IN THE HIGH COURT OF TANZANIA

(COMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 73 OF 2016

LEONARD WILLIAM T/A

MIEMBESABA OIL COMPANY LIMITED.....1ST PLAINTIFF

ELIMO WILLIAM MBOWE.....2ND PLAINTIFF

VERSUS

NATIONAL BANK OF COMMERCE LIMITED .....1ST DEFENDANT

SADOCK DOTTO MAGAI.....2ND DEFENDANT

ATN PETROLEUM COMPANY LIMITED.....3RD DEFENDANT

COMRADE AUCTION MART COMPANY LIMITED.....4TH DEFENDANT

27/11/2018&20/03/2019

JUDGMENT

MWANDAMBO, J.:

Leonard William trading as Miembesaba Oil Company Limited and Elimo William Mbowe, the 1st and 2nd plaintiff respectively have instituted the suit against National Bank of Commerce Ltd, Sadock Dotto Magai, ATN Petroleum Company Limited and Comrade Auction Mart Company Limited, 1st, 2nd, 3rd and 4th defendants respectively challenging the legality of the sale of their properties allegedly in exercise of the 1st defendant's right under mortgage deeds claimed to have been executed to secure credit facilities extended to a company known as Miembesaba Oil Company Limited

some time in 2008 (hereinafter referred to as the Company or the Borrower) and renewed subsequently. The defendants have taken a joint defence signed by Sadock Dotto Magai denying the plaintiffs' claims in the suit praying for its dismissal. Parallel with the defence, the 2nd defendant has preferred a counter-claim against the plaintiffs for vacant possession and eviction from properties on plot No. 141, industrial Area Kibaha comprised in certificate of title (CT) No. 36019 registered in the name of Leonard William t/a Miembesaba Oil Company Limited and farm No. 1768 Miembesaba, Kibaha Area Comprised in certificate of title No. 54680 in the name of Elimo William Mbowe.

The plaintiffs' case is premised in the following facts. The plaintiffs are directors in a company known as Miembesaba Oil Company Limited engaged in petroleum products business. In or about September 2008, the Borrower applied for credit facilities from the 1st defendant by way of an overdraft. That application was approved by the 1st defendant who, on 29th September 2008 issued a letter of offer for an overdraft facility of TZS 1,600,000,000/= for one year. The Borrower accepted the said offer against several securities amongst others, third party mortgages from the plaintiffs. The 1st plaintiff is a registered owner and occupier of a property or plot No. 141 Industrial area Kibaha Urban area comprised in a certificate of title No. 36019. The 2nd defendant for his part is the registered owner of a property known as farm No. 1768 situate at Miembesaba, Kibaha District comprised in CT No. 54680. It is the plaintiffs' case that the two properties have never been mortgaged to the 1st defendant for any loan despite which the 2nd defendant with instructions from the 1st defendant is all out to evict the plaintiffs and handover their properties to the 3rd defendant. The said 3rd defendant is alleged to have purchased the same from the 2nd defendant in pursuance of a sale agreement executed on 31st May, 2016. According to the plaint, the plaintiffs have never been aware of the said sale agreement neither have they consented to the sale of their properties nor authorized the 2nd defendant to sell the said properties to the 3rd defendant. It is their case that they became

aware of the sale of their properties at the time the 2nd defendant purported to evict them with a view to handing them to the 3rd defendant. It is the plaintiffs' contention that they have never mortgaged their aforesaid properties to the 1st defendant for any credit facility but in any event, the 1st defendant wrongly exercised its power because the sale was not done by public auction contrary to advertisements in the newspapers but through a private sale rendering the same void. By reason of the foregoing, the plaintiffs pray for the following reliefs:

> *"1.Declaration that the sale and transfer of titles of the properties on plot No. 141 Industrial Area Kibaha Urban area with certificate of title No. 36019 in the name of Leonard William t/a Miembesaba Oil Company Ltd, Farm No. 1768 at Miembesaba Kibaha District with certificate of title No. 54680 in the name of Elimo William Mbowe by the 2nd defendant working under the instructions of the 1st defendant to the 3rd defendant is void.*
>
> 1. *An order for specific performance by the defendants to unconditionally release original certificate of titles No. 36016 and 54680 over to the plaintiffs*
> 2. *Permanent injunction restraining the defendants, their agents, employees and or assignees to (sic!) demanding vacant possession of the suit properties from the plaintiffs;*
> 3. *General damages arising from the sale of the properties;*
> 4. *Costs of this suit to be borne by the defendants;*
> 5. *Any other reliefs this honourable court may deem fit and just to grant."*

The defendants who are represented by IMMMA Advocates have resisted the suit by way of a joint written statement of defence and a counter- claim by which the 2nd defendant prays for eviction from the suit properties. According to the written

statement of defence signed by the 2nd defendant on behalf of all of them, the Borrower had obtained credit facilities from the 1st defendant by way of overdraft and a term loan secured by legal mortgages over the disputed properties.

