IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: NDIKA, J.A., SEHEL, J.A., And KENTE, J.A.)

CIVIL APPEAL NO. 373 OF 2020

AUSTACK ALPHONCE MUSHI ..... APPELLANT

VERSUS

BANK OF AFRICA TANZANIA LTD ..... FIRST RESPONDENT

MABUNDA AUCTION MART CO. LTD ..... SECOND RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Mbeya)

(Levira, J.)

dated the 15th day of October, 2018
in
Land Case No. 15 of 2015

.....

JUDGMENT OF THE COURT

21st & 27th September, 2021

NDIKA, J.A.:

In the High Court of Tanzania at Mbeya, Austack Alphonce Mushi ("the appellant"), sued Bank of Africa Tanzania Ltd. and Mabunda Auction Mart Co. Ltd. ("the first and second respondents" respectively) for breach of a loan agreement under which Masaleni Linner Company Ltd. ("MLCL"), of which the appellant was a shareholder and a director, was advanced overdraft and term loan facilities. The said facilities were secured by a mortgage over the appellant's landed properties. The crisp issue in the trial was whether the appellant was a party to the loan agreement for him to be entitled to sue the

respondents on it for breach thereof. The High Court (Levira, J., as she then was) answered that question in the negative. Resenting the decision, the appellant has now appealed to this Court.

It will be helpful to begin with the facts of the case, which, we think, are fairly straightforward and mostly undisputed.

The appellant was a shareholder and a director of the MLCL. On 22nd March, 2013, MLCL entered into a loan agreement with the first respondent for overdraft and term loan facilities in the sums of TZS. 50,000,000.00 and TZS. 130,000,000.00 respectively. The facilities were secured by, inter alia, a legal mortgage over the appellant's landed properties, namely, Plot No. 191, Block 'T', Mwanjeiwa area, Mbeya City and Plot No. 1541, Block 'M', Forest Area, Mbeya City ("the mortgaged properties") in favour of the first respondent.

It turned out that MLCL did not repay the loan as agreed, claiming that its crop farming project, for which the credit facilities were sought, had been afflicted by bad weather. By a letter dated 29th January, 2014 (Exhibit P.2), the appellant, acting as MLCL's Managing Director, wrote to the first respondent requesting a rescheduling of the repayment of the loan. It seems that the said request was not granted. Subsequently, the second respondent, acting on the first respondent's instructions, advertised in the *Nipashe*

newspaper of 28th May, 2014 that the mortgaged properties were up for sale at a public auction due to be conducted on 14th June, 2014. In an apparent bid to avert the auction, the appellant initially instituted a suit over the matter in the District Land and Housing Tribunal of Mbeya, which ended in vain as it was terminated for want of pecuniary jurisdiction.

Still unyielding, the appellant instituted the suit in the High Court, which is the subject of this appeal, for general and special damages for what was pleaded in paragraph 4 of the plaint as *"wrongful acts of breaching the loan agreement."* It was further pleaded in paragraph 19 of the plaint that despite the appellant's demands, the first respondent failed or neglected to consider the circumstances that constrained the appellant from complying with the terms and the conditions of the loan agreement and that it was insisting to go ahead with the proposed sale of the mortgaged properties. In the premises, the appellant prayed for the following reliefs:

1. *Declaration that the intended sale of the mortgaged properties is premature as the plaintiff [the appellant herein] is in negotiations to pay the outstanding loan balance.*
2. *An order for extension of time within which to finalise the negotiations going on.*
3. *Permanent injunction prohibiting the defendants [the respondents herein] from selling the mortgaged property.*
4. *Costs of the suit.*

5. *Any other relief or reliefs that the Honourable deems fit and just to grant.*

In their joint written statement of defence, the respondents not only denied the claim but the first respondent also asserted its automatic right under the law to sell the mortgaged properties following MLCL's default to repay the loan in breach of the agreement. Accordingly, they prayed that the suit be dismissed with costs.

