

TANZANIA / JUDGMENT

BAHARI LIMITED SCANNED

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IN THE HIGH COURT OF TANZANIA (LAND DIVISION) AT DAR ES SALAAM LAND CASE NO.
20953 OF 2024 BAHARI APARTMENTS LIMITED..... PLAINTIFF
VERSUS EQUITY BANK TANZANIA LIMITED..... 1st DEFENDANT
EQUITY BANK KENYA LIMITED.....2ND DEFENDANT CITY LAND
COMPANY LIMITED..... 3rd DEFENDANT SALISLA INVESTMENT
LIMITED..... 4th DEFENDANT

RULING

4th to 11th December, 2024 E.B. LUVANDA, J The Fourth Defendant above mentioned raised a preliminary objection to the effects that the Plaintiff has no legal capacity nor right to institute a summary suit to nullify a sale by the mortgagee while exercising his power of sale under the mortgage. In the submission in chief, Mr. Jovin M. Ndungi learned Counsel for Fourth Defendant submitted that the Plaintiff claims is mainly seeking for reliefs: the declaration that the alleged sale of the Plaintiffs properties registered under certificate of title No. 41571, Plots No.1521, 1522 and 1523 Msasani Peninsula Area Dar es Salaam by the First, Second and Third Respondent (sic, Defendants) to the Fourth Respondent (sic, Defendant) purportedly is illegal and unlawful; i an order setting aside the said sale; an order declaring the Plaintiff to be the rightful owner of the suit properties; permanent injunction against the Defendants from dealing or disposing the suit properties; an order for payment of general damages. He submitted that these are not claims which can be brought under summary suit and the Plaintiff has no legal capacity to institute a summary suit to nullify a sale by the mortgagee while exercising his power of sale under the mortgage. He submitted that the reliefs claimed are ordinary claims which should be initiated by an ordinary proceedings and not by summary procedure. He submitted that under the provisions of Order XXXV of the Civil Procedure Code, Cap 33 R.E. 2019, the law is very restrictive with regard to what can be brought under the summary suit. He submitted that claims which are not specifically provided for under that order are excluded from being initiated by summary procedure. He submitted that the plaintiff being a mortgagor in the instant suit, in terms of the provisions of rule 1(c)(iii) and (iv) of Order XXXV Cap 33 (supra), he could only initiate the suit by summary procedure if he were claiming for redemption or retransfer or discharge of mortgage and not otherwise. He submitted that although the Plaintiff has sought input of section 140(1) of the Land Act, Cap 2 113 R.E, 2019 which prescribes for initiating proceedings in relation to exercise by mortgagee of powers to sell or enter into possession of the mortgaged land to be

brought in court in accordance with Cap 33 and to be tried by summary proceedings. He submitted that this requirement was introduced by Act No. 17 of 2008 and led into amendment of rule 3(1) of Order XXXV Cap 33, by introducing rule 3(1)(c)(i)(ii) and rule 3(3) in Cap 33. He submitted that this rule guides the court as to whether to allow the mortgagor appear and defend a summary suit for suits arising from mortgages or not. He submitted that in fact, the mortgagor under the rule has to demonstrate that the loan or the portion of the loan claimed is indeed discharged or loan was actually not taken. He submitted that there is no any other amendments to Cap 33 to operationalize the provision of section 140(1) Cap 113 (supra) so that to enable the Plaintiff have legal capacity and right to initiate the instant suit against the Defendants by summary suit. He invited this Court to examine a plaint and rule that it is incompetent and dismiss the same, citing *Jomo Kenyatta Traders Ltd and Five Others vs National Bank of Commerce Ltd*, Civil Appeal No. 48 of 2016, for a position that after examining a plaint therein, it was concluded that the Respondent had not right to institute a summary suit against the First, Second, Fourth and Fifth Appellants therein who had not executed any mortgage deeds to secure the First Appellant's debt. He submitted that herein, the Fourth Defendant was not a party to a mortgage created by the Plaintiff in favour of the First and Second Defendant to secure repayment of the debts. He submitted that in the instant suit, the Fourth Defendant was not a party to a mortgage created by the Plaintiff in favour of the First, Second Defendants to secure repayment of the debts. He submitted that the Fourth Defendant is just a Bonafide purchaser of the suit properties. He cited paragraphs 6, 7, 8, 9, 10, 11 and 12 of the plaint, for an argument that there is no any mention of redemption, retransfer or discharge of the mortgage for which the Plaintiff would be entitled to institute a summary suit. In reply, Mr. Robert R. Rutaihwana learned Counsel for Plaintiff submitted that the argument of the Fourth Defendant's Counsel, that it is the mortgagee only who has the power to sue based on summary procedure when exercising his power of sale, is misconceived and is not backed up by the law. He submitted that he understand that, the power of sale by the mortgagee is statutory and derives from the law, citing section 140(1) to (11) Cap 113 (supra). He submitted that, the provision is long enough but requires a careful reading and understanding. He submitted that there is no dispute that, the Plaintiff was the mortgagor against the First and Second Defendants. He submitted that the suit on the 4 validity of the mortgage was filed by the First and Second Defendants and determined through Commercial Case No 139 of 2022, arguing currently there is a judgment adjudging the Plaintiff along with other parties to pay the amount of the loan as specified in the judgment and decree attached to the plaint. He submitted that in between, the First and Second Defendants proceeded to sell the Plaintiff's property purportedly under power of sale provided by the law, arguing this is what prompted the Plaintiff to institute the suit challenging the exercise of such powers where currently there is a judgment of the court compelling the Plaintiff to pay the monetary value of the loan instead of selling the Plaintiff's properties. He submitted that both Defendants maintain that, the sale of the Plaintiff's properties was in exercise of the power of sale under mortgage. He contended that this submission therefore takes them to, the question how does one put a challenge in law to such power of sale if he is aggrieved? He submitted that the answer to the question is that, because the right to sale is derived from the law, which is Cap 113 (supra), the answer to the question above also derives from the same law and this is provided under section

