on the amount claimed at the rate of 13% per annum from the 26th September 2007 to the date of Judgment;*
- (c) *The Defendant shall pay interest on the decretal amount at the Court rate of 7% per annum from the date of Judgment to full and final satisfaction of the decree;*
- (d) *The Defendant shall pay the costs of and incidental to this suit.*

Order accordingly.


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R.V. MAKARAMBA
JUDGE
02/03/2012

Judgment delivered this 2nd day of March, 2012 in the presence of Mr. Merinyo for Mr. Maige, Advocate for the Defendant and in the absence of the Plaintiff.



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R.V. MAKARAMBA
JUDGE
02/03/2012.

Words count: 6,066