For trial, three issues were framed, the first one, being whether the appellant was a party to the loan agreement for him to be entitled to sue the respondents on it for breach thereof. As indicated earlier, the High Court determined the said issue in the negative, an outcome which precipitated the dismissal of the suit with costs.

Resenting the aforesaid decision, the appellant has now appealed on two grounds, which we rephrase as follows:

1. *That the appellant having mortgaged his landed properties in favour of the first respondent to secure the loan taken by MLCL, the learned trial Judge erred in law and in fact in dismissing the suit instead of striking it out or ordering for a joinder or substitution of the parties in accordance with the law.*

2. *That the learned trial Judge erred in law and in fact in holding that the MLCL breached the loan agreement although it was in evidence that MLCL wrote the first respondent on 29th January, 2014 requesting*

for a rescheduling of the loan repayment on the ground that the appellant's agricultural activities for which the loan was taken had been affected by bad weather.

Mr. Justinian Mushokorwa, learned counsel, argued the appeal for the appellant. In highlighting the written submissions he had lodged in support of the appeal, he contended, in respect of the first ground of appeal, that after the learned trial Judge had noticed that the appellant had not joined MLCL which, being the borrower, was a necessary party to the suit, it ought to have either struck out the suit or ordered for a joinder or substitution of the parties instead of dismissing the suit. To bolster his submission, Mr. Mushokorwa cited two cases: **Conrad Berege v. Registrar of Cooperative Societies and the Attorney General** [1998] T.L.R. 22 decided by the High Court (Lugakingira, J., as he then was) and **Stanslaus Kalokola v. Tanzania Building Agency and Mwanza City Council**, Civil Appeal No. 45 of 2018 (unreported) for the proposition, in terms of Order I, rule 10 (2) of the Civil Procedure Code, Cap. 20 R.E. 2019 ("the CPC"), that it was open to the trial court at any stage of the proceedings, even when formulating the judgment, to order addition of a person as a party to the case who ought to have been joined but was not joined.

As for the second ground, the learned counsel argued, in essence, that since the first respondent had not disputed receiving the appellant's letter

requesting for rescheduling of the loan repayment (Exhibit P.2) and that it did not respond to it, by necessary implication it consented to the requested rescheduling and, therefore, it was precluded from proceeding with the auctioning of the appellant's properties.

Replying, Mr. Kamru Habib, learned counsel for the respondents posited, on the first ground of appeal, that the trial court rightly held that the appellant, not being a party to the loan agreement, had no *locus standi* to sue the respondents on that agreement and that the appellant's omission to join MLCL as a plaintiff in the suit should not be blamed on the trial court. It was his further argument that the provisions of Order I, rule 10 of the CPC were inapplicable to the suit at hand because the suit was not instituted through a *bona fide* mistake. It was a suit instituted by a mortgagor who alleged that there was a breach of a loan agreement but the trial court rightly held that he was not a party to the loan agreement.

Mr. Habib went on to distinguish the cases relied upon by the appellant. On the case of **Stanslaus Kalokola** (*supra*), he argued that it concerned a plaintiff's failure to implead the Government of Tanzania as a necessary party in accordance with the provisions of Government Proceedings Act, Cap. 5 R.E. 2002 (now R.E. 2019). As regards **Conrad Berege** (*supra*), he argued that it concerned the permissive nature of the provisions empowering the trial court,

upon application by a party or on its own, to order a joinder of a party at any stage of the proceedings.

As regards the second ground, Mr. Habib submitted that since it was determined that the appellant had no standing to sue upon the loan agreement, the issue whether the said loan agreement was frustrated or not did not arise. He reiterated that it was MLCL that could have sued on the loan agreement, not anyone else.

In a brief rejoinder, Mr. Mushokorwa claimed that since the credit facilities to MLCL were secured by a legal mortgage over the appellant's properties, the appellant was, therefore, a party to the loan agreement and that he was entitled to sue upon it.

