

IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)

AT IRINGA

LAND CASE NO. 13 OF 2010

EDWIN SAMBALA PLAINTIFF

VERSUS

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| 1. NATIONAL MICROFINANCE
BANK LTD. | } | DEFENDANTS |
| 2. MEM AUCTIONEERS &
GENERAL BROKERS LTD. | | |

2/3/2015 & 24/4/2015

JUDGEMENT

MADAM SHANGALI, J.

The plaintiff EDWIN SAMBALA is a businessman who at the time of the alleged defamation was a Councilor of Gangilonga Ward. On 29th April, 2010, the plaintiff filed this suit against the NATIONAL MICROFINANCE BANK LTD. as the 1st defendant and MEM AUCTIONEERS & GENERAL BROKERS LTD. as the 2nd defendant claiming for a permanent injunction restraining the defendants from proclaiming his house for sale and payment for

T.Shs.200,000,000/= as general damages arising out of defamation. The plaintiff is the beneficial owner of the house on Plot No. 161 Block "1B" Lugalo Area, Iringa Municipality in which he carries out business of a workshop cum garage and office under the name and style of Sambala Construction Ltd.

The suit is erected on the claims that on or about 24th April, 2010, the 2nd defendant acting under the instructions of the 1st defendant posted a proclamation of sale of the plaintiff's house. The Notice was fixed on the outer gate of the plaintiff's premises proclaiming it for sale by a public auction which was about to be conducted on 4th May, 2010 in order to recover the loan allegedly advanced to the plaintiff by the 1st defendant. The plaintiff claims that, the words in that proclamation of sale are highly defamatory of him. The relevant words that were presented on the said proclamation of sale (*Tangazo la mnada*) stated in Swahili words that:-

"Kwa idhini tuliyopewa na Bank ya NMB tutauza nyumba hii kwa mnada wa hadhara tarehe 4 mwezi wa 5 2010 ili kufidia deni la Bank ya NMB tawi la Mkwawa."

In their joint written statement of defence which was filed on 24th May, 2010 the defendant, strongly denied any liability. To them, the plaintiff being a legal owner of the suit house had

undertaken to guarantee one Nolasco Hyasint Hyera to secure a loan of T.Shs.5,000,000/=. The borrower defaulted to pay the debt. As a result the plaintiff, guarantor became responsible for the debt leading to his mortgaged house to be auctioned to recover the loan. The parties agreed the following four issues for the determination by this court:-

1. Whether property of Plot No. 161 Block 1B Lugalo Area, Iringa Municipality was collateral for a loan of T.Shs.5,000,000/= secured from the 1st defendant.
2. Whether the plaintiff guaranteed one Nolasco Hyera to secure a loan of T.Shs.5,000,000/= from the 1st defendant. ,
3. Whether the defendants defamed the plaintiff.
4. What reliefs are entitled to the parties.

Parties to this suit were all represented by learned Advocates. Mr. Edward Kenyuko represented the plaintiff, whereas the defendants were represented by Prof. Binamungu and Ms. Kitta.

It is not irrelevant to state here that, the court is aware of the amendment of the Newspapers Act, Cap. 229 by the Written Laws (*Miscellaneous Amendments*) No. 2, Act 2010 Act Number

11 of 2010.. Following this amendment, it is no longer mandatory for the court to sit with assessors when trying defamation cases. See Section 57 (1).

At the hearing of this suit the plaintiff testified on his own behalf and in addition called one witness to prove his claim. On the other side the defendants called one witness who testified for both defendants.

Testifying as PW1, the plaintiff complained that he was seriously humiliated, his business affected and reputation greatly impaired in the community by the proclamation of sale which suggested that he was indebted/bankrupt and thus untrustworthy person. That the said proclamation of sale (*Exhibit P1*) was fixed at the main gate leading to his three houses located within the same premises. The houses were Plot No. 161 "1B" which is the garage and the subject of the matter, Plot No. 163 "1B" Sambala Lodge and Plot No. 164 "1B" a bar and lodge. He complained that the said proclamation of sale did not specify exactly which house among the 3 houses was subject to auction. However, he admitted that there was a time when he offered his title deed in respect of Plot No. 161 Block "1B" as a guarantor for the loan of T.Shs.30,000,000/= to be advanced to his friend Nolasco Hyera (PW2) by the 1st defendant, NMB. That was in September, 2008. He further admitted that he was called at the Bank (NMB) where he was advised to fill and sign guarantee agreement documents