140 (1) and (11) Cap 113 (supra), specifically subsection (1). 5 The learned Counsel interpreted the provision of section 140(1) Cap 113, that it has two aspects: substantive right and procedure. He submitted that on substantive right, it governs all proceedings instituted in court, arguing including the suit filed by the Plaintiff. He submitted that this is in exercise by the mortgagee of the power to sell. He submitted that it is what the First and Second Defendants did in selling to the Fourth Defendant through the Third Defendant, the Plaintiff's mortgaged property. On the aspect of procedure, he submitted that this means how to pursue the substantive right given by the law. He argued that he understand the provision directing them to proceed in accordance with the provisions of the Civil Procedure Code and by way of summary proceedings. He submitted that the wording of section 140(11) Cap 113 (supra) responds to the query by the Fourth Defendant. He submitted that if the law says, the provisions of section 140 Cap 113 (supra) apply to any action to challenge the sale of the mortgaged property under the Act and the defendants maintain that, they were exercising their power of sale under mortgage which powers are exercisable under Cap 113, queried how does the Fourth Defendant say the Plaintiff has no right to bring a suit in summary way of that the suit is offensive to the provision of the law. He 6 submitted that, the Fourth Defendant's Counsel misconceived the provisions of section 140 (1) Cap 113 even though attempted to cite it. He faulted the learned Counsel for Fourth Defendant for avoiding to cite the provision of section 140(11) Cap 113. He submitted that the Fourth Defendant again claims to have derived title from the, First and Second Defendants through the Third Defendant, arguing he is not telling us where does he place his interest as the purchaser of the property. He submitted that suit in the name of wrong person has never been an issue to striking out the suit. He submitted that it is up to the court to decide either the party be retained or substituted or omitted the issue being to determine the real question in controversy, citing Order I Rule 10 (2), Cap 33. He argued this Court to decline such invitation for applying Jomo Kenyatta (supra), for reason that examining the plaint closely is looking at the facts than the law and makes the preliminary objection loose its taste, secondly he contended that such invitation should be made, while aware of the provisions of section 140 (1) and (11), Cap 113. He distinguished Jomo Kenyatta (supra) for explanation that therein involved enforcement of the mortgage by the mortgagee which here in this matter it is 7 the question of sale by the mortgagee which is purely regulated and the law instructs how to go about it. Secondly, the case is distinguishable, in principle in that, in that case already the summary judgment was entered and it was up for the court to set it aside as it was entered against some of the parties who were not parties to the mortgage. Thirdly, it did not address anything about the applicability of section 140 Cap 113. He submitted that even in ordinary summary suit falling under Order XXV like on cheques and promissory notes, when a party has been granted leave to defend hence diminishing the status of proceeding summarily the plaint is not amended but the all procedures follow. He submitted therefore that, once the court finds that the suit should not be summarily tried it will proceed to determine the same in ordinary way by ordering the parties to file their respective defences, citing *National Bank of Commerce v. National Chicks Corporation Limited & Others*, Civil Appel No. 129 of 2015 CAT (unreported). On rejoinder, the learned Counsel for the Fourth Defendant submitted that the gist of our preliminary objection is not based on what the Plaintiff's counsel understood to be lack of locus standi to sue. He submitted that the basis of the

