

**IN THE HIGH COURT OF TANZANIA  
(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CIVIL CASE NO. 97 OF 2011**

**LINUS PATRICK KALANDAMWAZYE**

**T/a SICHULA ENTERPRISES.....PLAINTIFF**

**VERSUS**

**KELVIN S. MWAILENGE.....1<sup>ST</sup> DEFENDANT**

**MICHAEL B. MWASEBA.....2<sup>ND</sup> DEFENDANT**

**TULVIN INVESTMENT COMPANY.....3<sup>RD</sup> DEFENDANT**

**TULVIN AUCTION MART CO. LTD.....4<sup>TH</sup> DEFENDANT**

**PRIDE TANZANIA LTD.....5<sup>TH</sup> DEFENDANT**

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**JUDGMENT**

***7 Dec.2017 & Apr. 2018***

**DYANSOBERA, J:**

The Plaintiff herein has filed a suit in this Court against the five Defendants to claim a declaration that the seizure of the plaintiff's equipment by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are unlawful, compensation for loss of earnings to the tune of

Tshs. 2,000,000/= per day from the date 20<sup>th</sup> June, 2011 until the date of judgment, payment of annual rent and business investment to the business premises at the tune of Tshs. 30,000,000/=, general damages arising out of psychological torture following defendants' conduct Tshs.200,000,000/=, compensation for the equipment seized at the actual value of Tshs. 130,000,000/=, interests and costs.

All the five defendants were duly served, only the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants who are represented by Mr. Gaspar Nyika of IMMA Advocates, filed their joint written statement of defence in which they are disputing the claims. The 1<sup>st</sup> and 2<sup>nd</sup> defendant neither filed their defence nor made appearance in court. Upon the prayer by Mr. Mohamed Tibanyendera, counsel for the plaintiff, the suit against them proceeded ex parte.

It is common cause that the 5<sup>th</sup> defendant is a body corporate registered under the laws of Tanzania. The plaintiff is a natural person and was doing bakery shop business at Mwananyamala "A", Kinondoni District, in Dar es Salaam trading as Sichula Enterprises. In March, 2011 in the course

of its usual business of a lending money, the 5<sup>th</sup> defendant granted to the plaintiff a loan of Tshs.30,000,000/= to facilitate better developments and improvement of the said bakery business. The plaintiff accepted the offer with all the terms and conditions contained in the loan agreement. In the said loan, the plaintiff was to repay it with interests for a period of twelve (12) months from 21<sup>st</sup> April, 2011 in monthly installments of Tshs. 3,025,000/=. It was a term of the loan agreement that the loan had to be secured. That in compliance with the term of loan agreement as to the security, the plaintiff charged his business equipment and three cars for repayment facility. Then Ally Msham Sedangi issued a 3<sup>rd</sup> party mortgage over the landed property situated at Manzese Mvuleni as a security for the repayment of the loan.

Later, the 5<sup>th</sup> defendant sought to recover the loan and instructed the 3<sup>rd</sup> and 4<sup>th</sup> defendants to auction the house and all the other assets charged as security. The process of auction by sale was pursued by the 3<sup>rd</sup> and 4<sup>th</sup> defendants and this led to the institution of this suit.

At the beginning of the trial the following only two issues were framed:

- “(1) whether the seizure and sale of the equipment found in the plaintiff’s bakery at Mwananyamala by the defendants was lawful*
- (2) To what reliefs are the parties entitled?*

Each of the parties produced one witness to testify on its behalf. The Plaintiff produced one LINUS PATRICK KALANDAMWAZYE (PW1).