We have examined the record of appeal and considered the contending submissions of the learned counsel as well as the authorities cited. In our view, the appeal turns on two main issues: first, whether the appellant was a party to the loan agreement for him to be entitled to sue the respondents on it for breach thereof; and secondly, if the first issue is answered in the negative, then whether the learned trial Judge was right in dismissing the suit instead of striking it out or ordering for a joinder or substitution of the parties in accordance with the law.

Starting with the first issue, it is noteworthy from the impugned judgment, at pages 130 to 134 of the record of appeal, that the learned trial Judge took into account, rightly so, that the parties to the loan agreement were MLCL as the borrower and the first respondent as the lender. She was alive to the fact that although the appellant was a shareholder and a director of MLCL, on the principle of separate corporate personality as enunciated in the path-breaking decision in **Salomon v. Salomon** [1897] AC 22, MLCL was in the eyes of the law a different person altogether from the appellant or any other of its shareholders. We think it is instructive to reproduce the aforesaid principle as stated by Lord Macnaghten at page 54, which the learned Judge also excerpted in her judgment:

> *"The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are subscribers liable, in any shape or form, except to the extent and in a manner provided by the Act."*

Having determined that MLCL was a distinct legal person from the appellant, the learned trial Judge held that upon the doctrine of privity of

contract as elaborated in **Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co. Ltd.** [1915] 847, the appellant, acting in his personal capacity, could not sue upon the loan agreement as he was not privy to the contract. She also referred to the decision of the High Court, Commercial Division at Dar es Salaam in **Puma Energy Tanzania Ltd. v. Spec-Check Enterprises Ltd.,** Commercial Case No. 19 of 2014 (unreported) where it was held that the plaintiff in that case had to establish if it had *locus standi* to sue upon the contract because under the doctrine of privity of contract it is only the parties who are privy to the contract that are obliged to perform it and, consequently, have the right to sue upon it to enforce performance.

On our part, we entertain no doubt that the learned trial Judge marshalled capable argument to support her conclusion that the appellant had no standing to sue the respondents on the loan agreement. However, by way of emphasis, we would add that contract, as a juristic concept, is the intimate if not the exclusive relationship between the parties who made it – see Furmston, M.P., **Cheshire, Fifoot and Furmston's Law of Contract** (16th edn), Oxford University Press, Oxford, 2013 – Online Edition, at page 698. A contract, being principally a matter between the contracting parties, will normally state the rights and duties of the parties but having nothing to do with other parties. In **Tarlok Singh Nayar & Another v. Sterling General**

Insurance Company Limited [1966] 1 EA 144 and **Kayanja v. New India Assurance Company Limited** [1968] EA 295, the Court of Appeal for East Africa recognised the application of the common law doctrine of privity of contract as it held that a stranger to a contract cannot sue upon it unless he is given a statutory right to do so. See also the decision of the High Court (Massati, J., as he then was) in **Tanzania Union of Industrial and Commercial Workers (TUICO) at Mbeya Cement Company Ltd. v. Mbeya Cement Company Ltd. and National Insurance (Tanzania) Ltd.** [2005] T.L.R 41 stating and applying the said doctrine.

We recall that Mr. Mushokorwa claimed that because the loan agreement referred to the mortgaged properties as securities, as shown at page 10 of the record of appeal, the appellant necessarily became a party to the agreement. This submission, with due respect, is clearly misconceived. As the learned trial Judge rightly held, the reference to such properties as securities did not make the appellant a party to that agreement. He was only a party to the contract of guarantee between him and the first respondent under which the securities were given and upon which he assumed the obligation to repay the loan upon MLCL's default. He could only sue upon such contract but not upon the loan agreement to which he remained a stranger.

We turn to issue whether the learned trial Judge should have struck out the suit or ordered for a joinder or substitution of the parties in accordance with the law instead of dismissing it.

In submitting that the trial court should have ordered for a joinder or substitution of the parties, Mr. Mushokorwa rightly placed much reliance upon Order I, rule 10 of the CPC as the controlling provision on the matter. It stipulates as follows:

> *"10.-(1)**Where a suit has been instituted in the name of the wrong person as plaintiff** or where it is doubtful whether it has been instituted in the name of the right plaintiff the court may at any stage of the suit, **if satisfied that the suit has been so instituted through a bona fide mistake, and that it is necessary for the determination of the reai matter in dispute so to do,** order any other person to be substituted or added as plaintiff upon such terms as the court thinks just."* [Emphasis added]

The above provision, in our considered opinion, plainly empowers the court to order a substitution or addition of a person as plaintiff where a suit has been instituted in the name of the wrong person as plaintiff subject to two conditions. First, that the court must be satisfied that institution of the suit in the name of the wrong person was a *bona fide* mistake. Secondly, that the

order for substitution or addition of person as plaintiff is necessary for the determination of the controversy between the parties. We agree that on the authority of **Conrad Berege** (*supra*), which we approve, that such an order could be made at any stage of the proceedings including when the trial judge is formulating the judgment.

In the instant case, it is too plain for argument that the appellant provided no factual or legal basis upon which the trial court could have considered to invoke the provisions of Order I, rule 10 of the CPC. We have examined the transcript of the trial proceedings but we found no material upon which the learned trial Judge could have considered and determined whether the two conditions stated above were met.

As a matter of fact, when the appellant's claim as pleaded in the plaint and supported by the evidence is examined critically, it leaves no doubt that the institution of the suit in the name of the appellant was not a *bona fide* mistake but an act calculated to delay the first respondent's lawful exercise of its right of sale under the mortgages and the law. This fact is laid bare not least by the apparent frivolity of the appellant's cause of action as pleaded in paragraphs 4 and 19 of the plaint. The assertion in paragraph 4 that the respondents committed *"wrongful acts of breaching the loan agreement"* was neither particularised in the succeeding averments in the plaint nor was it

substantiated in the evidence. Most inexplicably, the averment in paragraph 19 of the plaint faults the first respondent for failing to consider the circumstances that constrained the appellant from complying with the terms and the conditions of the loan agreement and for being intent to go ahead with the proposed sale of the mortgaged properties. This averment, on its own or with the rest of the averments in the plaint, constitutes no cause of action for breach of contract because the first respondent had no contractual duty to consider the circumstances that allegedly constrained the appellant from fulfilling his contractual obligation as guarantor of repaying the loan upon MLCL's default. The request by the appellant or MLCL for rescheduling of the loan repayment was a matter for negotiation and agreement by the parties and that the first respondent's refusal to reschedule the loan could not constitute a breach of contract entitling the appellant (or MLCL) to the reliefs prayed for. The trial court's intervention in a purely private contractual setting was, therefore, unwarranted.

The above said, we uphold the trial court's finding that the appellant was not privy to the loan agreement and that it could not sue the respondents upon it. We also hold that the dismissal of the appellant's suit was merited because there was no legal justification for the trial court to invoke the Order I, rule 10 of the CPC. Consequently, the first ground of appeal fails.

The foregoing determination, in our view, is sufficient to dispose of the appeal. On that basis, we find no pressing need to deal with the second ground of appeal.

In the final analysis, we dismiss the appeal with costs.

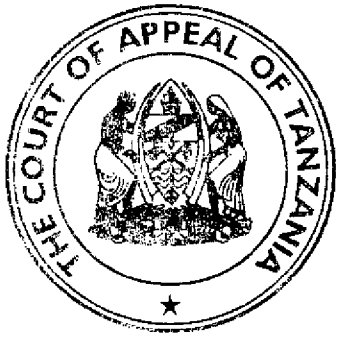
DATED at **MBEYA** this 25th day of September, 2021

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

This Judgment delivered this 27th day of September, 2021 in the presence of Mr Justinian Mushokorwa, counsel for the Appellant and Mr. Felix Kapinga, counsel for the Respondents, is hereby certified as a true copy of the original.



H. P. Ndesamburo
DEPUTY REGISTRAR
COURT OF APPEAL