

TANZANIA / JUDGMENT

selemanibakari nannauka vs crdb bank plc 2 others 2023 tzhc 17438 30 may 2023

COURT
TZHCDECIDED
30 May 2023

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA
MTWARA DISTRICT REGISTRY AT MTWARA LAND CASE NO. 09 OF 2022 SELEMANI BAKARI
NANNAUKA PLAINTIFF VERSUS CRDB BANK PLC 1st
DEFENDANT MEM AUCTIONER AND GENERAL BROKERS (T) LTD..... 2nd DEFENDANT M/S
ACER PETROLEUM (T) LTD 3rd DEFENDANT

RULING

2nd & 3rd: May 2023 LALTAIKA, J; This is a ruling on a preliminary point of objection raised by for the defendants herein thus: "That the Plaintiff is bad in law for failure to disclose a cause of action against the 1st and 2nd Defendant herein/" Earlier on, the plaintiff had filed the suit against the defendants LAND CASE NO. 09 OF 2022 praying for the following reliefs:

- i. Declaration that public auction purported to have been conducted on the 22nd of July 2022 in respect of Plot No. 50 Block "O" Amkeni Newala Urban area and Plot No. 1 Block A, Naganga Mkangaula Masasi is unlawful
- ii. An order to nullify, set aside sale and declare Plaintiff to be the lawful owner of Plot No. 50 Block "O" Amkeni Newala Urban area and Plot No. 1 Block A, Naganga Mkangaula Masasi. Page 1 of 12
- iii. Payment of Tanzania Shillings 72,000,000/= being loss of expected earnings from 01/10/2021 to the date of filing this dispute and to the date of full satisfaction
- iv. Interest at the 1st Defendant lending rate of the secured loan at the rate of 17% on item (iii) above, from the date of eviction to the date of

Judgement.

- v. Punitive damages to the tune of Tanzania Shillings 700,000,000
- vi. Interest, General damages and costs. When the matter was called on for hearing on the 2nd of March 2023, Mr. Stephen Lekey and Mr. Issa Chiputula, learned Advocates appeared for the plaintiff and defendants respectively. The learned counsel opted to dispose of the point of objection by way of written submissions. With approval of this court, a schedule to that effect was jointly agreed. I commend the learned counsel for their strict compliance to the court's order. Submitting in support of the Preliminary Objection Mr. Chiputula stated that on the 7th day of October 2022 the Plaintiff had filed the present suit against the Defendants, claiming, among other

