IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 103 OF 2022

SHAYMAA COMMISSION AGENT CO. LTD....................PLAINTIFF

VERSUS

KCB BANK TANZANIA LIMITED.............................1st DEFENDANT

YONO AUCTION MART & CO. LTD..........................2nd DEFENDANT

JUDGMENT

Date of last Order:22/09/2023
Date of Judgment:08/12/2023

K. D. MHINA, J.

This is a suit for declaratory and injunctive orders involving the *Murabaha* agreements between the **Shymaa Commissioner Agent Co. Ltd** [hereinafter to be referred to as the plaintiff] and the **KCB Bank Tanzania Ltd** [hereinafter to be referred to as the 1st defendant] and the Mortgage deed over a landed property described as Plot No. 78 Block "J" with Certificate of Title No. 33870 located at Kawe Low Density within Kinondoni Municipal.

According to the facts, the relationship between the plaintiff and the 1st defendant commenced when the plaintiff opened at the 1st defendant's Bank, an account known as SAHL which operated under Shariah principles.

Later, the plaintiff and the 1st defendant entered into *Murabaha* agreements. The first *Murabaha* of TZS. 250,000,000/= was entered on 24 August 2018 with a profit margin of 10% per annum and to be payable within 24 months.

The second *Murabaha* of TZS. 300,000,000/= was entered on 25 February 2019 with a profit margin of 11% per annum and to be payable within 24 months. The total amount for both *Murabaha* plus margin profit was TZS. 668,750,000/=.

The security for the *Murabaha*, inter-alia was the Mortgage deed over a landed property described as Plot No. 78 Block "J" with Certificate of Title No. 33870 located at Kawe Low Density registered in the name of Samwel Cornel Apson, as a guarantor.

On 4 April and 8 July 2019, after encountering business challenges, the plaintiff requested the restructuring of the *Murabaha*. The 1st defendant granted the request by extending the payment time, but according to the plaintiff, there was also an additional TZS. 76,000,000/= against his wishes and contrary to the *Murabaha* agreement.

Later, the plaintiff encountered business challenges, and his bank accounts were withheld by the Tanzania Revenue Authority; thus, he failed to repay the loan, which he alleges was TZS. 134,700,000/=.

When the plaintiff requested an extension of time, the 1st respondent responded by directing Yono Auction Mart and Co. Ltd [hereinafter to be referred to as the 2nd defendant] to sell the mortgaged property.

The above facts triggered the plaintiffs to seek relief from this Court. He now prays for Judgment and Decree against the defendants for the following reliefs;

i. *An order restraining the defendants from auctioning and disposing of Plot No. 78 Block "J" with Certificate of Title No. 33870 located at Kawe Low Density registered in the name of Samwel Cornel Apson.*
ii. *An order against the 1st defendant that the interest of TZS. 76,000,000/= imposed against the plaintiff is illegal and contrary to Murabaha agreements executed by the 1st defendant and the plaintiff on 24 August 2018 and 25 February 2019.*
iii. *An order directing the 1st defendant to extend time in favour of the plaintiff for repayment of the two Murabaha agreements.*
iv. *Declaration order that the amount due and payable by the plaintiff to the 1st defendant is TZS. 134,700,000/=*
v. *Costs of the suit and*
vi. *Any other reliefs this Court may deem fit to grant.*

The 1st defendant countered the allegation by filing a written statement of defence (amended) and alleging that the plaintiff was indebted to TZS. 222,474,445/49 by October 2021. And that after the expiration of the statutory notice, they appointed the 2nd defendant to dispose of the mortgaged property vide an auction. Conversely, the 2nd defendant filed the written statement of defence (amended), where he denied impropriety on the instructions by the 1st defendant for them to conduct an auction.

The above dissension put the parties at issue; therefore, the following issues were framed for the determination of this suit, namely:

i. *Whether TZS 76,000,000/= was an additional interest, and whether it was contrary to Murabaha agreement between the plaintiff and the 1st defendant Bank.*
ii. *Whether the intended auction of plot no. 78 Block J with C.T No. 33870 located at Kawe by the 2nd defendant upon the instruction of 1st defendant bank was illegal and contrary to Murabaha agreement.*
iii. *What is the outstanding debt the plaintiff owned by the 1st defendant Bank.*
iv. *To what relief the parties are entitled.*

In this suit, the plaintiff was represented by Mr. Malindi Saidi, a learned advocate, while Mr. Tazan Mwaiteleke, also a learned advocate, represented the defendants.

