IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 62 OF 2017

DIAMOND TRUST BANK (KENYA) LIMITED.....PLAINTIFF

Versus

PRIME CATCH (EXPORTS) LIMITED.....1st DEFENDANT

FIROZ HAIDERALI JESSA.....2nd DEFENDANT

ZULFIKAR HAIDERALI JESSA.....3rd DEFENDANT

SALIM HAIDERALI JESSA.....4th DEFENDANT

NASIRI HAIDERALI JESSA.....5th DEFENDANT

NADIR AZIZ HAIDERALI JESSA.....6th DEFENDANT

Last Order: 21st Oct, 2020

Date of Ruling: 16th Feb, 2021

RULING

FIKIRINI, J.

The plaintiff brought this suit under summary procedure of Order XXXV of the Civil Procedure Code, Cap. 33 R.E. 2002 (the CPC), claiming jointly and severally against all defendants for KShs. 380, 226, 448.71 (Kenyan Shillings Three Hundred Eighty Million Two Hundred Twenty-Six Thousand Four Hundred and Forty-Eight and Seventy-One Cents) or its equivalent in Tanzania Shillings at the exchange rate prevailing on the date of the judgment, plus interest, costs and any other reliefs the Court deems just, convenient and equitable.

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All the defendants filed their written statements of defence meaning leave to appear and defend the suit was sought and granted by this Court. With their written statements of defences notices of preliminary points of objection were raised. The 1st defendant through Mr. Ezron Jasson learned counsel, raised five points namely:

a. That the facility documents and guarantee are in executable and unenforceable for containing incurable defects;
b. That the loans in issue are foreign loans which have not been registered according to the laws of Tanzania and hence unenforceable;
c. That the suit involves mortgage of a landed property in Tanzania by a foreign company contrary to the laws of Tanzania;
d. That the cause of action arose in Kenya hence this Honourable Court has no jurisdiction; and
e. That the defendants have never been served with any statutory demand/notice of default in respect of the said default.

The 2nd, 4th and 5th through, Mr. Nuhu Mkumbukwa learned counsel also raised five points:

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a. That the facility documents and guarantee are in-executable and unenforceable for containing incurable defects;

b. That the loans in issue are foreign loan which have not been registered according to the laws of Tanzania and hence unenforceable;

c. That the suit involves mortgage of a landed property in Tanzania by a foreign company contrary to the laws of Tanzania;

d. That the defendants have never been served with any statutory demand/notice of default in respect of the said default.

e. That the suit is misconceived and bad in law for being preferred as a summary suit against the guarantors who were not parties to the mortgage contrary to the law.

While Mr. Florence Tesha learned counsel did so, on behalf of the 3rd and 6th defendants, by raising a number of points as follows:

a. That the facility documents and guarantee are in-executable and unenforceable for containing incurable defects;

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b. That the loans in issue are foreign loan which have not been registered according to the laws of Tanzania and hence unenforceable;

c. That the suit involves mortgage of a landed property in Tanzania by a foreign company contrary to the laws of Tanzania;

That the defendants have never been served with any statutory demand/notice of default in respect of the said default.

The preliminary points of objection were ordered be disposed of by way of written submissions under the following schedule of filing: the defendants to file their written submission by or on 3rd November, 2020; reply submission by the plaintiff by or on 17th November, 2020 and rejoinder if any by or on 24th November, 2020 and the matter was fixed to come for orders on 25th November, 2020, on which the date for the ruling date was fixed to 16th February, 2021.

All the counsels had more or less the same submissions in canvassing the points and, they concentrated on those points which were:

(a) That the loans in issue are foreign loan which have not been registered according to the laws of Tanzania and hence unenforceable; and

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(b) That the defendants have never been served with any statutory demand/notice of default in respect of the said default.

From the submissions it was apparent that some of the points raised were dropped. The 1st defendant abandoned objections, (a), (c) and (d) remaining with points (b) and (e) whereas, the 2nd, 4th and 5th defendants abandoned points (a) and (c) leaving points (b), (d) and (e), and the 3rd and 6th defendants did so by dropping their points (a) and (c) arguing points (b) and(d) and as well point (e) on the Court's jurisdiction which was raised by their learned counsel in course of the submission.