things, the unlawful sale of two landed properties. He prayed for various declarations and monetary compensations, including the declaration that the sale was unlawful, declaration of ownership of the properties, payment for expected earnings, interest rates, punitive damages, general damages, and costs. Mr. Chiputula further informed that on the 11th day of November 2022, the 1st and 2nd Defendants lodged their detailed Written Statement of Defence, which included a preliminary objection. Mr. Chiputula explained that the preliminary objection stemmed from a previous land case, Land Case No.8 of 2021, where the plaintiff filed a Page 2 of 12 suit against different parties. The court in that case rejected the plaint for failure to disclose the cause of action. On the 7th day of October 2022, the plaintiff lodged the current suit, Land Case No.9 of 2022, which is the subject of the preliminary objection. The plaintiff alleges unlawful sale of the mentioned properties, which were given as securities in a mortgage formed between Nannauka General Enterprises & Co. Ltd and the 1st Defendant (CRDB Bank Pic). The plaintiff claims not to be part of the contract and asserts that Nannauka General Enterprises & Co. Ltd, which was involved in the previous suit, is not a part/ to the current suit. Mr. Chiputula acknowledged that a Preliminary Objection must be based on a point of law, as stated in the case of Mukisa Biscuit Manufacturing Company Ltd Vs. West End Distributors Ltd (1969) E.A 696. He emphasized that the law requires the disclosure of a cause of action under Order VII Rule I (e) of the Civil Procedure Code R.E 2019. On examining the plaintiffs plaint, Mr. Chiputula asserted, it was observed that it failed to comply with this requirement by not disclosing a cause of action. Mr. Chiputula argued that in the case, of Stanbic Finance Tanzania Ltd Versus Giuseppe Trupia and Chiara Malavasi [2002] TLR 221, it was stipulated that in determining whether the plaint discloses a cause of action against the Defendant, the plaint must be considered within its four corners, including its annexures. The court further defined the term "cause Page 3 of 12 of action" as the facts that give a person the right to seek judicial redress or relief against another, as found in the plaint and its annexures. The learned counsel also referred to the case of John M. Buyombalirwa v. Agency Maritime Internationale (Tanzania) LTD TCA 13 [1983] TLR, where it was held that the expression "cause of action" is not defined under the code but can be taken to mean the facts necessary for the plaintiff to prove in order to succeed in the suit. Mr. Chiputula mentioned that Black Law Dictionary defines cause of action as "a group of operative facts giving rise to one or more bases for suing or a factual situation that entitles one person to obtain a remedy in court from another person." He referred to legal- dictionary.thefreedictionary.com, which defines cause of action as the fact or combination of facts that gives a person the right to seek judicial redress or relief against another, as well as the legal theory forming the basis of a lawsuit. Mr. Chiputula referred this court to the case of Coke v. Gill. (1873) 8 CP 107 (116), where the word "cause of action" was defined as every fact that would be necessary for the plaintiff to prove, if contested, in order to support their right to the judgment of the court. Mr. Chiputula explained that the elements surrounding the cause of action must be assessed by looking at the case. He stated that every judicial action must involve the following elements: a primary right possessed by the plaintiff, a corresponding primary duty devolving upon the defendant, a delict or wrong committed by the defendant consisting of a

breach Page 4 of 12 of such primary right and duty, a remedial right in favor of the plaintiff, and a remedial duty resting on the defendant arising from this delict, and finally, the remedy or relief itself. He emphasized that every action, no matter how complicated or simple, must contain these essential elements for the court to determine the matter. Referring to paragraph 6 of the Plaint, Mr. Chiputula pointed out that the Plaintiff pleaded that a company known as Nannauka General Enterprises & Company Limited took over and merged an individual overdraft facility granted to Suleman Nannauka with its existing term loan facility. He noted that the merged facilities amounted to a certain sum, and a copy of the facility letter was appended and marked as Annexure SN-1 to the plaint. According to Mr. Chiputula, it is a requirement under the law that before a person can exercise their right to sue, they must establish that they have a cause of action against the adverse party for which redress is sought. He referred to Order VII, rule 1 (e) of the Civil Procedure Code, Cap.33 (R.E 2019), which provides that a plaint must contain the facts constituting the cause of action and when it arose. However, averred Mr. Chiputula, in the present case, the cause of action has not been disclosed because the mortgage agreement was signed between the 1st Defendant and Nannauka General Enterprises & Company Limited, and the Plaintiff was not a party to the mortgage agreement. He explained that as a guarantor, the Plaintiffs duty was to Page 5 of 12 discharge liability in case of default, and the securities were willingly placed to assist the 1st Defendant in recovering the debts in case of any. Mr. Chiputula stated that the genesis of the matter originated from the company's failure to repay the loan received from the 1st Defendant, which led to the disposal of the securities. He mentioned that it would have been more meaningful and justifiable if the Plaintiff had pleaded that the debts were fully paid and the 1st and 2nd Defendants disposed of the securities, or if the default notice was not served to the Plaintiff prior to the disposal. However, he pointed out that the claim stated in the Plaint does not disclose a cause of action. He referred to a remark made in the case of Ally Issa Chilindima v. Bank of Africa (T) Ltd, where it was stated that failure to pay the loan installments, as per the agreement, gives cause for the bank to recover the loan amount. Mr. Chiputula strongly argued that since the alleged cause of action arises from the disposal of the voluntarily provided securities to secure the loan, and the loan was given to a person who is not a party in the current matter, the disposal of the securities to recover the loan cannot be considered a factor in establishing a cause of action. He referred to the case of Auto Garage & others v. Motokov (No3) and stated that the Plaintiff must establish that they had a right, the right was violated, and the Defendant is liable. Based on the case of Ally Issa Chilindima (supra), he asserted that the cause of action cannot be formed as a result of preventing the execution of contractual duty. Referring to the case of William David Carlisle Wise v E.F. Hervey Limited, Mr. Chiputula highlighted that a cause of action is only disclosed Page 6 of 12 when a factual situation is alleged that contains facts upon which a party can attribute liability to the other or establish a right or entitlement to a judgment in their favor against the other. Concluding his submission, Mr. Chiputula prayed that the suit be struck out or rejected with costs. Counsel for the Plaintiff Mr. Stephen Lekey, on his part, stated that after carefully going through the submission, it was his humble submission that the preliminary objection was misconceived in both law and facts. He