It is the defendants' contention that the borrower defaulted in repayment of the outstanding loans resulting into the 1st defendant exercising its power under the respective mortgages by appointing the 2nd defendant as a receiver manager to sell the said properties. The defendants contend further that before the 1st defendant had exercised power, it issued notices of default which were acknowledged by the plaintiffs who undertook to remedy the defaults but to no avail and hence the sale of the mortgaged properties to the 3rd defendant by private contract after failing to obtain reasonable prices at public auctions in two occasions.

In their answer to the counter claim, the plaintiffs' admit the acceptance of the offer for credit facilities by way of overdraft in the amounts of TZS 1,600,000,000/= and a term loan of TZS 1,000,000,000/= but contend that the term loan was utilized to the extent of TZS 666,000,000/= leaving a balance of TZS 334,000,000/=. All the same, the plaintiffs dispute having executed legal mortgages on their properties as aforesaid to secure the credit facilities the 1st defendant granted to the borrower and so there was no connections between the credit facilities and their properties warranting sale by the 2nd defendant on the 1st defendant's instructions. The plaintiffs dispute the outstanding loan in the sum of TZS 5,134,000,000/= on the basis of which the 1st defendant appointed the 2nd defendant to sell their properties because the borrower had utilized only part of the term loan and so there was no basis of issuing any default notice. On account of the foregoing, the plaintiffs pray for dismissal of the counter claim. So much for the facts.

Before the commencement of the trial, the Court framed six issues for determination of both the suit and the counter claim as under:

1. *Whether there were credit facilities granted to Miembesaba oil Company Limited by the 1st defendant;*

2. *If issue No. 1 is in the affirmative, what was the exact outstanding loan amount payable to the 1st defendant by the borrower;*

3. *If issue No. 1 is answered in the affirmative whether the credit facilities were secured by legal mortgages over Oryx Pwani Petrol Station plot No. 141 Industrial Area Kibaha Urban area with certificate of title No. 36019 in the name of Leonard William t/a Miembesaba Oil Company Ltd, Farm No. 1768 at Miembesaba Kibaha District with certificate of title No. 54680 in the name of Elimo William Mbowe and plot No. 5 Kibaha CT No. 54453;*

4. *Whether the sale of Oryx Pwani Petrol Station No. 141 Industrial Area Kibaha urban with certificate of title No. 36019 in the name of Leonard William t/a Miembesaba Oil Co. Ltd and Farm No. 1768 at Miembesaba with certificate of title No. 54680 in the name of Elimo William Mbowe to the 3rd defendant by the 2nd defendant working under the instructions of the 1st defendant was lawful;*

5. *If issue No. 1 is answered in the affirmative, whether the 2nd defendant was entitled to sell the mortgage properties following defaults by the plaintiffs; and*
6. *What reliefs and the parties entitled to.*

As the suit was commenced by a plaint, parties were required to file their respective witness statements seven days following failure of mediation pursuant to Rule 49 (1) and (2) of the High Court (Commercial Division) Procedure Rules 2012(the

Court's Rules). Two witness statements by Leonard William (PW1) and Elimo William Mbowe (PW2) were filed for the plaintiffs. Only one witness statement was filed for the defendants concerning both the defence and the counter-claim. This witness statement was taken out by Frederick Mtei (DW1) who introduced himself as Corporate Recovery Manager of the 1st defendant. None was filed on behalf of the 2nd defendant who is labeled as a plaintiff in the counter-claim. I will advert to the effect of that failure at a later stage when addressing the issues relating to the counter-claim.

In the course of the trial the witnesses whose witness statements were filed earlier on tendered several exhibits and answered questions in cross examination. Upon the closure of the trial I invited the learned Advocates to file their closing submissions which they did. I must point out in passing that whilst I appreciate their industry, both of them went out of their way filing lengthy submissions containing as many pages as twice the prescribed maximum number contrary to the dictates of rule 19(1) of the Court's Rules. I chose to close my eyes to the overindulgence in this case because both Advocates did not comply with the Rule and so none was prejudiced hoping that this can only be an exception in this case and that in future they will closely adhere to the requirements of the rules made for a purpose. That said, I will now turn my attention to a discussion of the issues in the light of the evidence on record taking into account the substance of the counsel's submissions.

The first issue is whether there were credit facilities granted to the Borrower by the 1st defendant. Mr. Gaspar Nyika learned Advocate for the defendants submits and invites the Court to answer the issue affirmatively. He relies on a credit facility letter dated 29 September 2008 admitted in evidence as exhibit D1 and a renewal letter dated 3rd November 2009 (exhibit D2). Submitting further, the learned Advocate makes reference to a facility letter dated 14th December 2010 renewing the terms of the credit facility letter (exhibit D4) setting for the expiry of the overdraft

facility on 31st October, 2011 and repayment of the loan within sixty months. It is the learned Advocate's submission that that documentary evidence was corroborated by PW1's oral evidence.

