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

COMMERCIAL CASE NO. 5 OF 2002

SOCIAL ACTION TRUST FUND.....PLAINTIFF
VERSUS
KAYS HYGIENE PRODUCTS LIMITED.....DEFENDANT

RULING

KALEGEYA, J:

Mr. Kabakama, Advocate, for the Defendants has raised a preliminary objection that the suit is incompetent for being in violation of sections 125 and 126 (2) of the Land Act, 1999. Simply put, Mr. Kabakama charges that due notice was not given by the Plaintiff before mounting the present suit hence the incompetency attracting dismissal. He also made reference to **Commercial Case No. 198 of 2002, NBC Ltd vs Universal Electronics & Hardware Ltd and 2 others; Eliyazeli Senkuba vs Uganda Credit and Savings Bank [1965] E.A 624 (on appeal leading to Uganda Credit and Savings Bank vs Eliyazeli Senkuba [1966] E.A 500) and Kanti Printing Works vs Tanga District Council [1970] H.C.D 253.**

In response, the Plaintiffs' Counsel (of the CBS Law Offices) insists that the action is founded on a loan Agreement whose securities also included a debenture on the Company's assets and Mortgage; that though the latter was referred to, does not form the basis of the action.

Facts indisputed are as follows. On 6/2/2001 parties entered into a loan Agreement by which the Plaintiff extended a loan of shs.396 million to defendants. On 1/8/2001 Plaintiffs granted to Defendants an additional facility of shs.25 million. Both facilities were secured by a debenture over the Defendants' assets and also by a Legal Mortgage over the Defendants' Right of Occupancy with Certificate of Title No. 24234. The Plaintiffs are now before this Court charging that the Defendants did not service the facility as per terms of the loan Agreement such that by 27/1/2004 the outstanding liability, in terms of principal and interest, stood at shs.630,214,173.36 hence the present suit whose prayers are:

> *"(a) Payment of Tanzania Shillings Six Hundred Thirty Million Two Hundred Fourteen Thousand One Hundred Seventy Three Cents Thirty Six (Tshs.630,214,173.36) only being the principal debt and interest on the amount claimed at the rate of twenty percent (20%) per annum from 30th June, 2001. And in the alternative.*
>
> *(b) Sale of mortgaged property and charged assets.*
>
> *(c) Interest on the decretal amount at the Court's rate from the date of judgment till full and final satisfaction of the decree.*
>
> *(d) Costs of and incidental to the suit.*
>
> *(e) Any other reliefs the Court may deem just to grant."*

It is also undisputed that the Plaintiffs did not give notice to the Defendants in terms of Section 125 of The Land Act, (Act No. 4 of 1999). S. 125 of the Land Act relied upon by Defendants, in part provides:

"125. (1) Where a borrower is in default of any obligation to pay interest or any other periodic payment or any part thereof due under any mortgage or in the performance or observation of any covenant, express or implied in any mortgage and continues so to be in default for one month, the lender may serve on the borrower a notice in writing to pay the money owing or to perform and observe the agreement as the case may be.

(2) ……

(3) Where the borrower does not comply within two months of the date of service, with the notice served on him under subsection (1), the lender may –

(a) sue the borrower for any monies due and owing under the mortgage;

(b) ……

(4) The Minister shall by regulations, prescribe the form and content of a notice to be served under this section and where notice to be served under this section has been so prescribed, a notice served under subsection (1) shall be in that form and shall be void if it is not in that form.

126. (1) The lender may sue for the money secured by the mortgage only in the following cases –

(a) where the borrower is personally bound to repay the money;

(b) ……
……

(2) No action shall be commenced until the time for complying with a notice served under section 125 has expired.

