

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

COMMERCIAL CASE NO. 220 OF 2002

NATIONAL BANK OF COMMERCE LTD.....PLAINTIFF
VERSUS
MS. SAHARA TRADING CO. LTD.....1ST DEFENDANT
FRANCIS GACHANJA.....2ND DEFENDANT

R U L I N G

KIMARO, J.

The plaintiff, the National Bank of Commerce Ltd, has filed a Summary suit under Order XXXV of the Civil Procedure Code, 1966 for recovery of a loan. The loan stood at T.shs 82, 411, 915.00 as of May 6th, 2002 being the principal plus interest. The principal is T.shs 44,255,619.00 and interest T.shs 38,186,297.00. The loan was advanced to MS SAHARA TRADING COMPANY LIMITED. Francis Gachanja is the second defendant. He has been sued as a guarantor of the loan. It is pleaded by the plaintiff that Gachanja executed a legal mortgage over plot No. 364 Block "44" Kijitonyama Area, Dar-Es-Salaam City, Certificate No.186247/93 pledging the property security to secure repayment of the loan.

The loan has not been repaid to date. Gachanja has filed an application under Order XXXV rules 2 and 3 and sections 68 (e) and 95 of the Civil Procedure Code 1966, seeking for leave to appear and defend the suit.

The main reason given to support the application, (as per the affidavit of the applicant and the submission by his advocate,) is that the applicant did not execute the mortgage deed to secure the repayment of the loan taken by the first defendant, as the plaintiff has shown.

In terms of paragraph four of his affidavit, the applicant is a customer of CRDB Lumumba Branch. Sometimes in 1986, he took a loan from the said CRDB. As a security for the loan, he mortgaged the property which the plaintiff says was also mortgaged to secure repayment of the loan advanced to the first defendant.

According to paragraph seven of his affidavit, the applicant denies having even signed the mortgage deed and he wonders how his certificate of title for plot No.364 Block 44 Kijitonyama left CRDB and moved to the National Bank of Commerce. He says he has never taken the Certificate of title from the CRDB.

The respondent plaintiff on the other hand says in the affidavit sworn by her officer, one Ernest Mbepera that she has been, at all the material time, the registered mortgagee for lawful consideration in respect of the applicant's property on plot No.364, Block "44" Kijitonyama with CT 186247/93. That the applicant executed the mortgage to secure an overdraft facility granted to the first defendant. The respondent says further that during the

mortgaging transaction, and after conducting due diligence, the respondent found the property to be solely registered in the name of the applicant and it was free from any incumbrances.

What has been given above explains the main reasons for, and against the application.

In application for leave to appear and defend, the applicant must satisfy the court that there are triable issues. The application by Mr. Francis Gachanja does not raise triable issues. There is one main reason for holding so. Although the applicant denies having executed the mortgage and says that the property was mortgaged to the CRDB, Lumumba Branch, this is mere allegation. No evidence has been brought by the applicant to substantiate it. Such transactions are always documented. The Applicant has not produced any document to back up what he has sworn in his affidavit. The copy of the mortgage deed executed with the CRDB has not been produced. Nor has the CRDB been called upon to explain the truthfulness of what the applicant has told the court.

In paragraph five of his affidavit, he deponed that he was planning to apply for another loan at the CRDB and use the same property as security. The affidavit was sworn on 9th October, 2002. At paragraph seven it is deponed that he was making a follow up at the CRDB to know exactly how did they discharge the title to whoever collected it from them.

The application was heard on 27/03/03. From 9th October 2002 to 27th March 2003 it is a period of almost five months. If at all what the applicant was telling the court is true, five months are more than sufficient for him to get the explanation from the CRDB. The inference which this court makes is that the applicant is devising a delay tactic by trying to give an impression that there are triable issues while there is none.

The failure by the applicant himself to produce documents related to the mortgage which he says was executed with the CRDB Bank, Lumumba Branch, is a proof that such a transaction was either none existent or has been completed. Consequently, it is a failure to satisfy this court that there are triable issues.

The application is ultimately dismissed with costs.



N.P.KIMARO

JUDGE

31/03/2003

I Certify that this is a true and correct
of the original of the judge's handwriting

Registrar

Commercial Court

Dares Salaam

Dated

15/4/2003