IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 38 OF 2016

MSAE INVESTMENT CO. LTD.....PLAINTIFF

VERSUS

THE NATIONAL BANK OF COMMERCE LTD.....DEFENDANT

JUDGMENT

MGETTA, J:

Admittedly, in April 2012, the plaintiff herein applied for and subsequently in April 2013 obtained loan facility in the tune of Tzs 1,019,560,000/= from the defendant herein. Amongst the securities placed for that loan was house (unit) No. 33 with Certificate of title No. 186006/37/54 situated at Haidery Plaza, Upanga area within Ilala Municipality, Dar es salaam (henceforth the suit property). Thereafter, a dispute arose between them which, later on made them to resort into this court for resolution. It was 23rd February, 2016, through a legal service of Amani Law Associates, when Msae Investment CO. LTD, (henceforth the plaintiff) did institute this suit praying for judgment and decree against the

National Bank of Commerce LTD (henceforth the defendant) for the following:

(a) A declaratory order that the contract has been rendered impossible to perform,

(b) A declaratory order absolving the plaintiff from any indebtedness to the defendant,

(c) A permanent injunctive order restraining the defendant and or its agents from making any further demands upon the plaintiff,

(d) Cost of the suit be paid by the defendant,

(e) Any other and/or further orders and reliefs the court may deem just and equitable to grant.

In response, on 25th May, 2016 through a legal service of K & M Advocates, and upon a leave by this court the defendant filed written statement of defence (amended) containing a counter claim. In the counter claim, the defendant prays for judgment and decree against the plaintiff as well one Wilbard E. Mtenga and Ngiana seth Maria for the following:

(a) Payment of Tshs. 877,337,902.82.

(b) Payment of interest at commercial rate of 24% per annum in (a) above at from the date it was due to the date of judgment.

(c) Interest on the decretal sum at the Court's rate from the date of judgment until the payment in full.

(d) An order to enforce personal guarantees executed by Wilbard E. Mtenga and Ngiana Seth Maria for recovery of the outstanding amount in (a), (b) and (c) above.

(e) An order of enforcement of the debenture created by the plaintiff.

(f) Costs of the suit be paid by the plaintiff and the 1st and 2nd party to the counter claim.

(g) Any other order(s) and relief(s) may this court deem fit and just to grant.

Upon conclusion of the pleadings and mediation having failed, the following issues were agreed and framed for determination:

1. Whether there was a breach of terms and conditions of the loan facility agreement dated 19th April, 2013;
2. Whether the plaintiff is indebted to the defendant in the tune of Tanzanian Shillings 877,337,902.82;
3. Whether the public auction of the suit property was properly conducted;
4. To what reliefs are the parties entitled.

When the suit was called on for hearing, Mr. Alex Balomi, the learned advocate appeared for the plaintiff and one witness namely Wilbard Eliangiringa Mtenga, the managing Director of the plaintiff, was called to testify as a sole plaintiff witness (PW1); while, the defendant was represented by Mr. Markarious Tairo, the learned advocate and the following two witnesses were called to testify for the defendant: James Joseph Simba, a banker with the defendant who testified as defendant witness No 1 (DW1) and Frank Mbelwa, a debt collector and auction employed by Bani Investment Limited, as DW2.

During the hearing, PW1 testified that the plaintiff requested loan facility in April 2012 from the defendant to secure six buses make Scania. The defendant agreed. They managed to secure only four buses because of the defendant's failure to grant loan facility on time. The loan facility was obtained in April 2013 one year later, at the time the price to purchase them had gone up by about 20%. All that time the buses were bonded at the warehouse in Kenya. They were overstayed and as a result, they were to be registered in Kenya numbers; and, the plaintiff has to pay Kenya Revenue Authority charges including custom duties and 16% of Kenyan Value Added Tax. According to exhibit P1, loan facility agreement dated

19th April, 2013, the securities for the loan were the suit property covering Tzs 421,000,000/=, chattel mortgage deed of six buses covering Tzs 1,767,121,000/=, fixed and floating debenture covering Tzs 1,330,000,000/= of borrower's assets for 70% and Ngiana Seth Maria, 30%, and personal guarantee for Tzs 1,330,000,000/=. The time frame for disbursement of the fund, according to exhibit P1, was a maximum of two months.