In their brief submissions on the 1st point on unregistered foreign loan and its effect, it was contended that the plaintiff by not registering the mortgage deed nor obtaining its DRN as required by the law has failed to comply with the Bank of Tanzania Law on registration of foreign loans as stipulated in the Foreign Exchange Circular No. 6000/DEM/EX.REG/58 of 24th September, 1999 (a copy supplied), that all foreign loans must be registered and issued with Debt Registration Number (DRN).

Failure to fulfil the requirement under the law as put in place vide the BOT circular rendered the loan illegal and ineffectual, resultant of which the suit

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was unmaintanable against all the defendants was the conclusion of the counsels.

On the 2nd point it was the defendants' counsels' submissions that the plaintiff has failed to observe the mandatory requirement of issuing statutory notice of default of sixty (60) days. And contended that by so doing the plaintiff has contravened the dictates of section 127 (1) and (2) of the Land Act, Cap. 113 R.E. 2019 (the Land Act). It was further argued that since the provision has been couched in mandatory terms as the word used was "shall" implying that compliance was mandatory, such omission was fatal and rendered the entire suit unmaintainable for being preferred prematurely and contrary to the law.

In addition to the two points of objection, the 2nd, 4th and 5th defendants raised a supplementary point of objection:

a. That the suit is misconceived and bad in law for being preferred as a summary suit against the guarantors who were not parties to the mortgage contrary to the law.

With regard to the supplementary point, it was Mr. Mkumbukwa's submission that the provisions of Order XXXV Rule 1 (c) (i), (ii) and (iii) of the CPC provides for instances where suits arising out of a mortgage can

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be preferred. Everything in the referred provision related to the borrower and financial institution involved based on their contractual relationship which was defined by the mortgage deed, and nothing mentioned of guarantors, submitted the counsel. He went on contending that the rationale behind the provisions was to enable the plaintiff to proceed under summary procedure against the defendants out of the mortgage deed without unnecessary delay.

Expounding on role of guarantors, it was his submission that they were not parties to the mortgage deed and thus unprocedural and illegal to sue the 2nd, 4th, and 5th, under summary suit procedure in which they were not parties to deed of mortgage and hence denied their automatic right to defend themselves. Fortifying his submission, he cited the case of **Jomo Kenyatta Traders Ltd & Others v National Bank of Commerce Limited, Civil Appeal No. 48 of 2016,** in which the Court of Appeal stressed that summary suit can only proceed against parties who executed the mortgage deed (a copy supplied). Relying on holding, Mr. Mkumbukwa urged the Court to strike out the suit with costs as it was wrong to join the 2nd, 4th and 5th defendants, the parties who did not execute the mortgage deed.

Mr. Kesaria learned counsel featuring for the plaintiff's submission will be summarized as the points of objection resembled in particularly points (a) on registration of loans pursuant to the Laws of Tanzania, and (c) on default to issue statutory notice raised by all the defendants and the point on summary suit wrongly preferred against the guarantors raised by the 2nd, 4th, and 5th and 3rd and 6th.

Mr. Kesaria prefaced his submission by alluding that all the preliminary points of objection raised were not pure point of law as illustrated in the famous **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] E.A. 696,** that preliminary objection must be on pure point of law based on the facts availed on assumption they are correct, of which if argued will dispose of the matter. It was his assertion the preliminary points of objection raised by the defendants were not pure points of law, but constituted facts which needed to be proved, the exercise which can be done at the hearing of the suit and not as preliminary points of objection as all the defendants have improperly done. Condemning the endeavor as unnecessarily increased the costs, confused triable issues and caused unnecessary delay in disposing of the matter.