His evidence is to the effect that he is a peasant in Rukwa at Kalambo since 2012 but beforehand he was dealing with bakery business operated at Mwananyamala in Dar es Salaam and having bought it from Beatus Kaegele and Theresia Kaegele. These vendors were selling it at Tshs. 130,000,000/= but after negotiation the price struck at Tshs. 105,000,000/=. As the plaintiff’s capital was insufficient he went to the International Commercial Bank who indicated their willingness to give him a loan. The bank then did valuation of all bakery equipment and a house designed to be a security. The valuation report was tendered in court and admitted as

~~Exh.~~ P 1. It was found that the bakery assets were valued at Tshs. 83,082,000/= whereas the agreed amount was 103m/-. When he went back to the vendor of the bakery, a purchase price was agreed at Tshs. 80,000,000/= and the plaintiff paid Tshs. 24,000,000/= as down payment and was then given the owner's account in which he deposited 56,000,000/=. In proof of this, the plaintiff tendered a copy of remittance application form -Exhibit P 2 signed by the plaintiff on 7<sup>th</sup> day of December, 2010. The money was deposited into the bank account of International Commercial Bank. The bank, after evaluation and having agreed to give him a loan gave him Tshs 105,000,000/=. A letter of offer from the said bank was supplied and addressed to Sichula Enterprises. In court was tendered the Term Loan Approved letter/secured overdraft facility AA No. 2010/137 dated 26.11.2010 Exhibit P 3. After the payment, the plaintiff and the bank signed on 12.12.2010 a Handing over Notice of Kaegele's bakery-Exhibit P 4 collectively. The plaintiff then started operating the bakery business and improved it.

It was further evidence of the plaintiff that after the agreement of the loan of Tshs. 30,000,000/= from the 5<sup>th</sup> defendant, the plaintiff mortgaged a house of Ally Mshani of Manzese Mvuleni. He told this court that he was given Tshs 25,000,000/= out of Tshs. 30,000,000/=: paid costs of the loan and it was a year contract at a monthly payment of 3,025,000/=. The plaintiff insisted that he was paid 25,000,000/= as evidenced by 3 pay in slips by Pride Tanzania dated 25.3.2011 (Exhibit P. 5 collectively). The plaintiff admitted that he was given a schedule of monthly payment as evidenced by a statement of Loan account for Mr. Linus Patrick Kalandamwazye at Pride Tanzania dated 12.12.2011- Exhibit P. 6

It was the plaintiff's further evidence that after securing the money from the 5<sup>th</sup> defendant, he got a tender of supplying bread and burns to a school known as Green Acres at Mikocheni and supplied goods worth Tshs. 6, 800,000/=. He argued that he was not paid the money by the 5<sup>th</sup> defendant in the agreed time. In other words, the 5<sup>th</sup> defendant delayed

payment as a result he delayed remittance for the two months period. According to the plaintiff

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The plaintiff admitted that there is nothing to show what they took and what they did not take. That it is after the assets were impounded that he filed this suit. He argued that he and his family were psychologically affected and that it is possible that the diabetes he suffers was caused by the defendant's action.

On cross-examination by Ms Caroline, the plaintiff admitted that the equipment were mortgaged for the loan of Tshs. 30,000,000. He admitted that there was a condition of imposition of penalty or interest in case of default and was by 2%. He admitted that for the two months he failed to repay the loan arguing that it is within those two months that an auction was conducted. It was in the plaintiff's further admission that he did not remit any payments. He also admitted that the mortgage acted as security and that the 5<sup>th</sup> defendant wanted to secure their money and on default of repayment, they had to sell the mortgaged property but that

they had to follow the procedure. He told this court that he was communicating with the 5<sup>th</sup> defendant on the failure to repay the loan telling them that he was in hardship. According to the plaintiff, he wrote to the 5<sup>th</sup> defendant asking for extension of the repayment schedule and the latter replied in hand writing. The plaintiff maintained that he did not pay within the time he was required to pay and that he knew that he delayed payment and expected that he would repay the money with interest or fine but not the mortgage and the sale and seizure of the mortgaged property was made before the expiry of the extended time.

As far as the auctioning of the house is concerned, the plaintiff said that he was present during the sale and saw the proclamation notice. Admitting that when mortgaging the house and equipment, the 5<sup>th</sup> defendant had the right to realise the loan by selling the security but that the value of the house exceeded the loan that was due. He admitted that the valuation was done in 2010 and the value has a life span. The plaintiff also admitted that when taking the loan from the 5<sup>th</sup>



defendant, the latter did not value the equipment but relied on the valuation done by the Bank.

