

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT MWANZA**

COMMERCIAL CASE NO. 18 OF 2013

NICODEMUS YOHANA NYAMAJEJE PLAINTIFF

VERSUS

CRDB BANK

EAGLE AUCTIONMART & GENERAL BROKERS } DEFENDANTS

ALOYCE KUMALIJA

17th April & 18th May, 2015

JUDGMENT

MWAMBEGELE, J.:

The plaintiff who is a natural person had instituted Commercial Case No. 18 of 2013 against the defendants jointly and severally praying for a declaration that the sale of his premises located at Plot 517, Block F, Igoma Area, Mwanza City by the second defendant to the third defendant to realize Tshs. 78,670,148/82 was illegal for being tainted with procedural irregularities and thus to be discharged forthwith, an order for restoration of the said premises to him, general damages and costs of the suit.

From the plaint, it appears that the first defendant had advanced to the plaintiff a loan amounting to Tshs. 135,000,000/= as a working capital upon which the latter offered the said premise as a security. The plaintiff failed to discharge a balance of Tshs. 78,670,149/82 after he had managed to repay the rest of the moneys whereupon the first defendant exercising his powers under the mortgage instructed the second defendant to issue a notice of intention to sell the security. The property was then sold to the third defendant at Tshs. 30,000,000/= and without compliance with the procedure.

The first defendant through its written statement of defense denied all the allegations and put that the premise was sold at Tshs. 70,000,000/= and not Tshs. 30,000,000/=. By way of a counterclaim, the first defendant stated that as at 2nd August, 2013, the plaintiff's outstanding amount was Tshs. 80,787,987/20 and upon selling the mortgaged property the plaintiff outstanding balance and interest as at 20th August, 2013 was Tshs. 15,009,390/40, hence the counterclaim praying for the said principal amount of Tshs. 15,009,390/=40, interest thereon at 20% per annum from 02.08.2013 to the date of judgment, interest on the decretal sum at court's rate from the date of judgment to the date of payment in full as well as costs of the counterclaim.

The second defendant also denied the allegation and put that the auction was advertised in the *Habari Leo* Newspaper of 1st August, and

the sale was made through a public auction to the highest bidder at Tshs. 70,000,000/= not Tshs. 30,000,000/=. As for the third defendant, the suit had been proceeding *ex parte* as against him since he had defaulted to neither file a defense nor enter appearance.

The record shows that the plaintiff's suit was, by a ruling of this court of 01.09.2014, dismissed with costs for want of prosecution. This was after he had failed to file the required witness statement despite the suit having been restored and the time for doing so having been extended. This stance relieved the second defendant who had not raised the counterclaim and who had no interest whatsoever therein. Thus, he did not partake in the proceedings in respect of the counterclaim.

When the matter came up for hearing of the counterclaim on the 17.04.2015, the first defendant was represented by Mr. Galati learned advocate. The plaintiff was absent but a certain Thomas Bartazar present in chambers informed the court that the plaintiff was in Dar es Salaam and had sent him to ask for an adjournment so that he could get another advocate as the previous one had withdrawn from representing him. Mr. Galati objected to the prayer for adjournment submitting that the reasons for adjournment were not sufficient and further that the person who appeared and supplied the information had no *locus standi*. He thus prayed to proceed *ex parte* with the hearing of the counterclaim.

I allowed the prayer for obvious reasons that indeed the person who appeared had no *locus standi* since he was neither a recognised agent, nor an advocate, and as such, the plaintiff had neither appeared atop of having defaulted to file a witness statement in respect of the claim.

The first and sole witness to testify for the first defendant cum plaintiff was one Dionis Deogratias Mambo whose witness statement in lieu of examination in chief was admitted in evidence and marked as Exhibit PWS1. Therein, he introduced himself as the Accounts Manager of the first defendant stationed at Nyerere Branch in Mwanza City. He testified that he knows the plaintiff cum defendant as the client of the first defendant with account No. 0150091790601 and a loan account No. 016S091790602 at the said branch. He said that through a facility letter dated 18.07.2011, the plaintiff obtained a loan amounting to Tshs. 135,000,000/= from the first defendant whose repayment was to be complete within twelve months by equal monthly instalments of Tshs. 12,505,658/=30 up to October, 2012. He stated further that the loan was secured by a mortgage created by one Butterfly Educational Services Tanzania Limited over a property located at Plot No.517, Bolck "F" Igoma Area Mwanza City, registered under Certificate of Title No. 2686. He told this court that the plaintiff defaulted to pay the outstanding amount of Tshs. 78,670,149/80 whereafter the first defendant issued a demand notice to which the plaintiff did not heed. He went on to aver that the first defendant appointed the second defendant to auction the mortgaged property and as at 02.08.2013

when the property was sold, the outstanding amount was Tshs. 80,787,987/20 which, despite the auction, was not realized in full. It was his averment that upon sale by way of auction of the property, the property was sold at Tshs. 70,000,000/= and therefore the balance still owed was Tshs. 15,009,390/40.

To corroborate his statements, PW, tendered the Facility letter (Exhibit P1), *Habari Leo* Newspaper, dated 01.08.2013 (Exhibit P2), plaintiff's bank statement for account No. 0150091790601 (Exhibit P3) as well as a pay-in slip (Exhibit P4).

Having gone through the first defendant's counterclaim, I deem the issues requiring determination by this court to be, first, whether the plaintiff owed the first defendant the sum of Tshs. 15,009,390/40 as alleged and, two, to what reliefs, if any, are the parties entitled?

Exhibit P3 comprises the bank statements of the plaintiff in respect of both the personal and loan accounts both issued on the 26.09.2013. The statement for the loan account indicates that an amount of Tshs. 70,000,000/= was credited therein 02.08.2013. This amount was applied for Automatic Loan Repayment (Tshs. 32,778,596/80), Auctioning Fee (Tshs. 4,200,000/=), Partial Loan Repayment (Tshs. 33,000,000/=) as well as Monthly Maintenance Fees (Tshs. 21,403/20). This does not indicate any debit to be outstanding. However, as for the loan account, it indicates that as at 20.08.2013, the total outstanding

debt was Tshs. 80,787,987/20 and on the credit side it was a total of Tshs. 65,778,596/80 whereas a book balance is indicated to be Tshs. 15,009,390/=. This, in my view, establishes the amount prayed for in the counterclaim.

I will therefore, in reply to the second issue regarding reliefs, award the first defendant the amount of Tshs. 15,009,390/= as prayed. The plaintiff is also condemned to pay interest on the principal sum at the rate of 20% per annum as agreed in the loan facility from 20.08.2013 to the date of this judgment and further interest at the court's rate of 7% on the decretal sum from the date of this judgment to the date of full and final satisfaction. The plaintiff is also condemned to pay costs of the defendant for this counterclaim.

In fine, and in compliance with rule 67 (3) of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012, I enter judgment for the first defendant in the counterclaim and I proceed to decree thus:

1. The plaintiff shall pay the first defendant the total of Tshs. 15,009,390/= as an outstanding amount of the principal loan plus interests thereof as at 20.08.2013;
2. The plaintiff shall pay the first defendant interest at 20% on the principal amount in (1) above from 20.08.2013 to the date of this judgment;

3. The plaintiff shall pay the first defendant further interest at the court's rate of 7% on the decretal sum from the date of this judgment till final and full satisfaction; and
4. The plaintiff shall pay costs of the defendant for this counterclaim.

Order accordingly.

DATED at MWANZA this 18th day of May, 2015.

J. C. M. MWAMBEGELE
JUDGE