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On the registration of the loans the point raised by all the defendants, it was Mr. Kesaria's submission that the cited provision from the Foreign Exchange Circular (supra) are to be read together with the BOT undated Press Release titled Registration of Foreign Loans with BOT (copy supplied) in which section 3.1 has been referred, in which the objectives of the cited provision has been elaborated. The main objective was monitoring of Tanzania's Private Sector External Debt (PSED) in ensuring that submission of the listed documents as required was made through their Commercial banks leading issuance of DRN and not registration of the said documents as has been incorrectly submitted by the defendants, submitted Mr. Kesaria. He went on stating that all these were the facts which needed to be ascertained by way of evidence at trial and not at this stage as a preliminary point of objection. Putting the Court on notice he informed it that the plaintiff will be calling a witness from the BOT to testify on the purpose, effect and consequence of issuance or no issuance of DRN and whether it was defendants or plaintiff's responsibility to avail the said listed documents to BOT. This witness will also testify on whether the registration of lack of such rendered a loan unenforceable as submitted by the 1st defendant. Instead there will be a sanction in the form of a penalty or fine

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by the BOT, even though it has not yet been proved if the plaintiff has omitted or not to comply with the requirement. Concluding his submission on this point he stated that all stated above, did not mean that the loan between the plaintiff and defendants was illegal, ineffectual or unenforceable as has been incorrectly asserted by the defendants. Also the assertion that the omission to register was fatal and rendered the suit unmaintainable was bare assertion from the Bar and was not backed up by any law or evidence and this Court should therefore disregard it.

The second point on statutory notice was equally dismissed by Mr. Kesaria by submitting that this would require evidence to determine whether the statutory notice was served or not, so the raised point cannot be dealt with at this stage as a preliminary point of objection.

On filing of the summary suit point raised by all the defendants except the 1st defendant, he submitted that the point was no longer relevant and has been overtaken by events. Expounding on that, he stated that after institution of the suit the defendants applied for leave to appear and defend the suit the application which the plaintiff conceded to as per the Court record dated 30th April, 2019. The matter has been proceeding as a normal suit and no longer summary suit, ever since. The defendants will

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thus appear and be heard and judgment under Order XX and not Order XXXV which governs Summary Suit will be entered.

Discussing the **Jomo Kenyatta** case (supra), he pressed was distinguishable as in that case defendants were not given leave and defend the suit which was not the case in the present suit.

On behalf of the 2nd, 4th and 5th Mr. Mkumbukwa, in rejoinder, maintained that the points of objection raised were pure points of law. On the statutory notice submission, dismissing the submission by Mr. Kesaria, Mr. Mkumbukwa equated the situation to that of a suit against the government, and inquired if it could not have been objected based on the lack of mandatory statutory notice which would have forced the Court to proceed with the hearing of the incompetent suit on merit on the pretext of **Mukisa Biscuit** case (supra).

On the BOT circular, disapproving the plaintiff's counsel submission, he rejoined by stating that the circular and in particular section 3.1 is couched in mandatory and in dictative terms meaning its derogation attracts sanctions. According to Mr. Mkumbukwa the wording presupposes that without fulfilling the said conditions, the inward transaction cannot be processed and approved by any bank. And if there was no compliance it

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means no DRN would be issued and any purported approval and processing of the loan became illegal for offending the BOT circular. Fortifying his submission, Mr. Mkumbukwa referred to the Black's Law Dictionary, 9th Ed p. 1397 to get the meaning of the term "registration" which as per the dictionary meant:

"the act of recording or enrolling."

The definition was put forward to counter Mr. Kesaria's argument that foreign loans were not registered by BOT but only given DRN. Mr. Mkumbukwa further submitted that the fact that the loan in issue has never been registered and therefore no debt record number issued, has not been disputed despite being raised in paragraph 3 of the defendants joint written statement of defence, it was thus misconception to argue that parties should await evidence from BOT.

Pressing more on the point and enforceability of the loan at issue, he submitted that the fact the BOT circular has the force of law, any act that contravenes its terms and conditions become illegal. The foreign loan that contravened the said circular such as the loan at issue becomes illegal for non-compliance to the express provision of the law and this Court cannot bless and enforce such illegal transaction.

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Countering the submission on issuance of notice under section 127 (1) and (2) of the Land Act, he contended that the suit is related to mortgage as per annexture P-3, even though the plaintiff seemed to distance herself from this fact. The plaintiff claim was thus misplaced and should be dismissed. Issuance of the statutory notice was a legal requirement which did not require evidence. The pleadings under paragraph 16 of the plaint on default came without a default notice attached, rendering the suit incompetent for being prematurely filed.