For his part, Patrick Mutani learned Advocate for the plaintiff urged the Court to answer the issue negatively. The learned Advocate went at great length to demonstrate that no credit facilities were granted by the 1st defendant to his clients. In the first place the learned Advocate submits that exhibit D1 should be discarded because it was not pleaded by the defendants in their amended written statement of defence. At any rate, the learned Advocate submits that the terms of exhibit D1 were not accepted by the Borrower in the manner required by section 38 and 39 of the Companies Act, Cap. 212 [R.E. 2002]. Counsel bolsters his submission by placing reliance on the decision of the Court of Appeal in **Hotel Travertine Limited & 2 Others vs. National Bank of Commerce Limited** [2006] TLR 133 in which it was held that the appellant's letter did not constitute an acceptance of the offer because it was at variance with the mode of acceptance the respondent had prescribed.

I have passionately examined the above submissions by counsel in the light of the pleadings and the evidence on record and I think there is more than preponderance of probabilities that the existence of the credit facilities can hardly be disputed regardless of Mr. Mutani's ingenuity to persuade me to hold otherwise.

To start with, the learned Advocate's attempt to have me discard exhibit D1 at this stage is with respect, legally untenable. As the record will show, the document sought to be discarded now was admitted as an exhibit without any objection from the learned Advocate on 12th October, 2018. That document forms part of annex NBC - 10 to the defendant's reply to the answer to the counter-claim referred in para 6 thereof. Besides that if I uphold Mr. Mutani on this, it will amount to condemning the defendants unheard which is legally unacceptable. That being the case, it is too late in the day asking for discarding of an exhibit which forms part of the record following

its admission during the trial at which DW1 answered questions in cross examination. At any rate, the mere fact that the document was admitted does not make it to be conclusive proof of the contents of what it purports rather the weight to be attached to it in the light of the other evidence on record. Secondly, as the learned Advocate might be undoubtedly aware, it is trite law that parties are bound by their own pleadings. That principle has been reiterated in a number of cases including **James Funke Gwagilo vs. Attorney General** [2004] TLR 61. By their own pleadings in para 2 of their defence to the counter-claim, the plaintiffs admitted the existence of credit facilities by way of a letter dated 3rd November 2009 (exhibit D 4). According to that letter, two forms of credit facilities were granted that is to say; an overdraft of TZS. 1, 600,000,000/= and a term loan of TZS.1, 000,000,000/=. The former is shown to be existing suggesting that it was being renewed. Logically the renewal must have reference to an earlier overdraft facility granted in September, 2008 vide exhibit D1 whose existence was admitted by the plaintiff through the evidence of PW1 while answering questions in cross examination. PW1 admitted so when referred to the letter of offer dated 28th September, 2008 before it was formally tendered by DW1 and admitted as exhibit D1. PW1 admitted too that the borrower accepted the terms and conditions in exhibit D1 containing, inter alia, the type of securities pledged against the credit facilities. More or less the same testimony was adduced by PW2 in answer to questions in cross examination. This witness admitted that the borrower obtained credit facilities from NBC in 2008/2009 in the form of overdraft and term loan which were renewed later. It is surprising thus that the learned Advocate for the plaintiff contends as he does that the 1st defendant never granted credit facilities to the borrower allegedly because the acceptance of the offer did not conform to the dictates of section 38 and 39 of the Companies Act. That line of argument is flawed for, at no time has the borrower challenged the existence of the credit facilities on the ground reflected in the counsel's closing submissions. On the contrary, both witnesses for the plaintiffs who are directors of the Borrower have expressly admitted

expressly admitted acceptance of the offer as well as the utilization of the credit facilities granted by the 1st defendant.

It thus follows that the reliance on section 38 and 39 of the Companies Act is made out of context and so is reference to **Hotel Travertine Ltd vs. National Bank of Commerce Ltd** (supra) decided on facts not similar to facts in the instant suit rendering it distinguishable to the issue under consideration. In the upshot, I find that the 1st defendant has sufficiently discharged its burden of proof on the grant of credit facilities to the borrower and thus the first issue is answered affirmatively.

The second issue is predicated on the answer to the first issue. It seeks to determine the exact outstanding loan amount payable to the 1st defendant by the borrower. I have already found and held that the 1st defendant granted credit facilities to the borrower in issue number one. Since it is the 1st defendant rather than the Borrower who claims that the sale of the plaintiff's properties by the 2nd defendant was a result of borrower's default to repay the loans, the burden of proof lies on it to succeed thereon. It is the 1st defendant's case through para 6 and 30 of the amended written statement of defence and counter-claim that the outstanding loan amount on both the overdraft and term loan was TZS. 5,134,396,777.99 as of 30th April, 2015.The same averments are made in DW1's evidence in para 7 of his witness statement. During the trial, the witness tendered a bank statement in respect of Account Number 053103000240 maintained at Mlimani City Branch in the name of Miembesaba Oil Limited (the Borrower) for a period from 1st April 2014 to 30th April 2015.