emphatically and outrightly prayed this court to dismiss the objection with costs. The learned counsel for the Plaintiff argued that the Defendants claimed that the plaint did not disclose a cause of action but highlighted that they based their conclusion on only one paragraph of the plaint, specifically paragraph 6. He pointed out that the instructive case of John M. Byambolirwa, Stanbic Finance Tanzania Ltd, and others, which the Defendants had quoted and relied upon, should not be ignored. Mr. Lekey acknowledged that the case of John M. Byambolirwa (Supra) required the plaint to disclose the cause of action, as supported by other cases such as Anthony Leornard Msanze & Another v. Juliana Elias Msanze & Others, Civil Appeal No 76 of 2012 CAT (Unreported) and Order VII Rule 1 of the Civil Procedure Code (Supra). He referenced the apex court's decision in the case of Anthony Leornard Msanze, which held that the cause of action should be discovered by looking only at the plaint, without delving into the written statement of defence or replies. The learned Counsel emphasized that the plaint should be examined within its four corners, as established in the case of Stanbic Finance Page 7 of 12 Tanzania Ltd Vs. Giuseppe Trupia and Chiara Malavas [2002] TLR

217. Mr. Lekey noted that the plaint must be perused along with any attachments considered part of it, assuming the truth of any express or implied allegations of fact. He argued that when looking at the plaintiffs plaint and its attachments, it indeed disclosed the cause of action. Mr. Lekey stated that the cause of action against the 1st and 2nd Defendants was the unlawful sale of the plaintiff's properties. While he acknowledged that the plaintiff was a guarantor of the loan advanced to Nannauka General Enterprises Co. Ltd. and that Nannauka failed to repay the loan, he clarified that the plaintiffs grievances were related to the compliance of the law in the exercise of the 1st Defendant's right through the 2nd Defendant. He referred to specific paragraphs of the plaint and annexures to illustrate the facts supporting the plaintiff's grievances. Mr. Lekey emphatically highlighted the relevant provisions of the Land Act and the Auctioneers Act, which the Defendants allegedly failed to comply with regarding the sale of the properties. He pointed out the lack of proper public notice and publication, as well as the absence of a valuation before the sale referencing the case of Lengai Lemako Laiza ©Paulo Lengai
- v. CRDB Bank PLC & Others, Land Case No. 58 of 2016 [Unreported]. He emphasized the duty of care of the mortgagee (1st Defendant) to obtain the best price and behave as a reasonable person in conducting the sale. Mr. Lekey argued that all the facts contained in the plaint and its annexures established the plaintiffs cause of action against the 1st and 2nd Defendants. He addressed the Defendants' reference to the case of Jem Page 8 of 12 International Company Limited (Supra), stating that it was irrelevant since there was no dispute over the loan but rather focused on the Defendants' conduct in exercising their rights. Mr. Lekey also distinguished the case of Ally Issa Chilindiman (Supra), emphasizing that the properties in question had not yet been sold. He concluded by quoting a line in R. v. Paddington, Valuation Officer, Exparte Peachey Property Corpn Ltd [1966] 1 QB 380 at 4001 that the court would listen to anyone Whose interests are affected by what has been done. The learned counsel rested his case by a prayer that the objection raised by the Defendants be dismissed