In re-examination, the plaintiff told the court that the 5<sup>th</sup> defendant verified the bakery equipment before he secured the loan but did not prepare their valuation report.

As to the end result of the land case the plaintiff and his fellow had filed before the District Land and Housing Tribunal, the plaintiff said that it had come to an end whereby the Tribunal declared that the auction was not lawful. The plaintiff insisted that the agreement was that in case of default of repayment of the loan, he would pay 2%.

Rehema Vicent Hinjo, the 5<sup>th</sup> defendant's credit officer testified for the defence. She recalled that her duties are to receive the clients, negotiate with them and visit their work place and homesteads and thereafter writes a report and table it to the committee which decides on the credit to be advanced and how much. Then the client is called and appraised of the amount and executes the contract.

As far as the present case is concerned, the defence witness said that the plaintiff was their client who in 2011

secured a loan of Tshs. 30,000,000/= and signed a contract which is an offer form titled loan agreement. This "*Fomu ya Kukubali Masharti ya Mkojo*" was admitted in court and formed as Exhibit D 1. According to the defence witness, the conditions were repayment within 12 months with interest at the rate of 21%. In other words, the plaintiff was required to remit Tshs. 3,025,000/= per month. He was also required to pay 2% which amounted to Tshs. 600,000/= as fees and another 2% as premium which is Tshs. 600,000/=. Further the plaintiff was obliged by the contract to pay cash collateral of 25% which equals 4,500,000/=. It was the defence evidence that the plaintiff paid Tshs. 600,000/= as loan fees, and Tshs 600,000/= as insurance. He did not pay the cash collateral of Tshs. 4,500,000/= as he had no cash but asked the amount to be deducted from his loan. The defence witness explained that Tshs. 600,000/= was normal fees, Tshs. 600,000/= as insurance is used when the client dies and is paid to the lender while cash collateral acts as a security for the loan. The other securities apart from the above collateral, were a house belonging to Ally Mshamu and house hold assets. The written

documents to prove these securities were affidavits (Exhibit D. 2 collectively). According to this exhibit, there were business equipment and a house of a third party that is Ally Mshamu and his wife.

According to the defence witness, there was a schedule (Exhibit P. 6) for the repayment of the loan commencing on 21<sup>st</sup> of the month. It was asserted that the plaintiff did not pay as per schedule; instead he wrote a letter asking to pay twice the following month. The letter was dispatched to the 5<sup>th</sup> defendant on 5<sup>th</sup> day of May, 2011. The 5<sup>th</sup> defendant declined to accept the offer as it went contrary to the agreement. The plaintiff was, instead, given a notice so that he repaid and directed him how to pay. That was on 20<sup>th</sup> day of May, 2011. The plaintiff defaulted. On 7<sup>th</sup> June, 2011 the plaintiff was served with a reminder but did not also pay. As Tshs. 30,000,000/= was a big loan, the 5<sup>th</sup> defendant had to make a close follow up. After the plaintiff failed to repay the loan, the 5<sup>th</sup> defendant employed the brokers, the known as Tulvin Auction Mart who followed up the debts and notified the plaintiff so that the loan was recovered. No money was

recovered; instead, the 3<sup>rd</sup> defendant realized the money by selling the security and the plaintiff was so informed as per the report-Exhibit D 3. It was the defence evidence that the auction was conducted on 20<sup>th</sup> June, 2011 and sold were the business equipment which formed as security and fetched about Tshs. 15,382,000/= . As to the reasons the said property was sold, the defence witness explained that first, they were securities for the loan and second, the plaintiff failed to repay the loan and the efforts to sell the house had failed to materialize after a stop order was issued by the Kinondoni District Land and Housing Tribunal and that to date, the house has not been sold. It was argued on part of the defence that after the sale of those items, the debt was not liquidated and the plaintiff still owes the 5<sup>th</sup> defendant.

As to the value of the equipment auctioned and sold, it was the defence case that they were being used and as such they depreciated in value and the auction usually determines the sale price. It was therefore argued that the defendants had legal justification to sell that equipment as they were collaterals and the plaintiff had failed to repay the loan.