That account was for an overdraft showing an outstanding amount of TZS 3,830,093,712.47 principal and interest of TZS 77,115,980.79. Although the accompanying statement of DW1 certifying the authenticity of the transaction shows two accounts covering the overdraft and the term loan, the latter was not attached to the statement and none was tendered as an exhibit. That explains why the Court

rejected the admission of the said bank statement when DW1 attempted to tender the same on 12th October 2018. The former was admitted as exhibit D11.

The learned Advocate for the plaintiffs has spent a significant amount of energy in his bid to explain that there was no lawful demand showing the exact outstanding loan in the Borrower's amount. He relies on, amongst others, the credit facility agreement (exhibit D4) as well as section 127(2) of the Land Act, Cap. 113 [RE. 2002] henceforth to be referred to as the Act. With due respect I do not see any relevance to any of the arguments made in that behalf to the issue which was meant to investigate the outstanding amount with or without any demand or notice of default to the Borrower. I hold the view that ascertaining the outstanding amount to the Borrower's accounts on the credit facilities cannot be dependent on the notices of default as Mr. Mutani, learned Advocate would wish it to be the case. At any rate, there is no suggestion that there are two versions of the outstanding loan amounts. Without further ado, I reject the learned Advocate's argument for being irrelevant and patently misconceived.

That said, there is no doubt that by reasons of exhibit D11 which was not assailed by the plaintiffs during cross examination, the outstanding loan amount was a shown therein, that is to say TZS **3,907,209,693.26** and I so hold.

The third issue is whether the credit facilities granted to Miembesaba Oil Company Limited were secured by Legal Mortgages over Oryx Pwani Petrol Station Plot No. 141 Industrial Area Kibaha Urban area with certificate of Title No. 36019 in the name of Leonard William Mbowe t/a Miembesaba Oil Company Limited Farm No. 1768 at Miembe Saba Kibaha District with certificate of Title No. 54680 in the name of Elimo William Mbowe and plot No. 5 Kibaha with CT No. 54453.

It will be recalled that this is the major bone of contention by the plaintiffs who have maintained that the sale of their properties were flawed because none of the

said properties were pledged as securities by way of mortgage for the credit facilities granted to the borrower. Once again, the burden of proof lies in the person who asserts in the affirmative and in this case the 1st defendant.

The defendants, in particular the 1st defendant are positive that the plaintiffs executed legal mortgages over the properties the plaintiffs claim to the contrary. Specifically, the learned Advocate for the defendants submits that evidence shows that the plaintiffs mortgaged their properties to secure the facilities extended to the Borrower and invites the Court to look at the specific items in exhibits D1, D2, D3, D4 and D5. According to the learned Advocate, the said exhibits clearly indicate that Leonard William mortgaged his property on plot No. 141, industrial area Kibaha comprised in certificate of title No. 36019 whereas Elimo Wlliam Mbowe mortgaged his property namely; Farm, 1768, Miembesaba, Kibaha District comprised in certificate of title No. 54680. On the basis of the foregoing the learned Advocate invited the Court to answer the third issue in the affirmative.

For his part, the learned Advocate for the plaintiff urges the Court to uphold the plaintiffs' claim by answering the issue negatively. The learned Advocate advances three grounds in support of his contention. One, variance in the names in the mortgage deed in exhibit D6 with that shown in the certificate of title on the property on plot 5 No. CT No. 54453 shown to be Leonard William t/a Miembesaba Oil Company Limited. Two, the mortgages did not make reference to any credit facility extended to the borrower. Three, amounts secured by the mortgages are not indicated. To bolster his submissions the learned Advocate refers the Court to section 113(1) of the Act, section 29 of the Law of Contract Act, Cap 345 (R.E. 2002] and a decision of the Court of Appeal in **Alfi East Africa Ltd vs. Themi Industries & Distributors Ltd** [1984] TLR 256. The Court of Appeal relied on section 29 of Cap 345 and held that failure to state a price in a contract is fatal and renders the contract void. The learned

Advocate argues that by parity of reasoning, failure to state an amount secured by the mortgage is similarly fatal and renders the same void.

I have examined the arguments for and against the issue against the evidence on record in the light of the averments of the parties in their respective pleadings. It will be recalled that the 1st plaintiff had claimed in the amended plaint that he has never mortgaged his property on plot No. 141, Kibaha Industrial Area in the name of Leonard William trading as Miembesaba Oil Company Limited. Likewise, the 2nd plaintiff contends alike in para 13 of the amended plaint in relation to Farm No. 1768. It is not in dispute by going through the copy of the certificate of title to right of occupancy (exhibit P1) on plot No. 141, Kibaha industrial area, the registered owner of the said property is Leonard William trading as Miembesaba Oil Company Limited. There is equally no dispute that Elimo William Mbowe, 2nd plaintiff, is the registered owner of the property described as Farm No. 1768 at Miembesaba Kibaha District comprised in CT No. 54680 (exhibit P4). The first plaintiff's contention lies in the variance in the names shown in the mortgage deed (exhibit D6) and the certificate of occupancy, exhibit P1. On that account he disassociates himself with the mortgage deed meant to secure the credit facilities granted to the borrower. During the trial, PW1 admitted while answering a question from the learned Advocate for the plaintiff about obtaining an overdraft facility from the 1st defendant for TZS 1,600,000,000/= in 2008. He also admitted signing three documents namely; letter of offer dated 29th September 2008 (exhibit D1), mortgage of a right of occupancy on plot No. 141, Kibaha Industrial area comprised in CT No. 36019 (exhibit D7) as a director of Miembesaba Oil Company Limited although his name is Leonard William. PW1 admitted too that the mortgage he executed was to remain as a continuing security against the loan plus interest. In re-examination, PW1 was emphatic that his dispute centered on the fact that the borrower was Miembesaba Oil Company Limited as opposed to his name as Leonard William t/a Miembesaba Oil Company Ltd.