preliminary of objection is made well clear in the notice and our submissions in 8 chief that the Plaintiff has no legal capacity nor right to institute a summary suit to nullify a sale by the mortgagee while exercising his power of sale under the mortgage. He submitted that the Plaintiff's Counsel with due respect misconstrued the provision of section 140(11) Cap 113 and erroneously commenced the Plaintiff's suit illegally. He submitted that the provision of section 140(1) Cap 113, is plain and clear and it does not need any purposive interpretation or any other interpolation. He submitted that the section requires all proceedings regarding the exercise of mortgagee power of sell or entering into possession of the mortgaged land to be instituted or brought in court in line with the provisions of Cap 33. He submitted that here there is no any mention of commencement or institution of suit to be by way of summary procedure. He submitted that what is mentioned in the provision is that the trial should be made by way of I summary proceedings. He submitted that this plainly implies that the trial of the suits emanating from the mentioned causes of action that is exercise of power of sale or entering into possession by mortgagee should be tried by summary proceedings. He submitted that summary proceedings is a different thing altogether from a summary suit which by law is commenced by summary procedure, argued 9 whereas summary proceeding deal with the manner on how the trial court should summarily dispose of the suit already brought for trial in court, summary procedure deals with the manner on how the suit should be commenced or instituted in court. He cited Black's Law Dictionary, 9th Edition at page 1324 that it defines summary proceeding as non-jury that settle a controversy or dispose of a case in a relatively prompt and simple manner". He submitted that it is also referred to mean a summary trial, argued that this means that a summary proceeding is a way to resolve a case without a long trial. He submitted that the provision of the law is intended to facilitate timely disposal of disputes resulting from the mortgage particularly relating to exercise of power of sale or entering into possession of the mortgaged land by the mortgagee. He submitted that this provision does not prescribe on how the suit arising from exercise of power of sale or possession of mortgaged land should be commenced in court but it requires them to be brought in court in accordance with Cap 33. He contended that nor does the provision of section 140(11) Cap 113, regulates how the suit should be commenced in the court but only states that actions brought in court to suspend or stop sale of a mortgaged property by power of sale should be commenced in line with the Civil Procedure Act. io He submitted that there is no any specific mention plainly or by necessary implication that the suit resulting from exercise of power of sale or entering into possession should be commenced or initiated by summary procedure. He submitted that submissions and authorities cited in support of erroneously construed provision of section 140(1) and (11) Cap 113, are irrelevant and inapplicable to the circumstances of this suit and our raised preliminary point of law be sustained and the suit be dismissed with costs. That marked the end of submissions for parties. According to Mulla, The Code of Civil Procedure, Sixteenth Edition, at page 3642, commented that, 'The provisions of this order prescribing a special procedure for trial of certain classes of suits...' At page 3646, the author commented, '4 suit, to which this Order applies, may if the plaintiff desires to proceed hereunder, be instituted by presenting a plaint which shall contain-

(a) /I specific averment to the effect that the suit is filed under this Order;

- (b) That no relief, which does not fall within the ambit of this rule, has been claimed in the plaint' Herein the Plaintiff who is a mortgagor initiated the suit by presenting a plaint with an endorsement "Order XXXV: Summary Procedure" n Among reliefs claimed by the Plaintiff herein includes:
1. Declaration that, the alleged sale of the plaintiff's properties registered under Certificate of title No. 4157, Plot No. 1521, 1522 and 1523 Msasani Peninsula area in Dar es Salaam by the 1st, 2nd and or 3rd Defendants to the 4th Defendant purportedly under the power of sale is illegal and unlawful.
 2. The honourable court be pleased to issue an order setting aside the said sale of the plaintiff's properties registered under Certificate of title No. 4157, Plot No. 1521, 1522 and 1523 Msasani Peninsula area in Dar es Salaam.
 3. The honourable court be pleased to make an order that, the properties constituted under Certificate of title No. 4157, Plot No. 1521, 1522 and 1523 Msasani Peninsula area in Dar es Salaam are lawfully owned by the plaintiffs.
 4. The honourable court be pleased to issue a permanent injunction restraining the defendants and whoever claims from them from, dealing, alienating, transferring and or disposing and interfering with the plaintiff's properties registered under Certificate of title No. 4157, Plot No. 1521, 1522 and 1523 Msasani Peninsula area in Dar es Salaam. 12
 5. The honourable court be pleased to make an order for payment of general damages as the court may assess but at least to a tune of 1 billion.
 6. The honourable court be pleased to make an order awarding interests at court's rate of 7% from date of judgment in (iv) above to the date of payment thereof.
 7. The honourable court be pleased to make an order for payments of costs of the suit by the defendants.
 8. The honourable court be pleased to grant any other reliefs the court shall deem fit and the proper in the interest of justice. In his submission in reply, the learned Counsel for the Plaintiff argued that his suit is justiciable under the provision of section 140(11) Cap 113. However, his argument falls short, for did not say if the reliefs claimed above listed fall within the ambit of the realm of reliefs mentioned under subsection (11) of section 140, Cap 113, which provides, I bold a portion of interest to me, 'The provisions of this section shaii apply to any action brought to suspend or stop sale of a mortgaged property by power of sale conferred under this Act' Nowhere the Plaintiff pleaded that she is either fighting to suspend or stop sale. Rather herein sale was already conducted where the Fourth Defendant is a purchaser. That ground alone knocks out of the Plaintiff's claim or suit. 13 For another thing, the learned Counsel for Plaintiff was arguing that the suit is maintainable by operation of subsections (1) and (11) of section 140 Cap 113. Subsection (1) to section 140 Cap 113, provides, 'AHproceedings instituted in Court in relation to the exercise by the mortgagee of powers to sell or enter in possession of the mortgaged land shall be brought in