On cross-examination, the defence witness told this court she first came to know the plaintiff in February, 2011 when he went to the 5<sup>th</sup> defendant to ask for a loan and then in March, 2011 managed to secure it. She said that the affidavits of the plaintiff and his wife were silent on the value of the equipment. As to the actual amount received by the plaintiff, the defence witness was clear that he was paid Tshs. 30,000,000/= less 4,500,000/= which was deducted from the loan. It was further defence evidence that the plaintiff's business equipment was sold by Tulvin Auction Mart but it is the 1<sup>st</sup> defendant (Kelvin S. Mwilende) who was its Director who signed the report.

There was documentary evidence that the house was sold as evidenced by Exhibit P. 7. The defence witness admitted to have not seen the valuation report before the sale and admitted that the cash collateral is yet to be returned to the plaintiff. She admitted that the seizure and sale of equipment was done before the expiry of the contract but that it was due to the plaintiff's default.

On further clarification on Exhibit P 7, the defence witness told this court that the auctioneer proclaimed the third bidder to be the winner after paying 40,000,000/= but that the house was not sold as after the auction, the District Land and Housing Tribunal issued a stop order and the buyer failed to buy the house. According to the defence witness, the whole loan amounted to 36,300,000/= in that the loan was Tshs. 30,000,000/=, and Tshs. 6,300,000/= being interest. That there was also penalty of 2% from 1<sup>st</sup> April up to 19<sup>th</sup> June, 2011. There were also the expenses for the auctioneer which is 10% of the purchase price.

As to the refund or otherwise of the cash collateral, it was submitted on part of the defence that the cash collateral cannot be refunded as the loan is yet to be repaid. Explaining on why the seizure and sale was conducted before the expiry of the loan period, the defence witness said that the lender is permitted to realize his money. As to the application of interest of two percent, this court was told that it applies a day after failing to repay the loan and that the seizure and auction of

The equipment was done after the 5<sup>th</sup> defendant authorized the auctioneer to realize the money.

Learned advocates filed their closing submissions to which I will consider when discussing the issues framed.

Mr. Mohamed Tibanyendera, counsel for the plaintiff in his final closing submission, told the court that it is clear that the 1<sup>st</sup> and 2<sup>nd</sup> defendants when conducting their acts which led to this case were under employment and management of the 3<sup>rd</sup> and 4<sup>th</sup> defendants who were duly instructed by the 5<sup>th</sup> defendant to recover the outstanding loan balance issued by the 5<sup>th</sup> defendant.

The first issue was *whether the seizure and sale of the equipment found in the plaintiff's bakery at Mwananyamala by the defendants was lawful.*

It was submitted by counsel for the plaintiff that the plaintiff had applied for a loan of Tshs. 30,000,000/= but got Tshs. 25,500,000/= only. That the amount of Tshs. 4,500,000/= was deducted by the 5<sup>th</sup> defendant without the consent of the plaintiff. It is learned counsel's contention that this seriously affected the plaintiff's business plans as he had

re-allocate the money obtained from other expenditures contrary to his expectations and plans. Further that he failed to effect the first two installments due to default from his customer who was operating a school at Kinondoni which had ordered a supply of burns but could not effect payment in time the fact which was communicated to the 5<sup>th</sup> defendant. Learned counsel further submitted that the house was sold at Tshs. 49,000,000/= on 19<sup>th</sup> June, 2011 as evidenced by Exhibit P. 7. Counsel for the plaintiff argues that sale of the house was sufficient to recover the outstanding amount of Tshs. 36,500,000/=. That on 20<sup>th</sup> June, 2011 the 2<sup>nd</sup> and 3<sup>rd</sup> defendants proceeded to the plaintiff's bakery, seized all the assets including consumables and other equipment leaving the bakery and empty hall. Counsel contended that there was no record of seized assets nor was the inventory or a list of seized articles exhibited in court. Learned counsel lamented that the plaintiff was rendered poor, jobless and helpless and that the same applied to his employees. That he could not maintain his family and was therefore forced to leave Dar es Salaam and go to his home village in Sumbawanga. On this,