What emerges from the foregoing is that the first plaintiff would have the Court find that the mortgagor must, as of necessity be same as the borrower. As seen earlier, the learned Advocate for the plaintiff would have the Court find the mortgage void because of the difference in the names in the mortgage deed and the certificate of occupancy (exhibit P1).

The answer to the 1st plaintiff's contention lies in section 113 (2) of the Act as amended by the Land (Amendment) Act No. 2 of 2004 which stipulates:

> *"The power conferred by sub-section (1) shall include the power to create third party mortgages and second subsequent mortgages."*

A third party is defined under section 112(2) of the same Act to mean:

> *"a mortgage which is created or subsists to secure the payment of an existing or future or a contingent debt or other money or moneys worth or the fulfillment of a condition by a person who is not the mortgagor, whether or not in common with the mortgagor."*

It will be clear from the foregoing that it does not require a borrower to be the same person as a mortgagor and in this case, Miembesaba Oil Company Limited obtained credit facilities from the 1st defendant against securities pledged by third parties, the 1st plaintiff included. Incidentally, the 1st plaintiff admits having executed a mortgage against the overdraft although he contends that he did so in his name as Leonard William which is not the same as Leonard William trading as Miembesaba Oil Company Limited. There is no dispute that the 1st plaintiff is a director in the borrower company. The question that arises for determination is whether the fact that the certificate of title (exhibit P1) is registered in the name of Leonard William t/a Miembesaba Oil Company Limited is tantamount to saying that Leonard William is a

different person and independent from the registered owner of the property on plot No. 141, Industrial area, Kibaha Urban area.

As shown above, Leonard William, the 1st plaintiff (PW1) trades in the name of the Borrower a company in which he is a director. However, that does not in law mean that Leonard William, the signatory to the mortgage deed is a distinct person from the registered owner of the property in dispute. In my view it seems to be logical that having admitted in his evidence that he executed the mortgage to secure the credit facilities, he cannot now turn around and disassociate himself from the transaction. Surprisingly, PW1 was too economic with explanation in what capacity did he execute the mortgage of, as he now claims a stranger to exhibit P1. I would thus reject the contention for being misconceived and that takes me to the rest of the grounds advanced by the plaintiffs.

Both plaintiffs contend that the mortgages are void because they are not linked to any credit facility. However, PW1's evidence shows clearly that he executed the mortgage to secure an overdraft facility granted to the borrower in 2008 pursuant to a facility letter dated 29th September, 2008 (exhibit D1). The second plaintiff (PW2) for his part admitted having executed a mortgage of his property on plot No. 5 Miembesaba comprised in CT No. 54453 to secure a credit facility to the borrower company in which he is also a director. PW2 admitted too that he subsequently mortgaged his property known as farm No. 1768 situated at Miembesaba Area comprised in CT No 54680 as security for future loans to the borrower. This witness admitted also that the 1st defendant renewed the overdraft on renewed terms and that it had not repaid the loan amounting to TZS 2.2 billion as of 2013. Whilst contending that the mortgage was for future advances, PW2 could not pinpoint any clause in the mortgage deed in support of his contention. I will now turn my attention to a discussion whether the plaintiff's contentions have any basis.

According to the credit facility letter date 29th September 2008 (exhibit D1) one of the securities to the overdraft of TZS 1, 600,000,000/= was a legal mortgage over Miembesaba petrol station CT No. 54680, Farm No. 1768 located at Miembesaba, Kibaha. I take it that the information on the particulars of the property was given by no other than the borrower through PW2 considering that there is no suggestion that Miembesaba Petrol Station is the owner of the said property. Besides exhibit D1 showing that the overdraft was to be secured by, amongst others, a legal mortgage over Farm No. 1768, there is no evidence that the 2nd plaintiff executed the mortgage. It is common ground as conceded by PW2 that the 1st defendant continued to renew the facilities and this is vivid through a credit facility letter dated 3rd November 2009 and a subsequent one dated 14th December 2010 (exhibit D4 and exhibit D2 respectively). Unlike exhibit D1, the latter exhibit relate to two facilities namely; Overdraft of TZS 1,600,000,000/=and a term loan of TZS 1,000,000,000/=. It is also in evidence that there is no mention of farm No. 1768 made in the two exhibits. Evidence also shows that on 11th July 2012, the first defendant issued two letters addressed to the borrower that is to say; Multi option facility commercial terms in relation to an overdraft of TZS 1,600,000,000/= (exhibit D3)and term loan commercial terms dealing with the term loan facility of TZS 635, 769, 420/= (exhibit D5). The schedules to both letters listed a legal mortgage over farm No. 1768 as one of the securities and that was followed by mortgage deed executed on 16th July 2012 by PW2 admitted in evidence as exhibit D10. Recital 'B' to exhibit D10 makes reference to credit facilities expressed in exhibit D3 and D5 issued on 11th July 2012 duly accepted by both PW1 and PW2.