……

On the other hand, the Plaintiffs, insist that the loan Agreement entitles them to embark on the course taken and rely on the following clauses therein:-

"PAYMENT OF THE LOAN, INTEREST AND OTHER CHARGES

1.0 The Company shall, on demand and in accordance with the provisions herein, pay the discharge to SATF, a sum of Tanzania Shillings Three Hundred Ninety Six Million (Tshs.396,000,000/=) only. Being the principal amount of the Loan facility extended to the Company by SATF pursuant to the Loan Agreement between SATF and the Company dated the 6th day of February, 2001 (hereinafter called the "Loan") together with interest charged thereon and other charges payable in accordance with the Loan Agreement between the Company and SATF dated 6th day of February, 2001 (hereinafter called the "Loan Agreement")."

"ARTICLE 5

EVENTS OF DEFAULT

5.0 Notwithstanding anything herein contained to the contrary, the principal moneys hereby secured together with any unpaid interest which shall have accrued hereunder and together also with all other moneys secured by this Debenture shall automatically and immediately become repayable and payable with or without notice if any one of the Events of Default described in the Loan Agreement occurs."

And Clause 3 of the Mortgage Deed partly provides as follows:-

"The amounts above stated shall be payable in the manner stipulated in the Loan Agreement and Debenture and all the covenants, stipulations, provisions and powers contained in or subsisting in relation to the Loan Agreement and the Debenture shall extend and apply to this Mortgage..."

Now for the merits.

As already observed, it is beyond controversy that in relation to the action pegged on Mortgage no notice was issued under the Land Act. In terms of s. 125 (4) of the Act, and as supported by various authorities as reflected, an action on Mortgage filed in violation thereof is automatically invalidated. The question is whether in a situation where the cause of action is pegged on loan as a common factor, whose security however touches many components including a mortgage, the mear inclusion of the realization of the mortgage as one of the reliefs vitiates the foundation of the whole action leading to its total dismissal.

It is as clear as daylight that the Plaintiffs had the option of enforcing the Loan Agreement with or without the debenture and Mortgage; or with just a debenture or just a Mortgage and either way the action would be properly sitted in the Court.

Having carefully considered the arguments and the law, I am satisfied that the Plaintiffs could not, without due notice, mount an action for relief

pegged on mortgage. At the sametime however, I am satisfied that, in the circumstances, where the only offensive element is the reference to the Mortgage, it would not be in the interest of justice to dismiss the whole claim as urged by the Defendants. A proper remedy is to order the Plaintiffs to effect an amendment which would remove the offending elements. This stand is not of my own creation, it has the backing of the law. Under O. VII, Rule 11 CPC as amended by GN 228 of 1971;

> *"The Plaint shall be rejected in the following cases:-*
>
> *(a) where it does not disclose a cause of action;*
>
> *(b) ……*
>
> *(c) where the suit appear from the statement in the plaint to be barred by any law;*
>
> *Provided that where a plaint does not disclose a cause of action or* ***where the suit appears from the statement in plaint to be barred by any law and the Court is satisfied that if the Plaintiff is permitted to amend the Plaint****, the plaint will disclose a cause of action or, as the case may be,* ***the suit will ceaze to appear from the plaint to be barred by any law, the Court may allow the Plaintiff to amend the plaint*** *subject to such conditions as to costs or otherwise as the Court may deem fit to impose"* (emphasis mine).

Unfortunately, none of the Counsel addressed the Court on this. That notwithstanding, the law is as reflected above.

For reasons discussed, the preliminary objection stands allowed in part. The Plaintiffs should amend the plaint to remove the offending element.

The Plaintiffs to file an amended plaint by 13/5/2004. The Defendants to file an amended written statement of Defence by 19/5/2004. Reply, if any, by Plaintiff, by 21/5/2004. 1st Pretrial and scheduling conference on 24/5/2004.

L.B. KALEGEYA

JUDGE

Delivered

L.B. KALEGEYA

JUDGE

7/5/2004

1,423 words

I Certify that this is a true and correct of the original order Judgement Ruling

Sign .....

Date 7/5/04