which were blank in terms of the amount of loan required. In those circumstances he believed that he was signing and guaranteeing the loan of T.Shs.30,000,000/= to be advanced to his friend. PW1 stated that, having signed all the documents he was later surprised, when he was told by his friend Nolasco Hyera that he was able to secure a loan of T.Shs.5,000,000/= only from the 1st defendant. PW1 complained that since his title deed was aimed to secure the loan of T.Shs.30,000,000/= which was not attained he asked his friend Nolasco Hyera to demand for his title deed from the 1st defendant. That, the follow-ups to demand for the title deed ended in vain because it was discovered that the title deed was used to secure a loan of T.Shs.5,000,000/= instead of T.Shs.30,000,000/=. In the result the plaintiff stated that the whole transaction was tainted with dishonesty and fraud on the part of 1st defendant. He maintained that the said loan that was intended to be secured by the alleged guarantor as anticipated in guarantor Form 013 (*Exhibit D1*) was not issued as applied. Instead Exhibit D1 was filled to guarantee a loan of T.Shs.5,000,000/= which was duly advanced to Nolasco Hyera (PW2). He also maintained that the proclamation of sale was not justifiable in those situations and it was wrongly fixed on the main gate leading to his other business houses although the house in question is within the same premises.

The next witness for the plaintiff's case was Nolasco Hyasint Hyera (PW2) who while under oath, informed this court that he

has been a client of the 1st defendant for a long time. That he started with a loan of T.Shs.1,000,000/= and later he was upgraded to a loan of up to T.Shs.15,000,000/=. That, he used to secure the small loans by mortgaging movable properties. That in 2008 he needed a loan of T.Shs.30,000,000/= but the 1st defendant asked him to produce a title deed of a house to secure the loan. He stated that he approached his friend, the plaintiff for a title deed. The plaintiff agreed and decided to guarantee him with his title deed. Then he took the said title deed to the bank for the processing of the said loan.

The PW2 stated that while waiting for the processed loan to mature, he was called by the Bank Manager (NMB) and told that the said loan facility of T.Shs.30,000,000/= has failed because he defaulted to repay on time the earlier loan of T.Shs.15,000,000/=. That he was told that he had to wait for 90 days while serving his account. PW2 claimed that being in serious need for money he asked for advance loan of T.Shs.5,000,000/= while waiting for the loan of T.Shs.30,000,000/=. That he was asked/advised to secure the new loan of T.Shs.5,000,000/= by mortgaging his 2 photocopies machines and three computers all valued at T.Shs.26,100,000/=. He stated that the loan of T.Shs.5,000,000/= had no guarantor. A loan agreement dated 3rd November, 2008, was tendered and admitted in court as Exhibit P2. PW2 admitted that he defaulted to repay the said loan of T.Shs.5,000,000/= to date because he

was let down and frustrated by the failure of the bank (1st defendant) to issue a loan of T.Shs.30,000,000/= as applied.

When cross examined as to when he applied for the said two loans he stated that it was around August and September, 2008. He failed to remember when the said guarantee form was signed by PW1. When shown the guarantee form which was signed by PW1 in his presence he admitted to be the same document which was signed by PW1 as a guarantee form or guarantor agreement apparently showing a loan of T.Shs.5,000,000/= only. The witness admitted that the title deed was delivered to the Bank before the loan was approved. When asked as to who delivered it to the Bank, the witness stated it was PW1 and later on changed and said it was him.

Devota Dume, an employee of the 1st defendant as Commercial Manager, testified on behalf of the defendants as DW1. She told the court that she knows PW2 as their regular customer. That in the year 2008, PW2 applied for a loan of T.Shs.5,000,000/= from the 1st defendant. That, when required to provide collaterals for the said loan facility, Nolasco Hyera brought 2 photocopier machines, 3 computers and one title deed of a house No. 1857 MBY LR Plot No. 161 "1B" Wilolesi. DW1 stated that when they discovered that the mortgaged house was not the property of Nolasco Hyera they advised him to bring the real owner of the house in order to fill the security forms and

signify his willingness to surrender his house as a security for the loan. That, later the said owner of the mortgaged house, the plaintiff appeared and duly signed the guarantor agreement in respect of the applied loan of T.Shs.5,000,000/=. DW1 produced in court NMB guarantor form duly signed by PW1 and attached with the photograph of PW1. It was admitted and marked Exhibit D1. DW1 further stated that from there an agreement of the debtor was then prepared which shows a loan of T.Shs.5,000,000/= between the 1st defendant (NMB) and Nolasco Hyera. The said contract was tendered in court, and admitted as Exhibit D2. DW1 testified further to the effect that the need of all those securities was due to the fact that the debtor (PW2) had defaulted in repaying the earlier loan of T.Shs.15,000,000/= within a prescribed period.

DW1 stated that having received the loan of T.Shs.5,000,000/=: Nolasco Hyera failed to repay the debt within time. That at the end of contract there was an outstanding amount of T.Shs.3,037,000/=. The Bank issued a Demand Notice to Nolasco Hyera but he failed to honour the notice. A second Demand Notice was issued but without response. A third Demand Notice was issued but the debtor decided to remain silent. Then the 1st defendant decided to fix a proclamation of sale of the mortgaged house by using the second defendant Majembe Auction Mart.