In the light of the foregoing, it is not correct therefore as Mr. Mutani impressed upon the Court that the mortgage deed (exhibit D10) has no connection with the credit facility. On the contrary, an examination of exhibit D10 shows clearly that it was made for the purpose of meeting one of the conditions in exhibits D3 and D5 that is to say, security for the overdraft and term loan facilities granted to the borrower.

That said, I find no merit in the reason advanced by the plaintiff's learned Advocate in support of the contention for vitiating the mortgage deed (exhibit D10) executed by PW2.

The third ground is that the mortgage deeds (exhibit D6 and D8) are not in conformity with section 113 (1) and 113 (2) of the Act. It will be noted that Mr. Mutani learned Advocate concedes in his submissions that the mortgage deed by PW2 (exhibit D10) is in conformity with section 113 of the Act. His main problem is with regard to exhibits D6 and D8. Section 113 (1) and (2) provide as follows:

> s. 113*(1) An occupier of land under a right of occupancy and a lessee may, by an instrument in the prescribed form, with such variations and additions, if any, as the circumstances may require, mortgage his interest in the land or a part thereof to secure the payment of an existing or a future or a contingent debt or other money or money's worth or the fulfillment of a condition.*
>
> *(2) The power conferred by subsection (1) shall include the power to create third-party mortgages and second and subsequent mortgages.*

Exhibit D7 is a mortgage executed by Leonard William (PW1) as security for an unspecified amount as agreed between the 1st defendant and borrower under the relevant agreements. The mortgage was a third party mortgage and any additional amount to be granted to the borrower permitted by section 113 (1) of the Act in favour of Miembesaba Oil Co. Ltd in relation to an overdraft facility for the purposes of financing working Capital requirements of the business of the borrower with a maximum limit of TZS 100,000,000/=. Again in terms of the provisions of section 113 (1) of the Act, the mortgage was executed as a continuing security covering the principal and interest thereon and any additional amount to be granted to the Borrower. On the other hand, exhibit D8 relates to plot No. 5, Miembesaba Area, Kibaha comprised in CT No. 54453 in the name of Elimo William Mbowe, 2nd plaintiff

(PW2). Except for the particulars of the mortgagor and the description of the properties, exhibit D6 and D8 are identical and relate to the same overdraft. Mr. Mutani contends that since the amount secured is not shown in both exhibits, the same should be held not to have been securities for credit facilities granted to the borrower. He places his reliance on Land Form No. 40 made under section 113 of the Act. For ease of reference I will reproduce the operative part of Land Form No. 40.

> *"I /we..... of..... HEREBY MORTGAGE the lease hold estate registered under the above reference to.....of..... to secure the sum/ overdraft existing or a future or contingent debt or other money or money's worth of shillings (Tshs.....) with interest at.....per centum per annum payable or to secure the fulfillment of the following condition namely....."*

Section 113 (1) of the Act under which Land Form No. 40 was made permits modifications, variations and additions therein as circumstances may permit and that explains why the form contains several options to fit particular circumstances. It is common ground that both exhibits relate to an overdraft amongst other options in Land Form No. 40. My reading of the Form does not appear to indicate that it is mandatory to state the amount in each and every mortgage as Mr. Mutani submits. Much as the amount secured is one of the details featuring in a mortgage, I hold the view that a close reading of the form would appear to show that the requirement to indicate the amount is only relevant with regard to securing a future or a contingent debt or other money or moneys .In any event, Land Form No. 40 presupposes that it is the mortgagor who has to indicate the amount rather than the mortgagee and so, I hold the view that it will be absurd for the mortgagor to use it as a sword against the mortgagee. It will thus follow that the reference to section 29 of the Law of Contract Act and the case cited by the learned Advocate are irrelevant to the facts of

this case. This is more because unlike in this case, failure to state consideration in a contract is a fatal error which vitiates a contract.

It is my view that that principle cannot extend to cases such as this one and so Mr. Mutani's argument fails and that disposes issue number three which is answered affirmatively. I will now turn my attention to issue number four.

The Court is invited in the fourth issue to determine the legality of the sale of the mortgaged properties on plot No. 141, industrial area Kibaha and Form No. 1768 Miembesaba, Kibaha district to the 3rd defendant by the 2nd defendant under the instruction of the 1st defendant. The plaintiffs' complaints against the sale are anchored on want of default notices contrary to section 127 of the Act on the one hand and the manner in which the sale was conducted.