He testified further that according to exhibit P2 in case of default, the suit property was to be sold. the contract was frustrated and became impossible to perform because of the breach by the defendant. The breach were that one, it took one year by the defendant to disburse the fund; two, the plaintiff secured only four of the six busses; and three, it was agreed that the defendant would pay 70% and the plaintiff to pay 30% for taxes assessed by Tanzania Government upon arrival of the busses. The plaintiff required the defendant to honor such payments. The defendant refused to pay them as a result the plaintiff was forced to pay tax for 100% contrary to their arrangements. The defendant refused to pay to the Government import duties, 18% of VAT and other port charges amounting Tzs

173,252,182.70. Hence, it became impossible to perform the contract by neglecting to pay Government taxes as per assessment.

PW1 testified furthermore that they conducted several meetings and finally agreed that the plaintiff has to surrender the suit property to the defendant in order to sell to recover the whole amount due, and it was further agreed that no further claims should be made to the plaintiff and all interests was agreed to be stopped. From that date, there was no any claims whatsoever.

However, he added, it took a year from the time the suit property was handled over for sale and the date it was sold. The sale was conducted in absence of the defendant despite efforts made to let them attend, but in vain. Likewise, the lowest bidder was given an opportunity to buy the suit property at Tzs 150,000,000/= while there was a highest bidder at Tzs 850,000,000/=. He testified that the amount to be recovered was 600,000,000/=, had the property sold to the highest bidder the balance of 250,000,000/= would be remitted back to the plaintiff. The witness also tendered the letter from the defendant instructing Majengo Estate Developers ltd to sell the suit property at 600,000,000/= or near amount which was admitted as exhibit P3. Later on, the suit property was

sold by Ban Investment Limited according to exhibit D10. He therefore blended the sale of the suit property as dubious and improperly conducted.

To support the plaintiff claims, PWI also tendered a letter from managing Director (PW1) of the Plaintiff reminding the defendant to pay 70% of tax to the TRA as exhibit P2, a letter from the defendant instructing Majengo Estate Developers LTD to sale the suit property as exhibit P3, demand letter to Wibert E. Mtenga and Ngiana Seth Maria from the defendant as exhibit P4, receipt for payment of four buses as exhibit P5 and Tax assessment which was admitted for identification as ID-1.

In respect of the counter claim, PW1 testified that the plaintiff is not indebted to the defendant in the tune of Tzs 877,337,902.82. They agreed that the proceed of sale of suit property would cover the whole amount. He testified that they were not informed on the people who will conduct sale but later received certificate of sale from Bani Investment Ltd (see: exhibit D 10) signifying that they have already sold the suit property for Tzs 150,000,000/=. The plaintiff was aggrieved and took a matter to the Bank of Tanzania, the supervising authority for the defendant, complaining that the suit property was auctioned without following auction procedure.

Finally, PW1 agreed that the loan was Tzs 1,019,560,000/=. the plaintiff paid a total amount of Tzs 311,532,221/=. At a meeting, the defendant said that the outstanding amount of loan was Tzs 708,027,779/=. It was further agreed at the meeting that the defendant to sell the suit property to recover that outstanding balance. Thus, he added the plaintiff is no longer indebted.

When cross examined by Mr. Markarious Tairo, the learned advocate for the defendant, PW1 admitted that there was only one contract as per exhibit P1, between the parties which was concluded on 19th April, 2013, but he added, negotiation and subsequently application for loan facility were in April 2012, as he said, one could not obtain any loan without applying for it. According to him the defendant assured him that the loan facility would be available on or about October 2012. Instead the loan facility was availed in April 2013 where the prices of the buses had parachuted from what they were in October 2012. That is exhibited by exhibit P5, the receipt showing that on 15th October, 2012 the plaintiff transferred USD 500,000.00 to Kenya Grange Vehicle Industries Limited which was to supply the six buses. To him that proved that there was an

application made by the plaintiff to the defendant prior concluding loan facility agreement on 19th April, 2013.