On the summary suit preferred, it was the counsel's submission that the suit filed under summary suit procedure against the guarantors who were not parties to the mortgage deed as exhibited by annexture P-3 to the plaint was not proper. The fact the defendants, have been afforded leave to appear and defend, in the counsel's view did not change the nature of the suit preferred initially. It would be different had the original suit be withdrawn with leave to refile it as normal suit. Mr. Mkumbukwa therefore urged the Court to determine the issue of as to whether it was proper to file a summary suit against the defendants who were guarantors separately from any proceedings including leave to appear and defend the suit. Revisiting the **Jomo Kenyatta's** case (supra), he impressed upon the

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Court to conclude based on the decision in the cited case that the plaintiff had no right to file a summary suit against the defendants who were guarantors. The plaintiff's action rendered the summary suit incompetent despite the plaintiff's legally consenting for the defendants to appear and defend the suit.

On the basis of his submission he prayed for the Court to either dismiss the suit or struck it with costs.

Mr.Tesha in his rejoining submission he clearly stated that "*two wrongs do not make a right.*" The suit wrongly filed under summary suit against the guarantors, was incompetent and rendered this Court lacking in jurisdiction, going by the Court of Appeal decision. The records still refer to the summary suit which was incorrect. Discussing the decision in Commercial Case No. 33 of 2017, Mr. Tesha submitted that the decision was distinguishable from the present circumstances of this suit.

Touching on the foreign loan issue it was his rejoining submission that the plaintiff has wrongly construed the requirement of section 3.1 of the Foreign Exchange Circular number 6000/DEM/EX.REG/58 issued in September, 1998. It was his further submission that the requirement was for registration and not submission of listed documents as understood by

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the plaintiff and all other procedures that had to be followed and complied with. Without compliance and receiving of the DRN, repayment to the foreign lender might not occur. The plaintiff has not registered and hence contravened the laws of Tanzania and consequently making the repayment of the issued loan unenforceable.

Responding to the point on statutory demand notice pursuant to section 127 (1) and (2) which regulates the mortgage, it was his submission that it was imperative for the guarantors to be notified of the default of payment by the plaintiff and the only way was by statutory demand notice as that would have been the only way of putting the guarantors on notice of the plaintiff's default.

Reiterating his earlier submission which he stated the plaintiff has failed to counter he prayed for the dismissal of the suit entirely with costs.

I had a thorough read through the submissions and in determining whether the preliminary points of objection raised deserve sustaining or otherwise, my first port of call is the **Mukisa Biscuit** (supra) case from which the famous principle as what amounts to a preliminary point of objection was made. According to the decision a preliminary point of objection must be on pure point of law. And that no preliminary point of objection should be

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raised if there will be need to ascertain any of the facts by adducing evidence and/or if what is sought can be granted at court's discretion.

Guided by the principle, I will answer the three points of objection raised as follows: Will start with the one on jurisdiction. It an undisputed fact that the plaintiff preferred a summary suit under summary procedure as provided for under Order XXXV of the CPC. These are suits emanating from the deed of mortgage. Looking at Order XXXV Rule 1 (c) (i), (ii), (iii) and (iv) of the CPC, the law has provided categorically on instances where summary suits can be preferred which arose out of mortgages.

Reading from the pleadings it is evident that the plaintiff and the 1st defendant had entered into mortgage deed. The summary suit brought against the 1st defendant is thus proper. The provisions cited above has only mentioned the borrower who ought to be sued by the financial institutions such as the plaintiff for the monies secured by mortgage. The plaintiff can as well sue for redemption or for delivery of possession of the mortgaged property by the mortgagor which in the instance situation is the plaintiff. So far the provision has stated nothing or mentioned anything relating to guarantors. Under the circumstances the guarantors cannot essentially be sued under summary procedure since they are not parties to

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the mortgage deed. It was thus incorrect and misdirection for the plaintiff file a suit under summary procedure, the procedure availed to only regulate parties who had signed a mortgage deed and not guarantors. In the present suit and in particular the 2nd, 3rd, 4th, 5th and 6th defendants who were guarantors, were wrongly sued.