The learned Advocate for the defendants has urged the Court to answer the issue affirmatively and dismiss the plaintiffs' complaint to the contrary. To start with, the learned Advocate submits that the complaints regarding want of statutory notices of default was not pleaded by the plaintiffs in their amended plaint taking the defendants by surprise and so the Court should not entertain it having regard to the principle that parties must confine to their pleadings discussed in a **Vidhyarti vs. Ram Rakha** [1957] EA 527 and **James Funke Gwagilo vs Attorney General** (supra). With respect I agree with the learned Advocates submissions. It is plain that the plaintiffs have never intended to raise the want of service of statutory notices of default as a basis of their challenge against sale of their properties mortgaged to the 1st defendant. Service of default notices surfaced in the 1st defendant's counter-claim (at para 31) to which the plaintiffs had no issue with the 1st defendant and so it could not be a ground for challenging the sale. Put it differently, issuance and service of statutory notices could not be amongst matters in dispute between the parties and indeed, the witness statements by PW1 and PW2 say nothing about want of default notices. To cap it all, the learned Advocate had an opportunity to lead the witnesses to say

something in that regard did not wish to lead any of the witnesses during the trial. The fact that he did not do so and I think rightly so speaks volumes so because that would have been contradictory to the clear admission of service of default notices through PW2 when answering a question in cross examination on 11th October, 2018. That admission is consistent with a letter from the Borrower to the 1st defendant dated 13th February 2013 admitted in evidence as exhibit D12. The signatory to that letter is Leonard William (PW1) in his capacity as a Managing Director of the Borrower and so without further ado, I reject the complaint based on want of statutory default notices as lacking in substance.

The next ground of complaint relates to the manner in which the sale of the mortgaged properties was conducted by the 2nd defendant.

The plaintiffs have launched a two pronged attack against the sale one, the sale was sold by private contract and in collusion with the 3rd defendant and two, the 2nd defendant sold the mortgaged properties to the 3rd defendant after the rescission of the earlier agreement for sale made on 31st May, 2016. It will be recalled that apart from filing his written statement of defence and counterclaim, the 2nd defendant did not file any witness statement as required by rule 49(1) of the Court's Rules, 2012. It has been settled through case law that effect of failure to file witness statements is tantamount to failing to give evidence during trial. (see: **Barclays Bank Tanzania Limited vs. Tanzania Pharmaceutical Industries Limited and 3 Others,** Commercial Case No. 147 of 2012, **Tanzania Azimio Construction Limited vs. CRDB Bank Limited,** Misc. Commercial Application No.138 of 2014 and **Afriscan Group (T) Limited vs. Said S. Msangi,** Misc. Commercial Application No. 87 of 2013 (all unreported). This means that there is no evidence from the 2nd defendant explaining the manner in which he sold the mortgaged properties to the 3rd defendant. The evidence by DW1 cannot suffice to explain the manner in which such properties were sold because the 1st defendant on behalf of whom he adduced evidence appointed the 2nd defendant as a receiver manager of the mortgaged properties under

section 126 (a) and (d) of the Act. By appointing the 2nd defendant to sell the mortgaged properties pursuant to the power conferred on it under the relevant mortgaged deeds, the 1st defendant was no longer seized of those properties and so it could not do anything on them except through the 2nd defendant. It follows thus that to the extent it relates to the things done or omitted to be done by the 2nd defendant, DW1 is not a competent witness to testify on his behalf including defending his actions and prosecuting the counter-claim. Any evidence DW1 adduced on behalf of the 2nd defendant is but hearsay which is not admissible. After all there is nothing on record suggesting that DW1 worked closely with the 2nd defendant and so had personal knowledge of what transpired during the whole process of sale of mortgaged properties to the 3rd defendant. Having held that the 2nd defendant has failed to defend the suit against him, I will only consider the plaintiffs' evidence in determining the issue involving him. That means that as there is no evidence by the 2nd defendant cum -plaintiff in respect of the counter claim, the same shall stand dismissed for want of prosecution. I will now revert to the complaint that the sale was not conducted by public auction but by private sale.

There is a clear admission by the defendants in paras 17 and 19 of the amended written statement of defence and counter-claim that the sale was indeed not made by public auction but by private sale following failure to obtain reasonable prices at the public auction on two instances. However, the evidence on the poor reasonable prices is at large. Needless to say the learned Advocate for the defendants contends that it was not illegal to sell the mortgaged properties by private contract as the same is permitted under section 134 of the Act as amended by the Land (Amendment) Act. No 2 of 2004.