accordance with the provisions of the Civil Procedure Act (sic), and tried by way of summary proceedings' This provisions make mention to the mortgagee only, there is no mention of the mortgagor. Even the reliefs mentioned therein cater for the mortgagee alone.

Importantly, it makes cross reference to the applicability of the provisions of Cap 33. As per a lucid argument of the learned Counsel for the Fourth Defendant, that Cap 33 was amended by Act No. 17 of 2008 which introduced rule 3(l)(c)(i), (ii) and 3(3), in view of guiding the Court as to whether to allow the mortgagor to appear and defend the suit, also it mention some reliefs claimable under the suit arising from mortgage of land. For brevity, I reproduce rule 3(l)(c) of Order XXXV, 'The court shall, upon application by the defendant, give leave to appear and to defend suit, upon affidavits which- (a)...N.A... 14

- (c) in suits arising out of mortgages, where the mortgagor demonstrate that-
 - (i) loan or the portion of the loan claimed is indeed discharged; or (ii) loan was actually not taken' This provision which as I have said was introduced by Act No 17 of 2008 as appearing in the margin of Rule 3 to Order XXXV Cap 33, also to the margin of section 140 Cap 113. And it might be the reason the learned Counsel for the Fourth Defendant was stressing that the suit is misconceived, this is because reference of section 140 Cap 113 to the applicability of the summary procedure under Cap 33, seemingly to have been limited to giving room the Defendant (mortgagor) who is dragged to court by the Plaintiff (mortgagee) under summary procedure, to seek leave to defend by relying on either of the two defences mentioned under roman (i) and (ii) of rule 3(1) to Order XXXV. This is because, the reliefs available for summary suit arising out of mortgage is either to seek for delivery of possession, redemption, discharge or transfer which also is pegged to Orde XXXII. Therefore, at any rate the suit by the Plaintiff which its cause of action arise out of mortgage, was wrongly presented by way of summary suit. This is because 15 reading subsection 1 of section 140 which predominantly provides for reliefs which can be subjected to summary procedure, make reference to the mortgagee and reliefs applies to the mortgagee alone. Two, subsection (11) to section 140, make refence to all provisions therein, that is reading from subsection (1) to (11), inclusive, where in between there are several provisions allowing consolidation of the proceedings initiated in other forum other than the High Court. Section 140(3) Cap 113, provides, I bold applicable portion, "Notwithstanding any other provision oflaw, and excepting any action on customary mortgage under section 115, any action brought in a forum other than the High Court to contest, stay, suspend, terminate or seek relieffrom demand for payment of a debt secured by a mortgage of real property, or an action for possession of mortgaged property, or exercise ofa power ofsale under this Act shall be transferred to the High Court immediately upon commencement ofan action in that forum on the same subject matter and consolidated with such action' The next question is what is the fate of the summary suit presented by the Plaintiff. The learned Counsel for Defendant stressed for dismissal with costs. The learned Counsel for Plaintiff come up with an alternative solution that it can be tried as an ordinary suit, citing National Bank of Commerce (supra). To 16 my view National Bank of Commerce (supra) is easily distinguishable, therein the Court was dealing predominantly with issues of jurisdiction

unlike herein where the Fourth Defendant is challenging a propriety or competence or maintainability of the summary suit filed by the Plaintiff against the mortgagee along parties who are not privy to the mortgage. Nowhere the apex Court ruled that a suit which has been wrongly filed under special procedure to wit summary suit can be treated as an ordinary suit. As prefaced above while citing Mulla, summary procedure is a special procedure for trial of certain classes of suits for the reliefs which are provided by the law. Any person who come up under this procedure with a set of strange reliefs and for category of cases not provided for under the law, upon failure to defend his/her course taken, cannot seek for an alternative solution of reversing back to a normal civil suit. That suit to my view, is incompetent in the eyes of the law. It is strike out with costs. Ruling delivered in the presence of Mr. Robert Rutaihua learned Counsel for Plaintiff, Mr. Kelvin Kidifu learned Counsel for First and Second Defendant, Mr. Jovin Ndungi learned Counsel Fourth Defendant, in the absence of the Third Defendant. 18

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