In further cross examination, PW1 stated that it is true he complied with the terms and conditions in the exhibit P1 and the time frame for repayment of the loan was thirty six (36) months i.e. the loan was supposed to be full serviced by 31st March, 2016. That deadline was not met due to the breach of contract by the defendant.

After the closure of the plaintiff's case, the defendant's case opened and the two defendant witnesses started to testify.

DW1 testified that the plaintiff borrowed Tzs 1,019,560,000/= from the defendant for purposes of purchasing buses from Kenya Grange Vehicle Industries Ltd (henceforth Kenya Grange Vehicle) to expand its transportation business. The buses worth Tzs 883,560,000/=. The plaintiff Managing Director signed exhibit P1 on 20th April, 2013. One of the conditions of the loan was that the plaintiff has to pay USD 240,000 to Kenya Grange Vehicle, as initial payment, then the defendant will release the loan facility applied for upon its confirmation. Kenya Grange Vehicle confirmed by letter exhibit D1 dated 26th April, 2013 to the defendant that such amount has been paid by the plaintiff. Then the defendant released

the loan facility to the Plaintiff's bank account. The loan was supposed to be returned in full within thirty six months on a monthly instalment of Tzs 28,321,111.10 and the last instalment was to be paid on 31st March, 2016.

DW1 went on asserting that to enable the plaintiff obtain the loan, the plaintiff submitted four securities as shown in the schedule to the exhibit P1 namely the suit property, fixed and floating debentures produced as exhibit D3, chattel mortgages and personal guarantee signed by Wilbard E. Mtenga and Ngiana Seth Maria as exhibit D4.

DW1 proceeded to tender the bank statement "*On Balance Sheet*" and "*Off Balance Sheet*" as exhibit D2 collectively confirming that the loan was advanced to the plaintiff. "*On Balance Sheet*" shows that the customer's account is maintained in the Bank books and that he has received the loan and that he is repaying that loan in accordance with the agreement. *Off balance sheet* shows that the borrower has failed to repay loan on time, the Bank of Tanzania is therefore required to declare unpaid loan as loss and then remove it from the Bank books, but the borrower would still be under obligation of repaying that loan although *off balance*, as it is the case in this suit.

DW1 asserted further that the plaintiff failed to repay the loan despite several follow ups by the defendant. Ultimately, the plaintiff wrote a letter, exhibit P2 authorizing the defendant to sell the suit property that was mortgaged. The suit property worthy Tzs 580,000,000/=. At first the defendant did not find the buyer that could reach Tzs 600,000,000/=. The plaintiff was informed by the defendant as per exhibit P11.

DW1 testified further that they made reevaluation of the suit property as per exhibit D5. The suit property was found worth Tanzanian shillings 120,000,000/= as market value. Then the defendant managed to sell the suit property through public auction for Tzs 150,000,000/=. The sale proceed was used to reduce the total debt owed. He added that there is a personal guarantee as security that was admitted as exhibit D4 which have to be sold also to cover the remaining balance.

Before the suit property was sold, DW1 added, the plaintiff was issued with demand notice dated 1st September, 2015, exhibit D6; and, notice of default dated 13th October, 2015 exhibit D7 requiring the plaintiff to pay the outstanding balance within 60 days. That notice of default was received by one Neema Wilbard, and not by one of the two guarantors.

Moreover, the plaintiff had another loan in the tune of Tzs 23,000,000/= with the CRDB Bank. That loan was paid by the defendant to CRDB bank on plaintiff's behalf as per exhibit D8. The suit property was also a security to that loan.

In cross examination, DW1 admitted that the four securities placed by the plaintiff were over and above the money advanced to the plaintiff; that there is no evidence showing that there was any valuation of the suit property before the disbursement of the money by the defendant, but it was valued at Tzs 421,000,000/=. When it was to be sold its valuation was done which became Tzs 120,000,000/= lesser than before as per exhibit D5. He refused that there was any collusion between the defendant and the auctioneers to deprive the plaintiff of its property.