The submission by the plaintiff's counsel that the defendants were all afforded leave to appear and defend the suit after the plaintiff has conceded to their application is misconceived. This being a suit for recovery of a loan guaranteed by the 2nd, 3rd, 4th, 5th and 6th defendants, under the summary suit procedure they would have ended up missing the opportunity to appear and defend themselves unless leave is sought and granted which in an ordinary civil suit their right to defend the suit is automatic. Once service has been effected the defendants would have 21 (twenty-one) days or depending on the nature of the suit, right to file defence by way of written statement of defence.

The case of **Jomo Kenyatta** (supra) has well illustrated the legal position when the same scenario as the one prevailing in this suit occurred. In the case the plaintiff sued the borrower as well as the guarantors who were not parties to the mortgage deed. The Court of Appeal clearly distinguished

the two groups that of the borrower and the guarantor/s. It was the Court's stance that the plaintiff had the right to proceed against the borrower under the summary suit procedure and not the guarantors. In illustrating on that the Court had this to say:

> *"There will be no doubt by now that in so far as the suit was for the recovery of mortgaged debts; the respondent could have only proceeded under the summary procedure as against the third and the fifth appellants who had executed mortgage deeds.* ***She had no right to institute a summary suit against first, second, fourth and sixth appellants who had not executed any mortgage deeds to secure the first appellant's debts.***"[Emphasis mine]

The scenario in the above cited case fits well the scenario in the present suit, whereby the 2nd, 3rd, 4th, 5th and 6th defendants guaranteed the loan and were never parties to the mortgage deed secured between the plaintiff and the 1st defendant. This is concluded notwithstanding, the cited case of **Diamond Trust Bank (T) Ltd v Petrosol (T) Ltd & 3 Others, Commercial Case No. 33 of 2017.**

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Also I am alive to the fact that the suit has not yet started and the defendants have filed their written statement of defence, after getting leave but it is clear as day and night that this suit was incorrectly preferred against all the defendants except the 1st defendant. On this I am at one with Mr. Tesha that"*two wrongs do not make right."* Against that background, I find the most appropriate step would have been withdrawal of the suit with leave to refile as suggested by Mr. Mkumbukwa.

This being a legal requirement and not a discretionary decision I am even hesitant to bring on board application of section 4 of the Commercial Court Rules as amended by GN. No. 107 of 2019, that in administration of justice the Court should be seen to enhancing justice rather than technicalities and essentially effectively applying the overriding objective as provided under sections 3A and 3B of the CPC.

This ground is thus sustained that the summary suit preferred against the 2nd, 3rd, 4th, 5th and 6th defendants was incorrectly preferred.

Another point is on Statutory demand notice, this will not take me long as it is not denied that there was no statutory notice served upon the defendants as stipulated under section 127 (1) and (2) of the Land Act. The whole idea behind the provision is to make the borrower aware that

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they have default repayment of the loan at the same time notifying the guarantors. Without such notice there was no way the guarantors would have knowledge of the default which had occurred. By not serving the parties with the statutory demand notice, the defendants were caught unaware. This is regardless of the fact that there was a written statement of defence filed. Issuance of the statutory demand notice or default notice being a mandatory legal requirement, skipping it makes the suit considered as being brought prematurely.

This point of objection is equally sustained.

The third point of objection in my view is the only one overruled as the issue raised requires evidence. Protracted submissions from counsels from the defendants and that of the plaintiff's counsel and reference to the Foreign Exchange Regulations are mixture of facts and law, which stops being a pure point of law as it will require ascertainment by way of evidence.

This point is thus overruled.

However, since the two remaining points have been sustained, and considering that the suit has not been heard on merits, I find the proper

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reaction is to strike out the suit with costs rather than dismissing it as envisioned by the defendants.

The suit is thus strike out with costs.

P. S. FIKIRINI

JUDGE

16th FEBRUARY, 2021