The proclamation of sale (*Exhibit P1*) was fixed/advertised at the gate of PW1's houses and several other places in Iringa township. DW1 testified that the defendants have never defamed the plaintiff and that it was the plaintiff who decided to guarantee the loan advanced to PW2 by mortgaging his own house. She stressed that the blame should not be addressed to the defendants because the debtor (PW2) has failed to repay the loan to date. She denied the existence of any guarantee agreement on loan of T.Shs.30,000,000/= alleged by the plaintiff.

At this juncture, let me now attempt to determine the drawn issues. On the first issue, the evidence on record confirms that the said Nolasco Hyasint Hyera applied for and obtained a loan of T.Shs.5,000,000/= from the first defendant. It is also apparent that the plaintiff signed a guarantee form Exhibit D1 which also contain his own photograph. Infact he signed and thumb printed at each page of the guarantee agreement to signify his willingness to mortgage and surrender his house as collateral to the loan advanced to PW2. It is beyond my comprehension to believe the plaintiff's story that as a respectable businessman and councilor of Gangilonga Ward could have signed blank guarantee agreement documents and left the rest to be filled in his absence by bank officials without even knowing the exact loan amount or the inherent consequences of signing blank documents. If that was the case, then he did it on his own risk and he has nobody to blame but himself.

Suffice it to say, the available evidence on the record proves on the balance of probabilities that PW1 signed the guarantee agreement Exhibit D1 in respect of a loan of T.Shs.5,000,000/= that was advanced to PW2. The first issue is answered in affirmative.

The second issue is whether the plaintiff guaranteed one Nolasco Hyera to secure a loan of T.Shs.5,000,000/= from the 1st defendant. This issue is squarely answered by the first issue because it goes without saying that the house situated on Plot No. 161 Block 1B Lugalo area, the property of the plaintiff was used as collateral for a loan of T.Shs.5,000,000/= secured from the 1st defendant. Therefore the plaintiff was a guarantor of the said loan issued to his dear friend Nolasco Hyera, PW2. Now that it is out of dispute that the said Nolasco Hyera has defaulted to repay the said loan and indeed he is still indebted to date, the 1st defendant has a right to deal with the collateral property. In short the second issue is answered in affirmative.

In answering the third issue, I need to address my mind to what constitutes defamation. In the case of **Hamjeis Vs. Akilimali (1971) HCD No. 111**, the term defamation was defined as communicating with the mind of another, matter which are untrue and likely in the natural course of things substantially to disparage the reputation of the third person(s), on the face of it, quality of a legal wrong. For the words to be defamatory, a

practice shows, court must construe the words according to their fair and natural meaning which would be given to them by reasonable persons of ordinary intelligence. Falsehood is one of the factors which constitute defamation but malice must also be proved on the part of the defendant. Where the alleged defamatory imputation is proved to be the truth, the plaintiff have no action. Considering the available evidence the question is whether there was any defamation committed by the defendants against the plaintiff. Is there any evidence to establish any type of defamation against plaintiff?

Evidence on record confirms that the said Nolasco Hyasint Hyera applied for and obtained a loan of T.Shs.5,000,000/= and the plaintiff's house was used as collateral to secure the loan. Nolasco Hyera defaulted to repay back the loan and the 1st defendant acted promptly to remind his debtor by issuing three demand notices and eventually issued a proclamation of sale of the mortgaged house. It appears that according to the plaintiff, defamation exist as a result of affixing a proclamation of sale on the main gate leading to his three houses. The plaintiff must admit that the collateral house was among his three houses sharing the same gate. If the worry was for the buyers to be unable to detect which house was exactly the subject of proclamation of sale, it could have been cleared by the auctioneer. In my considered opinion, the truth is that the 1st defendant was entitled, privileged and qualified to take necessary

actions including to issue proclamation of sale of the mortgaged house following the misconducts of PW2 who refused to repay the loan. The defendants' action is justified under the contractual agreements including guarantor agreement. There is nothing whatsoever to establish or suggest existence of any defamatory imputations against the plaintiff. The third issue is resolved in favour of the defendants.

The last issue is what reliefs parties are entitled to. This issue is simple to determine because the plaintiff who was claiming for general damages has failed to prove his case. In the result the suit is hereby dismissed with costs.

M. S. SHANGALI

JUDGE

24/4/2015

Judgement delivered in the presence of Mr. Kenyuko, counsel for the plaintiff and Ms. Kitta, Advocate, holding brief for Mr. Prof. Binamungu counsel for the defendants.

M. S. SHANGALI

JUDGE

24/4/2015