DW2, Frank Mbelwa of Ban Investment Limited asserted that before conducting the auction, they issued 14 day notice to the plaintiff. they made advertisement through Nipashe newspaper, exhibit D10 dated 21st January 20016.Then they announced through a moving vehicle, they informed "Serikali ya Mtaa" within the vicinity, and then proceeded to conduct sale by public auction on Saturday morning, on 13th February, 2016. And during the auction they picked up the highest bidder who

purchased the suit property at Tzs 150,000,000/=. DW2 insisted that the procedure to conduct public auction was strictly followed from the beginning to the end of sell of the suit property by public auction. Finally, they issued certificate of sale, exhibit D9 to the purchaser.

On conclusion of the hearing, the learned advocates for their respective parties filed closing submissions which were filed as scheduled and, in this judgment, I have considered them.

Before examining each and every framed issues, I should state that from the pleadings and evidence adduced by parties, it is undisputed that the plaintiff secured loan facility from the defendant to a tune of Tzs 1,019,560,000/= for buying six buses from Kenya Grange Vehicle Industries Limited to boast its business of transportation. The plaintiff placed securities such as the suit property for purpose of obtaining the loan he applied for from the defendant. The loan facility was not fully paid as agreed. Hence, the suit property was sold.

I begin with the first issue whether there was any breach of terms and conditions of the loan facility agreement. In its adduced evidence, the defendant vehemently denied that allegation. Mr. Tairo, the learned advocate submitted that the loan facility was signed on 19th April 2013 and

its availability was within the date falling in two months after the date of the loan facility agreement, exhibit P1 was signed. Later on, the money was deposited in the plaintiff's bank account on 8th May 2013 as per exhibit D2. Therefore, the loan was not delayed. It is therefore the plaintiff who breached the contract by its failure to repay the loan in fully.

On the contrary, Mr. Balomi the learned advocate, contended that the defendant breached the terms and conditions of loan facility agreement by frustrating it, by refusing to observe legal obligations. According to the plaintiff the defendant assured it that the loan facility would be available on or about October 2012.hence, the plaintiff performed its obligation as agreed by depositing initial payments in the tune of USD 240,000 to the supplier of the six buses, as a precondition by defendant to release the entire loan applied for. Instead, the defendant failed to deposit the money applied for way back April 2012. The money was deposited on 8th May, 2013 into plaintiff's bank account where the price of the buses had parachuted from what they were in October 2012 as a result he bought four buses instead of six. That's **one**.

Two, it was agreed in a meeting to share tax liability in the distribution that when the four buses would arrive in Tanzania the

defendant would pay 70% and the plaintiff to pay 30% for taxes assessed by Tanzania Government upon arrival of the busses. The defendant refused to pay the Government as a result the plaintiff was forced to pay the entire tax for 100% contrary to their arrangements. On his side, Mr. Tairo denied that blame in his submission that loan facility agreement, exhibit P1 did not cover term on sharing of importation taxes between the plaintiff and the defendant and no meetings conduct for such agreement.

Despite that general denial by the defendant, I am of considered view the defendant contributed to a great extent to render the agreement impossible to perform. For the two basic reasons above, I answer the first issue that there was a breach of terms and conditions, whether expressly or implied, of the lease facility agreement by the defendant which entitles the plaintiff to be wholly relieved from further obligations.

The second issue to determine is whether the plaintiff is indebted to the defendant in the tune of Tzs 877,337,902.82. In his submission, Mr. Alex said *on balance sheet* and *off balance sheet*, exhibit D2 collectively showed that the plaintiff is not indebted by the defendant. The debt has been discharged from defendant's accounts book. On his part, Mr. Tairo

stated that having declared the debt as a loss, still the plaintiff is under obligation of repaying that loan although *off balance.*

In the case of **National Bank of Commerce Ltd Versus Universal Electronics and Hardware Ltd and two others [2005] TLR 257,** Hon. Kalegeya J (as he then was) held that, the writing off of debt was just an internal mechanism intended to clear the bank books of accounts but not to discharge customers' liability. It is therefore clear that when the money has been removed from off balance sheet does not necessarily mean the end of liability. The off balance sheet being one of the assets and liability of the company does not discharge the plaintiff from such liability. It is internal mechanism as per Bank of Tanzania Regulation, and since there is no dispute on the validity of off balance sheets it is clear that the plaintiff did not pay his debt full as agreed.

All in all and having analyzed and considered the evidence adduced by both partied, I am therefore aware that the plaintiff authorized the defendant to auction its suit property which at the time the loan was advanced to it that suit property worth Tzs 420,000,000/=. One would have expected its value to appreciate, but to the contrary it was auctioned

at Tzs 150,000,000/=. That clearly shows that the suit property was sold by the defendant at a depreciating value.

I am of the view that in case of default by the plaintiff to make the loan good, it was that suit property that the defendant, even without authorization from the plaintiff, would have sold to realize its unpaid loan. I thus consider that by selling what was placed as security for loan, the defendant as mortgagee was exercising its statutory right to recover its debt from the borrower, the mortgagor. Despite the allegation by the plaintiff, that the defendant sold the suit property to the lowest bidder worth of Tzs 150,000,000/= while there was a highest bidder for Tzs 850,000,000/=, the amount that would have reimbursed the due amount in full and the plaintiff would have received the remaining balance, when the suit property was sold, the unpaid loan became fully liquidated. I thus find that the plaintiff is not indebted to the defendant.

The above finding takes me to the issue whether the public auction of the suit property was properly conducted. **Sections 126, 127, 132** and **133** of the **Land Act Cap 113** provide procedure of auction of the mortgaged properties. There is no need of reproducing them herein because it is on the record that the plaintiff in writing as per exhibit P2

authorized the defendant to sell the suit property, I think, anticipating that that would mark the settlement of the debt.

At first the defendant failed to obtain the buyer at the price projected by the plaintiff, therefore the plaintiff was given another opportunity of two month to sell the suit property at his own price otherwise the defendant would have sold it. The record shown that the plaintiff did not sell the suit property as the result the defendant instructed Majengo Auction Developers Ltd and later on Ban Investment Company to sell the suit property as per the market price found in valuation report, exhibit D5.

However, the plaintiff was issued with 60 day notice, exhibit D7 and after its expiry, the defendant engaged the auctioneer to sell the suit property. On this issue it is evident that the plaintiff consented the sale of suit property by the letter dated 5th May 2014, I may say and I am saying that plaintiff's allegation that the public auction was not properly conducted is an afterthought.

Thinking loudly, if sale proceeds at public auction would have covered the whole debt automatically the plaintiff would not have come before this court to file the present suit. He could not even have challenged the legality of auction. The plaintiff was the one who informally initiated

the sale. He did not seek court assistance as the requirement of law. He cannot be the one who came to claim after the sale went wrong on his side. On top of that the plaintiff was given an opportunity to find the buyer of the suit property within two months but he did not adhere to such offer as the result the suit property was sold by the defendant. That's why I am saying that filing of this suit can be termed as an afterthought. For that reasons I find this issue to have no merits.

All the said, from the analysis of adduced evidence, I finally find that the evidence of the plaintiff is weightier than of the defendant. The plaintiff has proved his case on balance of probability and I proceed to declare that the loan agreement was rendered impossible to perform by the defendant, the plaintiff is found no longer indebted to the defendant, and I do issued a permanent injunctive order restraining the defendant and or its agents from making any further demands upon the plaintiff. On the other hand, I find the counter claims by the defendant to be faint and flimsy and not well founded.

In fine, the plaintiff has proved his case on balance of probability. Thus, I enter judgment and decree in favour of the plaintiff. I do

accordingly dismiss the claims in counter claim. The defendant is condemned to pay costs.

It is so ordered.

J.S.MGETTA
JUDGE
21/12/2020

COURT: This judgment is delivered today this 21st December, 2020 in the presence of Mr. Wilbard E Mtenga, the Managing Director of the plaintiff in person and in the absence of the defendant (with notice).

J.S.MGETTA
JUDGE
21/12/2020

COURT: Right of appeal to the Court of Appeal is fully explained.

J.S.MGETTA
JUDGE
21/12/2020