with costs. I have dispassionately considered the submissions by both learned counsel. I will start from where the learned counsel for the plaintiff Mr. Lekey ended namely a reminder that courts of justice should [strive] to listen to anyone whose interests are affected as per the case of ... V. Paddington, Valuation Officer, Exparte Peachey Property Corpn Ltd (Supra). I totally agree with the reasoning of the learned counsel. This is in line with rules of natural justice in general and the overriding objective principle in particular. Nevertheless, and without prejudice to the above, it is also important to remember that courts of justice are guided by rules of procedure. Unlike other forums where anyone can at any time say what they want, whether anyone is listening or not, even by climbing over a table, courts of justice require orderliness. That is the essence of procedural law. In any case, the hearing accorded to parties for determination of the matter at hand fulfills Page 9 of 12 the above requirement raised by the learned counsel emphasized in R. v. Paddington (Supra). A procedural requirement relevant to our discussion at hand is provided for under ORDER VII Rule 1 of the Civil Procedure Code (Supra) "the CPC" which requires that the plaint contains "the facts constituting the cause of action and when it arose." The next relevant question would be what is a cause of action? The CPC does not define the phrase "cause of action." In the case of John M. Byombalirwa v. Agency Maritime Internationale (Supra) the Court of Appeal of Tanzania intervened to fill the gap by expounding on the phrase to mean essential facts which a plaintiff in a suit has to plead and later prove by evidence if he wants to succeed in the suit. Mr. Chiputula started by giving a factual backdrop that is conspicuously missing in Mr. Lekey's response. According to Mr. Chiputula the alleged cause of action in the matter at hand arises from the disposal of the voluntarily provided securities to secure the loan, and the loan was given to a person who is not a party to the current matter. Building on this premise, Mr. Chiputula forcefully submitted that the disposal of the securities to recover the loan cannot be considered a factor in establishing a cause of action, Mr. Lekey on his part, without confronting head on the above assertion by his learned brother, stated that the cause of action against the 1st and 2nd Defendants was the unlawful sale of the plaintiff's properties. The word "unlawful" is, to say the least, a bit problematic to me. This is because the learned counsel for the plaintiff acknowledges that the plaintiff was a guarantor of the loan advanced to Nannauka General Enterprises Co. Ltd. Page 10 of 12 It goes without saying that the learned counsel needed to avoid the above pathway to craft a justifiable and convincing "cause of action." Financial institutions do not act unlawfully by disposing of assets voluntarily placed on their mandate to do so in the event that the loan advanced is not repaid. I do not want to go into the merits of the case but the word "unlawful" taken plainly without going into the evidence would open a pandora box to the detriment of business stability in our country. Before I wind up, I wish to highlight Mr. Chiputula's assertion that the preliminary objection stemmed from a previous land case, Land Case No.8 of 2021, where the plaintiff filed a suit against different parties. I have consulted the said case and I am fortified that the content is, by and large, the same as the matter at hand. That is why I did not labour, as I usually do, to provide a factual and contextual backdrop. Needless to say, that this court in that case rejected the plaint for failure to disclose the cause of action. Premised on the above, I find the Plaint defective for

failure to disclose a cause of action. Consequently, the preliminary objection raised is sustained. I make no orders as to costs. Each part to bear their own cost. It is so ordered. 30/5/2023 Page 11 of 12 COURT: This Ruling is delivered under my hand and the seal of this Court on this 30th day of May 2023 in the presence of Ms. Lightness Kikao, learned advocate for the Plaintiff, Ms. Anastasia Minja learned advocate for the The right to appeal to the Court of Appeal of Tanzania fully explained. Page 12 of 12

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