To prove his case, the plaintiff called one witness.

PW1 Ahmed Ally Salim testified to the following effect that in 2018, he opened the bank account at the 1st defendant Bank, known as Sahl Account, operated under Islamic law. Later, the Bank officials told him a loan called Murabaha was issued without interest. The Bank Officials also informed him that the condition of that loan was that the Bank did not advance the cash to the client but instead purchased the goods for the client (service and purchase of goods).

Since he had a showroom selling cars, he agreed and entered into a Murabaha agreement whereby the 1st defendant Bank purchased for him cars from Japan valued at TZS. 250,000,000/=. Then, the Bank would receive a profit of 10% per annum, which was TZS. 50,000,000/= for two years. After that, he continued with the business and paid the profit. He tendered to that effect;

i. *Murahaba agreement between the plaintiff and the 1st defendant dated 24 August 2018 as Exhibit P1.*

In 2019, the bank advanced to me another Murahaba of TZS 300,000,000/= that time with a profit of 11% per annum. Therefore, for two years, the amount was TZS. 368,750,000/= profit inclusive. He tendered to that effect;

i. *Murahaba agreement between the plaintiff and the 1st defendant dated 25 February 2019 as exhibit P2.*

PW1 further testified that under the Murabaha agreement, the bank was purchasing goods, and his duty was to sell those goods for profit. The Murabaha agreement cannot generate interest. It was only to produce a profit.

At the end of 2019, the business collapsed due to the COVID-19 pandemic; no vehicles were purchased from Japan, and it was difficult to sell them.

In July 2019, by a letter, he requested the 1st defendant's bank to change the business from cars to cooking oil, but the Bank did not respond.

In 2020, the Tanzania Revenue Authority closed his bank accounts; therefore, he failed to continue with the business. He tendered to that effect;

i. Notice from TRA to the plaintiff on the closure of the account dated 20 September 2020 and two letters from TRA to KCB bank and NMB bank, dated 14 April 2021, as Exhibit P3.

Following the challenges of the COVID-19 pandemic and the closure of the bank accounts, he requested an extension from KCB to repay the loan, and he was granted.

, while he had already been paid TZS. 534,050,000/= equivalent to 90%.

When cross-examined, he stated that the mortgaged house in Plot No. 78 Block J, Kawe CT No. 33870, belonged to his friend Samwel Apson, who signed the mortgage deed as a guarantor, and he was living therein with his wife and children.

He further stated that he knew that *"tawarruq"* was an interest and did not sign any agreement on 26 September 2021.

In defence, **DW1, Ivan Benjamin** (debt collector, auctioneer marketing officer and at Yono Auction Mart Co. Ltd) testified that after they were instructed by the 1st defendant to auction the mortgage of the defaulter, Samuel Apson, they served him with a 14 days' notice, which was received by Samuel relative.

After the expiration of 14 days, they advertise in Habari Leo newspaper and one English newspaper the auctioning of the mortgaged property. After the advisement, they were served with the court's injunction.

On his side **DW2, Avitus Ernest Kyarunzi** (Senior Manager Securities and Documentation at the 1st defendant Bank) testified that on 24 August 2018, the 1st defendant advanced to the plaintiff Murabaha loan via

his Sahl Account. That loan was of TZS. TZS 250,000,000/=. The terms of that agreement were for the client to repay the principal sum and 10% as a profit, i.e. TZS 25,000,000/= per annum. The repayment period was 24 months. Further, in case of default, there was a penalty of 10% per annum in addition to the 10% of profit.

After being given the loan, the client was given a grace period of one month. After the expiration of the grace period, the plaintiff requested an extension of thirty days, which he was granted. He tendered to that effect;

i. *The first addendum to Murabaha agreement dated 24 August 2018 as exhibit D1.*

On 25 February 2019, the plaintiffs requested another Murabaha agreement of TZS 300,00,000/=, which he granted. The profit was 11% per annum and be paid within 24 months.

The securities for Murabaha were the joint and severally guarantees of the Plaintiff's Directors dated 3 September 2018, Legal mortgage in respect of a landed properly on Plot no 78 Kawe with C.T No. 33870 located at Kawe registered in the name of Samuel Cornel Apson and the Debenture instrument of the plaintiff.