learned counsel concluded that the seizure of the plaintiff's assets was unlawful. The reasons advanced in support of this conclusion was that the 5<sup>th</sup> defendant was entitled to interest at 2% of any delayed payment of a loan. The loan period was yet to come to an end and the plaintiff had communicated all his hardship he was facing in his business and 5<sup>th</sup> defendant was aware of this. According to learned counsel, even if the plaintiff had defaulted, the collateral at Manzese was sufficient to cover the entire loan amount. He was of the view that the seizure of the plaintiff's assets was pre-mature. Counsel for the plaintiff asserted that the allegations that the plaintiff had filed a case with the District and Land Housing Tribunal immediately after the auction was not backed up and that nothing shows that the seizure was motivated by a court's stop order.

On this first issue, learned counsel concluded that the seizure was ill-motivated and was illegal as the 5<sup>th</sup> defendant intended to benefit from the house and equipment at the same time.

Counsel for the defendants, on the other hand, submitted that the defence witness through her evidence established that the plaintiff was granted a loan of Tshs. 30,000,000/= which was payable in 12 months at a monthly installment of Tshs. 3,025,000/= only. The loan attracted interest of 21% per annum and a default penalty of 2%. In that contract the plaintiff was supposed to repay principal sum together with interest within a period of 12 months. He was also given a schedule of the loan account and he had to commence repayment of the loan in April, 21, 2011(Exhibit P. 6). There were terms and condition of the loan as evidenced by Exhibit D 1. The plaintiff provided various securities. The plaintiff never paid the loaned amount as agreed at all. That the plaintiff is a defaulter and knows this but that despite notices and correspondences, the plaintiff remained adamant to make good the default. After serving the plaintiff with a notice, the 3<sup>rd</sup> and 4<sup>th</sup> defendant proceeded to realise the loan by auctioning the mortgaged assets.

Regarding the value of the assets in dispute, counsel for the defendant submitted that the said assets were second

and having been utilized for more than three years hence their value had depreciated. This court was asked to answer the first issue in the positive.

I have considered the pleadings and the evidence. There is no dispute that the parties, the plaintiff and 5<sup>th</sup> defendant in particular, entered into a contract whereby the latter advanced to the former a loan of the sum of Tshs. 30,000,000/=. The contract was reduced in writing and signed by the plaintiff and his wife on 4<sup>th</sup> day of March, 2011. It is entitled "**Fomu ya Kukubali Masharti ya Mkopo**" and **was** admitted in evidence as Exhibit D 1. The contract had terms and conditions. There is no dispute that the plaintiff defaulted repayment of the loan. Seeing this, the 5<sup>th</sup> defendant sought to realize the loaned money and employed the 3<sup>rd</sup> and 4<sup>th</sup> defendants, the brokers, to auction the collaterals which were a third party mortgaged house and plaintiff's bakery equipment.

Now, I am asked to answer whether the seizure and sale of the equipment found in the plaintiff's bakery at Mwananyamala by the defendants was lawful. I think the answer must be in the positive.

First, there is no dispute that the 5<sup>th</sup> defendant advanced a loan to the plaintiff. Both the plaintiff and 5<sup>th</sup> defendant entered into a contract and the contract bore the terms and conditions which, incidentally, the plaintiff undertook to observe and comply. In addition to that undertaking, the plaintiff mortgaged, among others, **business equipment** and 3 business cars. The said mortgaged equipment was subject to seizure and auction.

Second, it is equally not disputed that the plaintiff defaulted repayment of the loan as agreed.

Third, it was amply proved in evidence that the third party mortgaged house belonging to Ally Mshani which was auctioned on 19<sup>th</sup> June, 2011 at Tshs. 49,000,000/= but did not realize the debt as the auction and sale was declared illegal by the District and Land Housing Tribunal. Resort was therefore had to the plaintiff's business equipment, the subject of this case.