For his part Mr. Mutani, learned Advocate for the plaintiff maintains that mortgaged properties could have been sold by private contract subject to compliance with section 134(2) of the Act. With respect, the learned Advocate cannot be more

right. It is common ground that the sale of the mortgaged properties was advertised in newspapers and indeed that was the basis of the plaintiffs' knowledge of the sale. According to the advertisements in the newspaper, the mortgaged properties were scheduled to be sold by public auction on specified dates. As it turned out, the sale became abortive and hence the resort to private contract under section 134(1)(d)(e) of the Act which gives right to the mortgagee to sell the mortgaged property by private contract or public auction with or without reserved price. To that extent the learned Advocate for the defendants is right. However sale by means other than public auction is not absolute. It is subject to section 132 (4) of the Act as amended by section 15 of the Mortgage Financing (Special Provisions) Act No. 17 of 2008 which provides:

> *"(4) Where a sale of mortgaged property shall be made by means other than public auction, a mortgagee shall be required to give notice of sale of not less than ten days to the mortgagor and to any third party holding a registered interest in the property".*

There is no evidence whatsoever that the 2nd defendant who was appointed by the 1st defendant to sell the mortgaged properties issued any notice to the mortgagors prior to the sale by private contract to the 3rd defendant as required by section 132(4) of the Act. The net effect of that failure is that the 1st defendant acting through the 2nd defendant failed to discharge its statutory duty. However, that failure did not have any effect on the 3rd defendant in view of the clear provisions of section 135 of the Land Act as amended by the Land (Amendment) Act No 2 of 2004 which provides:

(a) a person who purchases mortgaged land from the mortgagee or receiver excluding a case where the mortgagee is the purchaser,

(b) A person claiming the mortgaged land through the person who purchases mortgaged land from mortgaged land from the mortgagee or receiver, including a person claiming through the mortgagee where the mortgagee

is the purchaser where, in such a case the person claiming obtained the mortgaged land in good faith.

(2) A person to whom this section applies: -

(a) – (b) n.a

(c) is not obliged to inquire whether there has been a default by the mortgagor or whether any notice required to be given in connection with the exercise of the power of sale has been given or whether the sale is otherwise necessary, proper or irregular.

(3) A person to whom this section applies is protected even if at any time before the completion of the sale, he has actual notice that there has not been a default by the borrower, or that a notice has not been duly served or that the sale is in some way unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the lender of which that person has actual or constructive notice".

It will be clear from the foregoing that the answer to the fourth issue will only be affirmative to the extent that the 1st and 2nd defendants sold the mortgaged properties without giving notices to the mortgagees as required by section 132 (4) of the Act as amended by section 15 of the Mortgage Financing (Special Provisions) Act No. 17 of 2008 (supra) without prejudice to the 3rd defendant's right.

Having answered the first issue affirmatively, the fifth issue will follow suit that is to say; as the Borrower defaulted in loan repayment obligations to the 1st defendant, the 2nd was entitled to sell the mortgaged properties. Having so held I now turn my attention to the reliefs the subject of issue number six.

My answers to the issues framed show that the plaintiffs have failed to discharge their burden of proof on the substantive claims against the defendants

except on the manner of sale of the mortgaged properties by private contract without compliance with section 132 (4) of the Act as amended by section 15 of the Mortgage Financing (Special Provisions) Act No. 17 of 2008. However, as indicated above, that did not have any consequence on the 3rd defendant who enjoys statutory protection as a *bonafide* purchaser of the mortgaged property under section 135 of the Act. That means that the plaintiffs' prayers for a declaratory order that the sale of the mortgaged properties and transfer thereof to the 3rd defendant must fail so are the prayers for unconditional release of the title deeds, permanent injunction and specific performance. Considering that the 1st and 2nd defendants sold the mortgaged properties without regard to the law as aforesaid and having regard to the section 135 of the Act, the remedy available to the plaintiffs lies in an action for damages rather than setting aside the said sale. Needless to say, the evidence in support of the claim was too scanty to make any meaningful assessment of damages more so when there is ample evidence of the Borrower's default to repay the loan coupled by the plaintiffs' failure to heed to the default notices.

Furthermore, the claim that the prices obtained through the private sales were a result of collusion has not been substantiated by any satisfactory evidence on the required standard. By definition, collusion means secret illegal cooperation in order to cheat or deceive others (see: *Concise Oxford English Dictionary 12th edition at page 282*). Collusion is by no means less than any other form of conduct bordering on commission of a criminal offence such as fraud on which the law is now settled that a claim of fraud in civil cases requires a standard higher than mere balance of probabilities as articulated in **Katende Versus Haridas And Company Ltd** [2008] 2 EA 173. That decision reflects a correct position on the law as can be seen in other cases including; **Omary Yusufu V Rahma Ahmed Abdulkadr** [1987] TLR 169 and **Ratilal Gordhanbhai Patel V. Layi Makany** [1957] EA 314. The plainitiffs in this case have not gone beyond mere assertion that there was collusion in the sale of the mortgaged properties to the 3rd defendant. In the absence of cogent evidence proving

collusion on the required standard, there is no basis upon which the Court can be called upon to award damages on account of collusion and in consequence the same stands rejected.

In the event and for the foregoing reasons, the plaintiffs' case and the counter claim are hereby dismissed. Considering that neither party has been wholly successful, I will make no order as to costs. Order accordingly.

Dated at Dar es Salaam this 19th day of March, 2019.

L.J.S MWANDAMBO

JUDGE