He tendered to that effect;

i. *Joint and several guarantees of the plaintiff's directors dated 3 September 2018 as exhibit D2.*

ii. *Legal mortgage in respect of a landed properly on plot no 7B Kawe with CT No. 33870 and Land form No. 40 admitted and marked collectively ad exhibit D3.*

iii. *Debenture instrument dated 28 February 2019 and the certificate of registration of charge dated 1 March 2019 as exhibit D4.*

The plaintiff did not pay according to the schedule; therefore, there were arrears.

DW2 further testified that when they informed the plaintiff, he requested the loan restructuring, which they agreed by advancing to him a *"tawarruq".*

He narrated that by tawarruq, they added the principle and the arrears to affect the Murabaha agreement and to reschedule the payments.

Therefore, the 1st Murabaha was extended to 35 months with a tawarruq of TZS 150,000,000/=. It was the principle and arrears of the 1st Murabaha and 10% of TZS. 150,000,000/. He tendered to that effect;

i. *Tawarruq dated 26 September 2019 in respect of the first Murabaha as Exhibit D5.*

Also, for the 2nd Murabaha, there was a tawarruq of TZS 291,000,000/=, which offset the principle, arrears and penalties of that Murabaha. He tendered to that effect:

i. Tawarruq dated 26 September 2017 in respect of the 2nd Murabaha as Exhibit D6.

Furthermore, DW2 stated that both tawarruqs were signed by the plaintiff's directors.

The plaintiff defaulted to repay, and on 19 November 2020, the Bank reminded the plaintiff by a letter regarding the arrears of TZS 27,024,844/=52 for tawarruq. Despite the reminder, the plaintiff failed to pay; therefore, they started the legal recovery process by issuing a statutory demand notice to the guarantor who mortgaged the house, Samuel Cornell Apson.

After the expiration of 60 days, the Bank instructed Yono Auction Mart to start the process of auctioning the legal mortgage. Then, the plaintiff filed this case.

DW2 further testified that until 5 October 2021, the amount of debt was TZS. 222, 447,447/77. He tendered to that effect;

i. Bank statement and the affidavit of Avitus Kyaruzi admitted as exhibit 7.

The current amount was TZS 210 874,406/69 from two *tawarruq,* plus 5,900,000/= account charges.

Regarding tawarruq, he testified that there was a dispute regarding the meaning of tawarruq. Therefore, the plaintiff complained to the Shariah Board that tawarruq was an interest. On 23 August 2023, the verdict was delivered on 30 August 2023 that tawarruq was not an interest, and the plaintiff was notified by a letter. He tendered to that effect;

i. A letter with a verdict dated 30 August 2023 by the Shariah Board of KCB as Exhibit D8.

He concluded by testifying that TZS 76,000,000/= was a profit margin and not an interest. And in case of default, Islamic Law does not prohibit the auction of the legal mortgage.

In a nutshell and briefly, that was the evidence from both the plaintiff and defendants' witnesses.

At the end of the hearing, the plaintiff filed the final submission to clarify his case, and I thank him for highlighting key issues of the dispute.

Having heard the evidence from both parties, I will start with the first issue;

"Whether TZS 76,000,000/= was an additional interest, and whether it was contrary to Murabaha agreement between the plaintiff and the 1st defendant Bank".

On this, I will sail and guided by the principle enunciated under ***section 110 (1) of the Evidence Act***, as a standard in proving a case.

The section reads;

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

Similarly, I will be guided by the case of ***Hemedi Said vs. Mohamedi Mbilu*** (1984) TLR 113, where it was held that;

"He who alleged must prove the allegations."

Therefore, the burden of proof lies on the plaintiff's side who made the allegations. From the evidence adduced at the trial, it is quite clear that the facts are straightforward, and there are issues that are not in dispute. The issues are;

One, the defendant advanced to the plaintiff two loans in the form of Murahaba agreement dated 24 August 2018, as evidenced by exhibit P1 and on 25 February 2019, as evidenced by exhibit P2.

In the first Murahaba, the value of goods (cars) was TZS. 250,000,000/= purchased by the defendant and given to the plaintiff. The repayment of the profit term was two years with a profit margin of 10%, i.e. TZS. 25,000,000/= per year. Therefore, the total amount of loan for the first Murahaba was TZS. 300,000,000/=

In the second Murahaba, the value of goods (cars) was TZS. 300,000,000/= purchased by the defendant and given to the plaintiff. The repayment of the profit term was two years with a profit margin of 11%, i.e. TZS. 33,000,000/= per year. Therefore, the total amount of loan for the first Murahaba was TZS. 368,750,000/=.