Fourth, the affidavits of the plaintiff and his wife one Bonoza Mazi Mambalamrk are clear that the business equipment and 3 business cars were made as security for the

loan of Tshs. 30,000,000/= together with interest of 6,300,000/=. These affidavits were sworn by the respective deponents on 4<sup>th</sup> February, 2011. There was no suggestion, leave alone indication that the seized assets were not the business equipment made collaterals when the plaintiff was securing the loan.

Fifth, in contractual relations, the court is duty bound to enforce what the contracting parties actually agreed. According to the evidence and the submissions, there was a contract which had not only terms and conditions but which the plaintiff accepted and signed. It is Exhibit D 1.

The said Exhibit which is *FOMU YA KUKUBALI MASHARTI YA MKOPO* reads in part:

1. *Kulipa ada ya mkopo shilingi 600,000/= ambayo ni asilimia mbili ya mkopo huu.*
2. *Kulipa shilingi 4,500,000/= ambayo ni asilimia kumi na tano (15%) ya mkopo ikiwa ni dhamana ya mkopo na itarudishwa pindi umalizapo mkopo huu. Dhamana hii italipwa bonus mara mbili kwa mwaka*

*kwa kutumia viwango vy a soko vya akiba ya muda wa siku 180*

3. *Kulipa shilingi 600,000/= ambayo ni asilimia mbili (2%) ya thamani ya mkopo ambayo ni bima.*

*The plaintiff agreed as follows:*

*Mimi LINUS P. KALANDAMWAZYE nimekubali kuchukua mkopo wa kiasi cha shilingi 30,000,000/= wenye riba ya shilingi 6.300,000/= na kufuata masharti ya kulipa rejesho kabla au tarehe ya kila mwezi kama ilivyo kwenye jedwali la marejesho kuanzia tarehe 21/4/2011 kwa muda wa miezi 12. Pia nakubali kulipa penalti ya asilimia mbili (2%) kwa kila rejesho litakalocheleweshwa. Na endapo nitakiuka makubaliano ya mkataba wa mkopo nawapa mamlaka PRIDE Tanzania Limited kuuza mali niliyo weka kama dhamana.*

The plaintiff and his wife then signed meaning that he was signifying to be bound by what had been agreed upon.

The plaintiff may have thought that the conduct of the 5<sup>th</sup> defendant appeared to be harsh and unfriendly to him but I

~~bank~~, that is the nature of the business of the banks and money lenders. This court in the case of **Agency Cargo International v. Eurafrican Bank**, Civil Case No. 44 of 1998, Dar es Salaam Registry, observed:

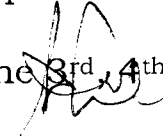
**“In order for a bank to continue being in banking business, it must have funds to lend and which must be repaid by its borrower. If a bank does not recover loans it will surely be an obvious candidate for bankruptcy.”**

I think the same principle applies to money lenders like the present 5<sup>th</sup> defendant. I also subscribe to the emphasis put by the Court on repayment of loans as per the terms of loan facilities and mortgage deeds. In the case of **General Tyre East Africa Ltd v. HSBC Bank PLC [2006] TLR 60** that:

**“The law is that banks/lenders and their customers/borrowers must fulfill and enforce their respective contractual obligations under various lending/securities agreements entered into by the parties”.**

In the instant case, I am satisfied that what befell the plaintiff were the consequences of his failure to fulfill and enforce his contractual obligation under the lending agreements entered into with the 5<sup>th</sup> defendant. He is to blame. The court is enjoined to enforce what the parties actually agreed. To do otherwise would be tantamount to elevate ritual above substance. For those reasons, I answer the first issue in the positive.


The upshot of this is that I find the plaintiff having failed to prove his case on balance of probabilities and I, accordingly, dismiss the suit with costs to the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants.

  
W.P. Dyansobera

JUDGE

6.4.2018

Delivered this 6<sup>th</sup> day of April, 2018 in the presence of Mr. Adrian Maro, learned counsel for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants and holding brief for Mr. Mohamed Tibanyendera, learned advocate for the plaintiff.

  
W.P. Dyansobera

JUDGE