

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY**

AT DAR ES SALAAM

CIVIL CASE NO. 246 OF 2014

STANBIC BANK (T) LTD.....PLAINTIFF

VERSUS

LISHA INVESTMENT LIMITED.....1ST DEFENDANT

LISWA SHABAN MABULA.....2ND DEFENDANT

THOMAS LISWA SHABAN.....3RD DEFENDANT

SHABAN LISWA SHABAN.....4TH DEFENDANT

JUDGMENT

Date of Last Order: 4/12/2019

Date of Judgment: 31/12/2019

S.M. Kulita, J.

The Plaintiff STANBIC BANK (T) LIMITED claims against the defendants namely;

- Lisha Investment Limited – 1st defendant
- Liswa Shaban Mabula – 2nd Defendant
- Thomas Liswa Shaban – 3rd Defendant
- Shaban Liswa Shaban - 4th Defendant

jointly and severally for the payment of USD 181,363.54 being the outstanding amount from credit facilities advanced to the 1st Defendant for purchase of motor vehicles and trailers leased to the 1st Defendant. The plaintiff further claims for payment of interest and penalties.

It is alleged that on 7/9/2012 the plaintiff offered the defendants a credit facility to the tune of Tshs. 371,324,443/58 and the same was accepted by the Defendants on the 10/9/2014. According to the plaint

the lease agreement for the motor vehicles between the plaintiff and defendants were secured by personal guarantee of the Directors of the 2nd, 3rd and 4th defendants. The mode of payment of the rental charges and monthly instalments were clearly stated in the said leased agreement.

It is further alleged that the plaintiff did observe the terms of credit facilities agreement of discharging money for payment of motor vehicles which were ultimately leased to the 1st Defendant, however the defendant did not observe the terms of credit facilities agreement as well as terms and conditions of the lease agreement to repay the rental amounts as agreed. The 1st defendant was therefore in default. That the plaintiff issued default notices and demand letters to the defendants but they never observed them.

The plaintiff therefore claims for the following against the defendants;

- (i) That the Defendants be ordered to pay the sum of USD 181,363.54 being the outstanding amount up to 16/10/2014 which are the credit facility and interests advanced to the 1st defendant by the Plaintiff.
- (ii) That the defendants be ordered to pay interest on the debt due to the agreed commercial rate of 24% per year from 1/11/2014 to the date of judgment.
- (iii) That the defendants be ordered to pay interest on the decretal sum at the court's rates of 12% from the date of judgment to the date of payment in full.

- (iv) The defendants be ordered to pay costs of the suit.
- (v) Any other relief(s) that the court shall deem just and fit to grant.

In reply to the plaint the Defendants raised the Counter claim against the Plaintiff stating that they had paid the plaintiff 30% of the purchase price for the motor vehicles which is equivalence to Tshs 138,060,000/=. They also paid comprehensive Insurance for those vehicles amounting Tshs.15,823,800/=. They also claimed that the Motor vehicle No. T 264 CEP with trailer No. T 239 CEP were damaged in the fire accident and comprehensively insured by the Insurer but the Plaintiff withheld the payments thereby making it difficult for the plaintiff to conduct its business under the agreement. The Defendant further alleged that the Lease agreement was to lapse on 25/11/2015 but the plaintiff impatient reposed two trucks with Reg. No. 243 CEP and T 572 CES ignoring the fact that the 1st plaintiff could only repay the arrears under the contract by utilizing the leased trucks as there was no agreed attentive source of income generated to repay the loan.

In the said counter claim the Defendants claims for the following reliefs:-

- (i) Refund of Tshs. 138,060,000/= being 30% of the trucks purchase price.
- (ii) Refund of Tshs. 15,823,000/= being the comprehensive insurance policy cover paid by the defendant in respect of the leased trucks.

- (iii) Interests on items (1) and (ii) at the rate of 24% from the date of contract the date of judgment.
- (iv) Interests on the decretal sum at the court's rate of 12% from the date of judgment to the date of payment.
- (v) Costs.

During the hearing one person testified for the plaintiff's case while the defence case consists a total number of two witnesses. The plaintiff was represented by Mr. Frederick Mbise (Advocate) while the Defendants were represented by Mr. Geoffrey Martine (Advocate).

The only witness for the plaintiff's case, MS. SHAINUR FERNANDES (PW.1) who is a Banker at Stanbic Bank (Plaintiff) working as a Loan Manager at Stanbic Headquarters Centre, Dar es salaam. The witness testified that her duties as a Loan Manager includes providing loan to customers and making sure that the same are settled according to the terms of agreement that have been signed by the parties ie. Borrowers and Lender.

She said that she knows the Defendants. Her bank provided them with a liquidating facility loan amounting Tshs. 371,234,445/58 with an interest of 24% per annum. PW.1 tendered the loan contract for the said credit Facility Loan dated 7/9/2012 as exhibit. It was received and admitted as Exh.P.1

PW.1 testified that the loan contract was subject to the following conditions;

1. The set date of repayment.

2. The set amount of repayment.
3. Joint registration of the assets.
4. The bank to retain the motor Vehicles Registration Card as custodian.
5. The bank regarded the owner of the motor vehicle till the settlement of debt
6. That the Borrower should surrender assets if he fails to settle the debt to the bank who is the financier.
7. Failure to settle the debt heads to not only return of vehicle but also interests charges well.
8. The bank will be the first and last prayer as if is the possessor of the Motor vehicle cards that are jointly owned by the bank and borrower.

PW.1 said that as the personal guarantors for Lisha Investment (1st Defendant) the 2nd, 3rd and 4th Defendants had to make sure that the loan is settled. PW.1 further stated that the bank had entered a contract with the supplier of the vehicles to set off the debt in case of default. They (bank) therefore entered into a lease agreement with Lisha Investment for that purpose. She tendered the Lease agreements entered between the plaintiff (Bank) and Lisha Investment dated 21/1/2013 and 07/02/2013 as Exhibit. They were received and collectively admitted as Exh P.2.

PW.1 further testified that there was a joint registration, that is a collection of the motor vehicles Registration Cards for the Vehicles which they financed its purchase for the defendants. She prayed to

tender them as Exhibits. The said Motor vehicle Registration Cards numbered seven were received and admitted as Exh. P3 collectively.

It is the testimony of PW.1 that as for the nature of the contract owner of the vehicles is Stanbic Bank (Plaintiff). She said that the Defendant were supposed to consider the "set date" and "set amount" in performing the contract. They defaulted to comply with the date and amount to settle the debt. She said that inspite of several demand notices, letters and meetings still the Defendants failed to settle the debt. They just made a part payment and never completed the rest. That being the case they decided to lodge a case against them. She said that they were still indebting USD 181,363/54 by the time they had decided to file this case against them. It is a principle sum plus interests. PW.1 tendered the Bank statement to prove the debt existence. It was received and admitted as Exh. P.4.

PW.1 said that they had given the Defendant a total number of ten vehicles, 5 lorries and 5 trailers (Deal No. 1 to deal No. 10). They had purchased/inherited the loan from NBC bank by paying Tshs. 52,131,573/40. The balance, Tshs 371,324,443/58 was used to purchase the said vehicles. She said that one of vehicles, a lorry with a trailer got an accident and became light off. The bank was compensated through insurance. She further said that two lorries were attached by the bank at Kibaha as a means of clearing the debt but they were not valuable at all as they were found to be just scrapers. They were nothing in settling the debt. She said that under clause 12.1 and 12.22 of the lease Agreement they have the right to take back the vehicle Assets and sell them to clear the debt.

PW.1 said that the seven remaining vehicles are not in their possession. They are under possession of the 1st Defendant. They had tried to trace them unsuccessfully. She said that the money acquired from the insurer for that one vehicle which had got accident was used to settle the deal for that said vehicle and the business in respect of it ended up there.

PW.1 concluded by praying the court to order the defendants to pay the whole outstanding amount of loan, interest at 24% from the date of filing the case to the date of judgment. She also prays for 12% interest per annum from the date of judgment to the date that the debt will be fully paid. She added that costs of the suit and any other remedy that the court shall deem fit be granted as well.

In the Cross Examination by the Defence counsel Mr. Godfrey Martine, PW.1 stated that they did purchase 10 vehicles for the Defendant, 4 in the first lease agreement and 6 in the 2nd lease agreement. They are total valued at Tshs 371,324,443/58. She also said that the defendant had contributed 30% as down payment which is a procedure. It is equivalent to Tshs. 138,060,000/=. She said that those monies are out of Tshs. 371,324,448/58 the bank had contributed for the acquisition of the said 10 vehicles. PW.1 also stated that the payment of Tshs. 15,000,000/= by the defendant was proper and unrefundable as that is a contractual requirement.

As for the two vehicles attached at Kibaha PW.1 stated that they found them with no engines nor tyres. They were just scrapers. She said that they were sold at Tshs. 15,000,000/= each. She

further stated that the defendant was to settle the debt through working and pay the bank.

That was the end of Plaintiff's case which comprises the testimonies of only one witness. The defence case comprises a total number of two witnesses.

LISWA SHABAN MABULA, the 2nd defendant who testified as DW.2 stated that he resides at Nzega. He engages himself in agricultural activities particularly cultivation of maize at Bariadi in Simiyu Region. He said that prior to that he was a Transporter holding a company namely Lisha Investment. He said that the NBC bank had facilitated him with Tshs. 280,000,000/= for purchasing two vehicles make Scania Lorries with Trailers. When the loan balance was Tshs. 54,000,000/= he decided so go to Stanbic Bank to find another loan to purchase more vehicles and transfer the said balance of Tshs 54,000,000/= to Stanbic Bank. The same applied to the Motor Vehicles Cards for those two vehicles which were under custody of the NBC. There at Stanbic Bank 1st Defendant through the guarantee of its Directors the 2nd defendant (DW.2) was given a loan of Tshs. 371,000,000/= which is 70% of price for the purchase of three vehicles. DW.2 said that he paid the Stanbic Bank a total sum of 138,000,000/= which is the 30% of the three vehicles price.

Dw.2 said that he entered into two contracts with the Stanbic Bank to purchase the vehicles. He was shown Exh P.1 and P.2 and stated that exh P.1 is contracts he had entered with Stanbic (Plaintiff). He said that Exh P.2 involves the contract for the purchase of 2 lorries with two trailers which had been loaned by the

NBC before the same being transferred to Stanbic and 3 lorries make Scania with 3 trailers.

Dw.2 testified that for the purchaser he was alone when the contract was signed. As for the other blanks of signing on which his Directors were supposed to sign DW.2 said that the plaintiff's officials told him to leave them plain and they could fill it later by themselves. They just demanded a commission of 10,000,000/= and he actually gave them.

DW.2 further stated that he later on contributed the said 30% of price and the bank sent them together with the loan to the supplier namely Morocco Commission Agency for supply of 3 lorries make Scania with trailers. He said that the total value of those vehicles is Tshs. 459,400,000/=

DW.2 said that he started business by transporting cement from Kimbiji and Wazo Hill Cement industries located in Dar es Salaam for Mwanza. He used to pay back the return to the plaintiff. However, one of the motor Vehicles got an accident that affected the return progress, as he started to pay back the loan return from the earnings of two vehicles only instead of 3 vehicles. He said that during that time they were in a process of indemnification of the insurance for the said vehicle which had got accident. It was later on paid but doesn't remember the amount that was paid but value of the vehicle was Tshs. 153,400,000/=. Dw.2 said that the indemnification was done to the bank not him. He further said that he asked the bank to replace the Lorry that had got accident but the prayer was not responded.

It is the DW2's testimony that one day while one of the Motor vehicles loading cement from Kimbiji cement Industry was attached by Majembe Auction Mart at Ubungo once it had been filled the fuel at one of the filling Station at Tabata in Dar es Salaam. It was for conveying cement to Mwanza. The reason behind was that it was indebted by Stanbic Bank. The luggage was to be overhauled into another vehicle while that one remained at the said Broker's Yard.

DW.2 further stated that the other vehicle was attached by Majembe auction mart as well at Kibaha while it was going to Dar es Salaam from Mwanza. DW.2 said that the business continued to undermine. He said that the fact that all two vehicles that had remained being attached payments to the bank could not be affected. He tried to consult the bank on that but it was unsuccessful.

Upon been supplied with Exh P.3 (Motor vehicles cards) DW.2 stated that the cards with registration No. T 246 CEP, T 467 CEP and T 472 CEP are for the vehicles that were purchased through the Stanbic loan. He added that their trailers cards have not been produced to court. DW.2 said that the vehicles he had acquired through NBC bank are registered with numbers; T 250 BBG and T 238 BBG. Their trailers are numbered T 242 BBG and T 249 BBG.

Dw.2 stated that he used to return the debt regularly save from the period that one of the vehicles got accident and subsequently when the Lender (Bank/Plaintiff) had attached the remaining two vehicles through the Auctioneer, Majembe Auction Mart.

The witness alleged that the claim of USD 181,363/54 by the Plaintiff is not genuine because the motor vehicle which had got an accident was valued at Tshs. 153,400,000/= and the same was paid by the insurer to the plaintiff herself. It was for a Motor vehicle and its trailer. He further said that the 2nd vehicle was attached at Ubungo by the auctioneer, Majembe. Its value is Tshs. 153,400,000/= including a trailer. Not only that he further said that the 3rd vehicle was attached by Majembe as well under the plaintiff's instructions. He said that vehicle which was attached at Kibaha was valued at Tshs. 153,400,000/= as well. He said that the value for all these 3 vehicles is Tshs. 459,200,000/=. He also said that the fact that he had already paid the plaintiff over 100,000,000/= in settling the said debt, it therefore doesn't make sense to say that he is indebted that USD 181,363/54.

DW.2 said that the returns that he had made to settle the debt plus the value of the properties that they had attached from him (DW.2) it means the bank is in possession of the properties valued at Tshs. 600,000,000/= and still they claim for the said USD 181,363/54.

The witness, DW.2 therefore claims for the court to order the Plaintiff to pay back him his 30% price that he had contributed for the purchase of the Motor Vehicles. He also prays for the Tshs. 15,823,000/= insurance money to be paid back to him as well. He said that the claim by the plaintiff has no merit instead he prays for compensation for breach of contract by the plaintiff.

In the cross Examination by Mr Mbise advocate DW.2 said that for the loan he had acquired at NBC and Stanbic Bank he had managed to get 5 vehicles with 5 trailers. One of the vehicles got fire accident. Two were attached by Majembe at the instructions of the Plaintiff. Two were broken down. He said that the two vehicles that were attached by the court broker were the properties of Lisha investment and NBC collectively. He said that though their debts had been transferred to Stanbic, he had managed to settle them before they had broken down. DW.2 said that Stanbic was wrong to attach the said Vehicles before the lapse of the contract period of three years. He said that according to the contract the insurer was to be paid by the banker but he did pay Tshs. 15,000,000/=. As for the issue of signatories in the contract (Exh. P.1) Dw.2 said that he is the only person who did sign for the borrower. He said that the remaining parts were filled or signed by the bank officials themselves.

Another witness for the defence case is Thomas Liswa Shabani (DW.1). He is the 3rd defendant and a son of the 2nd defendant (DW.2). This witness (DW.1) stated that he is a student at Liaoning Shima University in China. He said that he knows nothing about this case. He added that he also doesn't know the company called Lisha Investment.

He said that he had never signed any contract in the year 2012. He said that in that year he was a form one student, he could not know anything about loan contract. DW.1 was shown Exh P.1 (Loan facility) and stated that the signature put in front of his name

was not put by him and it is not his. He said that he could not enter the business contract while he had no money.

In the cross examination by Mr. Mbise DW.1 said that he doesn't know what is WSD (Written Statement of Defence). He added that he was not asked to do anything in respect of that document. He said that he came to know later that his father holds a company called Lisha Investment.

That was the end of testimonies from both parties. The following issues are to be determined;

- (i) Whether the 1st defendant breached the terms of contract the credit facilities with the plaintiff.
- (ii) Whether the Plaintiff's repossession of the trucks from the 1st defendant was in breach of the Lease agreement.
- (iii) Whether the defendants are indebted to the plaintiff, and if so to what extent.
- (iv) Whether the Plaintiff is indebted to the defendants as per Counter Claim.
- (v) To what reliefs are the parties entitled.

The first issue to be analysed is whether the 1st defendants breached the terms of credit facilities. According to the plaintiff's testimony the 1st Defendant did breach the terms of credit Facilities that's very they took action of attaching some of the suit properties to recover the debt, however the same were not enough to settle the debt. On the other hand the 2nd defendant (DW.2) claims that the plaintiff is the one who breached the contract. He also said that the value of

properties that the plaintiff had attached from him plus the sum of money, over Tshs. 100,000,000/= that he had already paid to settle part of the loan the said debt is already cleared with excess.

The terms of Credit facilities have been stated in the Annexure have been stated in the Annexure LLA - 1 to the plaint (Exh P.1).

The contract signed by both parties states that the repayment period is 36 months between 11/12/2012 and 25/11/2015 (See exhibi. P.2 ie annexure LLA-2 to the Plaint). According to the lease agreement (annexture LLA-2) the total rental Charge is USD 75,008/21 payable as follows; 1st Rental is USD 20,423/8 which was to be paid upon signing of the contract (lease agreement). The agreement mentioned the further 34 rentals being USD 1,549/95 payable on 25th day of each succeeded months commencing on 25/1/2013. The final rental would be due on the 25/11/2015.

The lease agreement at Para 16 deals with the variation in rentals. It means the parties can settle consensually, set and vary the terms of payments according to the business situation like natural hazards, accidents etc. It is evident in this matter that one Vehicle with a trailer which is among the contractual subject matter got fire accident to the extent of light off. It was a short time after the same being supplied to the 1st defendant for working ie. Transportation. As the said vehicle was comprehensively insured by the 1st defendant the plaintiff as the co-owner of the said vehicles was redeemed a new vehicle but the same was not taken to the 1st Defendant so as to replace the lost one. Obvious this must have affected the return of the 1st defendant to the plaintiff. Unfortunately the plaintiff said nothing to justify what she had

done in respect of that said vehicle. The only statement by PW 1 is that the Defendant had already started to default the return payments the allegation which has no proof at all. As the plaintiff has failed to keep the 1st defendant into the original position his act is nothing but a breach of contract. The subject matter of the contract was the said lorries, all of them, supplied to the 1st Defendant.

Another thing that I have noticed from the evidence is that neither party has mentioned the exactly amount that the 1st defendant had already paid to settle part of the debt. It has not been made clearly that by the time the 1st defendant vehicles were attached at Kibaha according to the plaintiffs or Kibaha and Ubungu according to the defendants, how much was the defendants indebted. It was supposed to be clearly exposed to court so that it can reach into a fair decision. Be it noted that while the accident had occurred and the affected vehicle indemnified it was within the contractual period of three years, the same applied to the period when the said two motor vehicles were attached. It means those things had been done while the contractual period was still in time. The records show that the case was filed on 3/12/2014 while the evidence, particularly Exh. P.1 and P2 show that the term of contract was ending up on 25/11/2015.

All in all the plaintiff's conduct indicates breach of contract particularly on the issue of denying to supply to the 1st defendant the motor vehicle indemnified by the insurer to replace the motor vehicle that had got an accident of which the 1st defendant could use together with other vehicles to settle the debt to the plaintiff. Be it noted that the said vehicle was part of the contract which was signed by the plaintiff and the defendant. Therefore it cannot be separated from the

subject matters of the contract. Therefore the 1st issue has not been proved in affirmative.

The 2nd issue is whether the plaintiff's repossession of the trucks from the 1st defendant was in breach of the lease agreement. As stated earlier that the motor vehicle that was indemnified by the insurer was supposed to be taken back to the affected person who is the 1st defendant. As a part of the contract it was wrong for the plaintiff to retain the said vehicle. The plaintiff's act of retaining the said vehicle is a beach of lease agreement.

As for the other vehicles which were attached by the Auctioneer, Majembe they were attached for the reasons that the 1st Defendant had defaulted to pay the return in time followed by total none payment. My view on that remains the same, since the subject matter to the contract has been defaulted by the plaintiff he is the one to be blamed for the none performance of the contract.

The 3rd issue is whether the defendants are indebted to the plaintiff, and if so to what extent. The core issue in this matter is loan. According to the Plaintiff's case the defendant is indebted a total sum of USD 181,363/54. PW.1 said that the said debt includes Principal sum Plus interest thereon. The said witness stated that the defendant had performed just part of the payment. But the testimony of PW.1 who is the only witness for plaintiff is too general. It doesn't specify as to how much was paid and how much was not paid. Furthermore there is no clarification as to what is the principal sum and how much was the interest out of that USD 181,363/54. The defendant is also said to have made a part payment in settling the debt but it has not been clarified as

to how much he had paid. That failure of the Defendant to settle the debt led to the attachment and sale of two vehicles which were under the possession of the defendants but there is no proof shown by the plaintiff as to how much were acquired from the sale of those said vehicles of which PW.1 said that they were just scrapers while DW.1 (2nd defendant) stated that the vehicles were in proper conditions and they were attached by the Auctioneer, Majembe while on the road performing their ordinary activities.

DW.2 said that one lorry was attached by Majembe at Ubungo Dar es Salaam while it was loaded Cement for Mwanza. He also said that the 2nd vehicle was attached while it was on the way back to Dar es Salaam after offloading cement at Mwanza. These contradictions of testimonies on the two sides could be resolved by the vivid evidence from the parties who respectively. That the one who alleges must prove. As for the plaintiff in this matter she was supposed to prove her allegation that the said lorries attached by Majembe were not in good conditions and sold at the said very low price of Tshs. 15,000,000/= as they alleged. A mere statement without proof cannot be accepted. The same applied to the Defendant he was to prove his allegations as well. The law requires the special damages to be specifically proved by evidence. It is a principle of law as per O.VIII, r.14(2) (a) of the Civil Procedure Code [Cap. 33 R.E 2002]. In **ETIENNES HOTEL V. NATIONAL HOUSING CORPORATION, Civil Reference No 32 of 2005, CAT at DSM (unreported)** it was held;

"It is a principle of the law that special damages must be specifically proved by evidence under O.VIII, r. 14(2)(a) of the Civil Procedure Code"

Therefore the issue whether the defendants are indebted to the plaintiff has not been proved.

The 4th issue that is whether the plaintiff is indebted to the Defendant as per the Counter Claim. According to the counter claim and DW.2's testimony the defendants indebt the plaintiff the following sum of money;

- (i) