

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM**

COMMERCIAL CASE NO.128 OF 2019

FIRST NATIONAL BANK (T) LTDPLAINTIFF

versus

YOHANE IBRAHIM KADUMA1st DEFENDANT

MARIANNE KUSAGA KADUMA.....2nd DEFENDANT

RULING

Date of the Last order: 10/06/2020

Delivery of the Ruling: 10/08/2020

NANGELA, J.:

This is a ruling in respect of two preliminary objections raised by the Defendants. The objections are to the effect that:

- (a) **This suit is incompetent for want of issuance and service of a Statutory Notice to the borrowers before commencement of legal proceedings for recovery.**
- (b) **The Plaintiff has no cause of action against the Defendants.**

Briefly stated, the Plaintiff in this suit is a limited liability company established under the laws of the United Republic of Tanzania and licensed to carry on the business of banking. The Plaintiff has initiated a suit suing the Defendants, jointly and severally, for allegedly repayment of monies advanced to the 1st Defendant, and guaranteed by the 2nd Defendant.

Pursuant to the "**Facility agreement**" and "**Mortgage**" issued in favour of the Plaintiff to secure the credit facility granted to the 1st Defendant

on 4th November 2015, the amount alleged to be claimed from the Defendants is **TZS 513,916,258.48**, whereby **TZS 443,155,722.86** is amount in respect of Home Loan and **TZS 70,760,535.62** being personal loan. Together, these monies are alleged to be constituting the amount due plus interest and other charges as of 2nd October 2019,

It is on the basis of the above background information that the Plaintiff has approached this Court seeking for the following Orders:

1. An Order that the defendants are liable and should immediately pay **TZS 513,916,258.4**.
2. Eviction, delivery of vacant possession and an Order for sale of the landed property registered as Plot.No.49, Land Office No.605409, Block 47, Kijitonyanyama Area, Kinondoni Municipality over CT.No. 142409 in the name of Yohane Ibrahim Kaduma & Marianne Kusaga Kaduma.
3. If the Plaintiff will be unable to recover the whole amount after the sale of the landed property, the Court order for recovery of any of the balance after the sale, from any properties of the Defendants.
4. Interest on No.1 above at a rate of 18% and 22% as per the loan agreement from 02/10/2019 to date of judgement.
5. Interest on the decretal amount at the rate of 7% per annum from the date of judgement till the date of full and final satisfaction of the decree.
6. Costs of and incidental to this suit.
7. Any other reliefs that this honourable court may deem just and equitable to grant.

On 4th December, 2019, through the services of MM Attorneys, the 1st and 2nd Defendants filed their joint Written Statement of Defence (WSD). Save for the fact that the Defendants executed the credit facility agreement with the Plaintiff in the nature of "Home loan" and "personal loan", the Defendants disputed each and every allegation contained in the Plaint, including the allegation that the Plaintiff served the Defendants with a Statutory Notice prior to the institution of this suit. Besides, the Defendants raised the earlier

mentioned two preliminary points of law in their WSD, objecting to the suit against them.

On 27th January, 2020, when this case was called on for necessary orders, there being a notice of preliminary objections (POs) this Court, opted to commence with the POs, as it is customarily correct to do so before embarking on the other procedural and substantive issues pertaining to the main suit. Consequently, on the 1st of April 2020, it was agreed that the POs be disposed by way of filing written submissions. The Court issued the following scheduling order for the filing of the submissions:

1. That, the Defendants were to file their written submission on or before 8th April 2020.
2. That, the Plaintiff should file its written submission on or before 15th April 2020.
3. That, Rejoinder submission by the Defendant be filed on or before 24th April 2020.

The Court set the date for mention of the case to be 7th May 2020 to ascertain compliance with the orders of the Court. On the material date, the case could not proceed but it was assigned another mention date which was 10th June 2020. On the material date, Mr. Innocent Mushi, learned Advocate, appeared for the Plaintiff. The Defendants and their legal counsel were absent. Mr. Mushi informed the Court that, although the Plaintiff complied with the earlier directives of the Court, he was unaware whether the Defendant has filed a rejoinder submission or not, since the Plaintiff was not served. Noting that the Defendant had filed rejoinder submissions, I made an order the Defendant to ensure that the Plaintiff is served. A date for this ruling, therefore, was set to be 10th August, 2020 at 11:00.

Since the parties complied with the filing order, I will now proceed by considering their written submission. In their joint written submission, the Defendants supported the preliminary objections. Starting with the *first ground of objection*, the Defendants submitted that, as indicated in paragraph 12 of the

Plaintiff issued the Defendant with a **Demand Notice** which was followed by a **Statutory Notice** served on the Defendant on 17th January 2017 and not 1st February 2017.

Referring to section 127 of the **Land Act, Cap.113 [R.E.200]** as amended by the **Mortgage Financing (Special Provisions) Act, No. 17 of 2008**, the Defendants submitted that, the position of the law is clear that after an expiry of sixty (60) days, following receipt of the notice, the claim must be paid, failure of which the mortgagee may exercise the right to sale the mortgaged property. To buttress that position, this Court was referred to the unreported cases of **Grofin Africa Fund v Nagoz Minerals & 2 Others, Commercial Case No.193 of 2017 (unreported)** and **M & M Food Processing Limited v CRDB Bank Limited & 2 Others** as well as **Registered Trustees of Africa Inland Church Tanzania v CRDB Bank Plc , Commercial Case No.7 of 2017.**

Besides, the Defendants submitted that, it is trite law that parties are bound by their pleadings, and, that, unless the same are amended, the parties must be confined to them otherwise to decide on matters that are not pleaded will amount to an error on the face of the record. To cement that position of the law and for reference purposes, the case of **Devotha Peter v Athuman Mtindu, Misc. Land Appeal No.42 of 2019 (unreported)** was cited as an authority.

In view of the above, the Defendants contended that, the purported Demand and Statutory Notices were never served to the Defendants as required by the law. Instead, it has been so asserted, the Plaintiff opted to serve the Defendants through postal address, of which, it is argued, the same never reached to the Defendants. It was submitted that, the postal address of the Defendants, as per "**Annex.FNB -2**" is P.O. Box 8090, DAR-ES-SALAAM but the Plaintiff is alleged to have sent the Statutory Notices to a different postal address which is said to be P.O. Box 3600 DAR-ES-SALAAM.

In view of the above, the Defendants argued that, the fact that the statutory notices were not issued and served to the Defendants subject to the requirement of the law, makes the suit incompetent and should be truck out with costs.

As regards the second ground of objection, the Defendants argued that, as per **Order VII rule 1 (e) of the Civil Procedure Code, Cap.33 [R.E. 2002]**, a plaint is required to disclose or state facts which constitute the cause of action, and, if it does not, then the same is required to be rejected in terms of **Order VII Rue 11 (a) of the Civil Procedure Code, Cap.33 [R.E 2002.]**.The Defendants referred to this Court the case of **John M Byombalirwa v Agency Maritime International (T) Ltd [1983] TLR, 1**, at page 4, and **Jamal Abdullah Suleiman v Amran Talib & 2 Others, Commercial case No.40 of 2012 (unreported)** regarding what constitutes a cause of action. It was contended that, the purported demand notice and statutory notices attached to the plaint as **Annex.FNB -4** were never served on the Defendants as required by the law and, consequently, the suit was filed prematurely prior to the services of statutory notices as required by the law.

On 15th April 2020, the Plaintiff filed its reply submission. In that submission, the Plaintiff Bank sought to adopt its earlier skeleton argument filed in line with the dictates of Rule 64 of the **High Court Commercial Division Procedure Rules, 2012 (as amended by GN 107 of 2019)**. The Plaintiff submitted that the preliminary objections raised by the Defendants are non meritorious and that they should be dismissed.

It was argued that, by all standards the objections do not meet the required test of a preliminary objection for the reason that, preliminary object worth to be entertained by the Court should be on a pure point of law which may dispose the matter completely. It was contended that the two grounds of objection were misconceived, confusing and misleading as they need evidence to prove them, which evidence the Plaintiff has. To bolster that submission, the

Plaintiff referred to this Court the case of **Mukisa Biscuits Manufacturing Ltd v West End Distributors Ltd [1969] E.A 696** regarding what a preliminary objection is all about.

In a further reply to the Defendant's submission, it was the Plaintiff's contention that, the postal address of P.O.Box 3600, Dar-Es- Salaam, is the address of the Defendant and that it was evident from **Annex FNB-1** and **3**. It was argued that, the Loan Agreement and the Personal Loan were signed by the Defendants and consented to by the 2nd Defendant who is the spouse and her address is P.O. Box 3600. It was argued that, the Defendant's Written Statement of Defense noted the address as well from paragraph 2 of the Paint.. The Plaintiff argued that, there has never been any information regarding change of that address.

As regards the second ground of objection, the Plaintiff argued that the same is devoid of merit as the Plaintiff, in **paragraphs 9, 10 and 11**, read together with **Annex.FNB 5**, discloses the cause of action. In the Plaintiff's submission, therefore, that, the objections should be dismissed.

In a brief rejoinder, the Defendants submitted that, the case of Mukisa Biscuits (*supra*) does not apply here because the objections were raised in respect of the pleadings filed and the law. Since parties are bound by their pleadings, it was argued that the issue of calling for evidence does not arise. It was argued that the issue is that the Plaintiff filed the suit before complying with the requirement of the law regarding issuance of a statutory notice, as per section 127 of the Land Act, Cap.113 [R.E 2002] as amended by Act No.17 of 2008.

The Defendants reiterated what was earlier stated in their submission chief, including reference to the cases of **Grofin Africa Fund v Nagoz Minerals & 2 Others, Commercial Case (*supra*)** (pages 4-5) and **Registered Trustees of Africa Inland Church Tanzania v CRDB Bank Plc (*supra*)** at

pages 10 and 11. It was the Defendants prayer that the suit should be struck out.

The issue which I am called upon to resolve in this ruling is whether the two "POs" raised by the Defendants are meritorious. I have carefully summarized the submissions made by the parties to this case. Before I address the main issue, I find it necessary to consider the validity of the POs which seem to be an ancillary issue raised by the Plaintiff. It has been contended that the two grounds of objection are misconceived, confusing and misleading as they need evidence to prove them. In view of that, the Plaintiff contended that the POs do not qualify as POs in law as they do not meet the tests set out in **Mukisa Biscuits Manufacturing Ltd v West End Distributors Ltd [1969] E.A 696**. That is the Plaintiff's argument. However, the Defendants have counteracted it, stating that, the POs are very valid as the first one is anchored on a non-compliance with a legal requirement while the second is based on non-disclosure of a course of action in the pleadings. I find it prudent to start by looking at this secondary issue.

To address the above secondary issue, let me revert to what the Court in Mukisa Biscuits case (supra) stated. In that in the famous case of **Mukisa Biscuit Manufacturing (supra)** New Bold P (as he then was) defined, on page 701, what Preliminary Objection is all about, noting that:-

"[A] preliminary objection is in the nature of what used to be a demurrer, it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of the judicial discretion."

A number of cases have cited with approval the **Mukisa's Biscuit case** (supra). These include the case of *Tanzania Union Of Industrial and Commercial Workers Tuico at Mbeya Cement Company Ltd v Mbeya Cement Company Ltd*, and *National Insurance Corporations Ltd [2005]TLR 49*; *Sykes Travel Agent Ltd v National Identification Authority (NIDA)* and *The Attorney General Civil*

Case No 27 Of 2019 (Unreported); and Mbonipa Kasase v Tanzania Revenue Authority (Revision No.422 of 2016) (unreported), to mention but a few.

In the case of ***Sykes Travel Agent Ltd V National Identification Authority (NIDA) and The Attorney General, Civil Case No 27 of 2019 (Unreported)***, this Court (Hon De Mello, J.) was called upon to discuss a somewhat similar legal scenario regarding an objection based on non-compliance with a requirement of the law. In particular, one of the objection raised in the case was that, the suit is bad in law for noncompliance with section 6 (2) of the Government Proceedings Act Cap. 5 (R.E 2002). However, the opposing legal counsel in that case argued that the objection raised did not qualify the test of what constitutes a preliminary objection as defined in the famous case of ***Mukisa Biscuits (supra)***. The Court made the following statement which I fully subscribe to, that:

"It is a settled principle of law that, objections must be of pure points of laws without requiring another facts/evidence to prove its existence. This principle was also insisted in the case of *National Insurance Corporation of Tanzania & Another vs. Shengena Ltd., Civil Application No. 20 of 2017 (Unreported)* approving what the Mukisa's (*supra*) at page 9-10 had this to say; 'We take that to be position of the law on the meaning of preliminary objection. With this in mind, we ask ourselves does the so called Preliminary Objection in the instance case pass this test. We think that it does not. The two so called points of objection are not self proof. They are subjected to proof of some other material facts'"

In the instant case, the controversy on which the first ground of objection is anchored, is whether this suit is incompetent for want of issuance and service of a Statutory Notice to the borrowers before commencement of the legal proceedings for recovery. The Defendants have locked horns with the Plaintiff on this. Each part opposes the version of the other and above all, the Plaintiff has argued that the 1st ground of objection, which is anchored on that issuance notice, is not a pure preliminary objection.

In my view, I am fully convinced that the 1st ground of objection does not meet the Mukisa Biscuits' case criterion. I hold so because, it invites

evidence to be tendered to establish whether such Notice was issued or not, and, if it was indeed issued, whether it was issued properly. In view of what was stated by this Court in ***Sykes Travel Agent Ltd v National Identification Authority (NIDA) and The Attorney General (supra)***, an objection must be of a pure point of law, requiring no further facts or proof/ to establish its existence. The 1st ground of objection is not self-evident or self proof, but each party will have to adduce evidence in support of their version of the story.

I am also alive to the wisdom of the Court of Appeal as expressed in the case of ***Karata Ernest & Others v Attorney General, Civil Revision No. 10 of 2010 (unreported)***. In that case, the Court of Appeal of Tanzania held that:

"Where a point taken in objection is premised on issues of mixed facts and law, that point does not deserve consideration at all as a preliminary objection. It ought to be argued in the normal manner when deliberating on the merits or otherwise of the concerned legal proceedings."

In view of the above legal position, I uphold the Plaintiff's submission that, the Defendant's first ground of objection falls outside the parameters of what an objection should be in law as it calls for additional facts/evidence to substantiate it. That first ground, therefore, is hereby dismissed. But what about the second ground of objection?

The second ground of objection raised by the Defendants is that, **the Plaintiff has no cause of action against the Defendants**. To expound more on this point, the Defendants submitted that, **Order VII rule 1 (e) of the Civil Procedure Code, Cap.33 [R.E. 2002]**, requires a plaintiff to disclose or state facts which constitute the cause of action, and, that, failure to do so, **Order VII rule 11 (a) of the same Code** requires such plaintiff to be rejected. Indeed, that is the correct legal position. However, can it be said that the plaintiff filed in this Court by the Plaintiff does not disclose a cause of action?

What constitutes a cause of action in law was aptly defined in the case of ***John M Byombalirwa v Agency Maritime International (T) Ltd***

[1983] TLR, 1, at page 4, and **Jamal Abdullah Suleiman v Amran Talib & 2 Others, Commercial case No.40 of 2012** (*unreported*) regarding what constitutes a cause of action.

In the case of **MIC (T) Limited v TTCL, Commercial Cause No.146 of 2002 (unreported)**, Mr. Justice, Bwana, J (as he then was) stated that: "*the question whether a Plaint discloses a cause of action must be determined upon perusal of the Plaint alone together with anything attached so as to form part of it.*" A similar view was held by the Court of Appeal in the case of **John M Byombalirwa v Agency Maritime** (*supra*), at page 5, where the Court of Appeal stated, that: "for purposes of deciding whether or not the Plaint discloses a cause of action, the Plaint and not the Reply should be looked at."

In this instant case, the Plaintiff has argued that the Plaint does disclose the cause of action. He has referred this Court to paragraphs **9, 10 and 11**, read together with **Annex.FNB 5**. However, it is a settled principle of law that, a plaint should be read or looked at as a whole, including all its Annexures, if any, when determining whether it discloses a cause of action or not. It cannot be read in a piecemeal as the Plaintiff seems to suggest to this Court. I will thus be guided by the existing legal principle.

Looking at the plaint and its Annexures, I find no doubt to hold that it discloses, in its fullest measure, what the cause of action is in this case. In particular, the cause of action is a breach of secured credit facility agreements (*Facility Agreements*) which the Plaintiff and the Defendants concluded in 2015/2017. Essentially, apart from paragraphs 1 to 3 of the plaint, which are purely introductory in nature, facts disclosing the cause of action as being breach of the facility agreements entered between the parties and secured by a legal mortgage in favour of the Plaintiff, and that the said breach has never been remedied, are disclosed in paragraphs 4, 5, 6, 7, 8, 9, 10, 11, and 12 of the plaint and its Annexures. In view of this finding, I am fully convinced, therefore, that

the Plaintiff has sufficiently disclosed the cause of action. The second objection is therefore unmerited.

In view of the findings that the two objections raised by the Defendants are devoid of merit, this Court settles for the following orders:

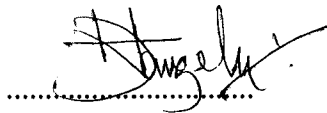
1. THAT, the two preliminary objections are hereby dismissed with costs, and;
2. THAT, the suit should proceed to its next stage of conducting a first pre-trial conference.

It is so ordered.



**DEO JOHN NANGELA
JUDGE,
High Court of Tanzania (Commercial Division)
10 / 08 / 2020**

Ruling delivered on this 10th day of August 2020, in the presence of Ms. Linda Mafuru, Advocate for the Plaintiff also holding the briefs of Mr. Leonard Masatu, Advocate for the Defendants.



**DEO JOHN NANGELA
JUDGE
High Court of Tanzania (Commercial Division)
10 / 08 / 2020**