Therefore, the total amount was TZS. 668, 750,000/=

Two, there is no dispute that one of the securities for Murabaha agreements is the mortgage deed landed properly on Plot no 78 Kawe with C.T No. 33870 located at Kawe registered in the name of Samuel Cornel Apson as a guarantor as evidenced by exhibit D3

Three, there is no dispute that the plaintiff failed to repay the loans, and he requested restructuring by extending the time for repayment. The 1st defendant granted the request.

At this juncture, it is important first to understand the meaning of *Murahaba*. The term is derived from the Arabic word *ribh, which means* profit. It is a contract in which the Islamic banks finance the customer by providing an asset in exchange for money as a profit. The purpose is to finance purchases without involving interest payments.

The dispute between the parties is on the addition of TZS. 76,000,000/= after the restructuring of the two Murabaha after extending the repayment period. The dispute is on two aspects. **One,** the plaintiff denied signing any document regarding TZS. 76,000,000/= and **two**; the amount was an interest, not a profit.

On the first aspect, PW1's evidence was that in 2021, he discovered an additional TZS 76,000,000/= in the remaining outstanding debt. On the other hand, DW1 stated that the plaintiff, through its directors, after being granted the extension to repay the two Murabaha, signed the Commodity Murabaha agreement (Tawarruq) for both Murahaba and he tendered exhibit D5 and D6.

At the trial, the exhibits were admitted without objection, and there was no cross-examination regarding the documents.

On this, there is a plethora of authorities of Court the Court of Appeal on the failure to cross-examine or object to tendering of the exhibit. In ***Anna***

Moises Chissano vs. The Republic, Criminal Appeal No. 273 of 2019(Tanzlii), it was held that once certain evidence goes into the record unchallenged, it is, in law, taken to have been admitted.

Therefore, contrary to what PW1 stated that he did not sign any document when his request for restricting was granted, the unchallenged evidence of DW2 supported by exhibits D5 and D6 revealed that he signed the restructuring documents after admitting the terms contained in the document.

Therefore, it is clear that the plaintiff signed the documents regarding TZS. 76,000,000/= in the restructuring of the earlier two Murabaha.

In contracts, it is settled law that parties are bound by the agreements they freely entered into, and this is the cardinal principle of the law of contract. There should be a sanctity of the contract. The Court of Appeal in Simon Kichele Chacha vs. Aveline M. Kilawe, Civil Appeal No. 160 of 2018, held that;

> *"On our part, we are satisfied that the contract entered between the appellant and the respondent had all attributes of a valid contract. It was not prohibited by the public policy and it is on record that the appellant was not complaining about his consent to the agreement being obtained by coercion, undue influence, fraud*

or misrepresentation in order to make it voidable in terms of the provisions of section 19 (1) of the Law of Contract Act, Cap. 345".

Equally applied in this suit, the plaintiff did not raise and prove his consent to exhibits D5 and D6 being obtained by coercion, undue influence, fraud or misrepresentation to make them voidable.

On the second aspect regarding TZS. 76,000,000/=. PW1 stated that the amount was chargeable interest, and *"tawarruq"* means the interest. On the other hand, DW1 stated that the amount was interest. It was a margin profit after restructuring the two Murabaha agreements by extending repayment time.

The key issue here is whether *"tawarruq"* amounts to interest or not.

According to PW1, tawarruq is a chargeable interest, while DW2 stated that it is a profit margin. According to exhibit D8, the plaintiff referred this matter to the Shariah Board of the 1st defendant Bank on 23 May 2023 when he had already filed this case on 6 May 2022. The Board ruled out that tawarruq was not a chargeable interest. It is a profit restructuring of the Murabaha. I quote what was ruled by the Board;

"Marekebisho haya kwa shighuli za kibenki za Kiislamu hutumia Mkataba wa Tawarruq (Commodity Mutabaha) ambao hubadili Mkataba wa Murabaha kuwa mkataba wa Tawarruq. Tawarruq

> *ni mkataba unaoruhusu kuchaji gharama ya faida kwenye ongezeko la muda wa malipo. Tawarruq ni mkataba ulioruhusiwa na Bodi ya Sharia ya KCB Bank kutumika kwenye maombi ya marekebisho ya muda wa malipo na chaji yake ni faida na sio riba kutokana na mkataba wenyewe unavyofanya kazi ukilindwa na sharia ya dini ya Kiislamu katika nyanja za kibenki. Ongezeko la makato sio riba".*

According to the **Arab Law Quarterly 33 (2019) 307-333,** the Shariah Board of Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI), an international standard-setting body for the Islamic financial industry defines "*tawarruq*"(monetisation) as:

> *".. the process of purchasing a commodity for a deferred price determined through musawamah (bargaining) or murabahah (mark-up sale), and selling it to a third party for a spot price so as to obtain cash."*

Further, according to the **Arab Law Quarterly 28 (2014) 278-394,** AAOIFI ruled that that *mutawarruq* is acceptable provided it is not organized and the conditions of sale are met

In addition to that the Organization of Islamic Cooperation (OIC) Fiqh Academy defines tawarruq as:

> *"... A person (mustawriq) who buys merchandise at a deferred price in order to sell it for cash at a lower price. Usually, the merchandise is sold to a third party, with the aim to obtain cash. This is classical tawarruq, which* ***is permissible****, provided that it complies with Shari'ah requirements for sales."* [Emphasis provided]

Therefore, from the above discussion, tawarruq is not an interest and is allowed in Islamic Banking. Thus, in the first issue, I hold that TZS. 76,000,000/= was not an interest and was not contrary to Murabaha agreements between the plaintiff and the 1st defendant Bank. In fact, the plaintiff entered freely into the restructuring of the Murabaha by signing exhibits D5 and D6.

Flowing from above, I find no justification for the plaintiff's complaint at this stage while willfully entered into a tawarruq agreement which I hold to be a lawful agreement.

The second issue on whether the intended auction of Plot no. 78 Block J with C.T No. 33870 located at Kawe by the 2nd defendant upon the instruction of the 1st defendant bank was illegal and contrary to Murabaha agreement should not detain me long.

As I alluded to earlier, one of the securities for Murabaha agreements was a mortgage deed in respect of Plot no. 78 Block J with C.T No. 33870 located at Kawe registered in the name of Samwel Cornel Apson, as a guarantor.

In the instant suit, it is clear that the plaintiff defaulted in repaying the loan, as evidenced by the bank statement (Exhibit D7). That fact that the

plaintiff defaulted to repay the loan was even admitted by PW1 in his evidence.

On this, I have two observations;

One, the law is clear that if you borrow you must pay according to the terms of the agreement. The Court of Appeal in **The Private Agriculture Sector Support Trust and another vs. Kilimanjaro Cooperative Bank**, Consolidated Civil Appeals No. 171 and 172 of 2019 (Tanzlii) held that;

> *"The parameters of loan are pretty straight-forward. If you borrow money, you must ultimately pay it back..........*
>
> *There is no shortcut".*

Two, in case of failure to repay the loan, the lender is empowered to sell the mortgage.

On this, the decision of the Court of Appeal in ***The National Bank of Commerce vs. Dar es Salaam Education and Stationery*** [1995] T. L. R. 272, elaborated that the law empowers the mortgagee to exercise power to sell the mortgaged property if a mortgagor fails to repay the loan.

Therefore, as for the second issue, the intended auction was not illegal as the loan was defaulted by the plaintiff, and despite being served, the guarantor failed to exercise his duty of repaying the loan.

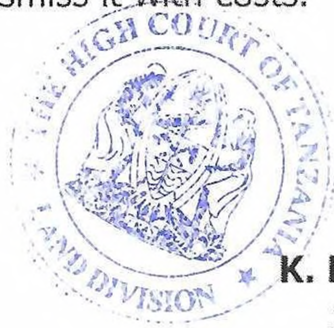
The third issue on what is the outstanding debt the plaintiff owned by the 1st defendant Bank; since there is no counter-claim, I find it a bit tricky to determine because it is the plaintiff who lodged the case to challenge the amount of TZS. 76,000,000/=, the issue which I have already determined in the first issue.

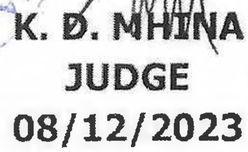
However, per the Bank Statement (Exhibit D7), the outstanding debt until October 2021 was TZS. 222, 444,445/=. On this, I think I shall end here.

Before concluding, I want to comment on the 3rd relief prayed by the plaintiff. He prayed for an order directing the 1st defendant to extend time in favour of the plaintiff for repayment of the two Murabaha agreements.

Briefly, in my opinion, the prayer is untenable because I know no law that allows the courts to extend repayment time for persons who defaulted on repayments of their loans. The court cannot intervene in the repayment of loan contracts. That is the duty of the parties who entered into the agreement.

In the circumstances, I do not find merit in the plaintiff's case. I accordingly dismiss it with costs.





K. D. MHINA
JUDGE
08/12/2023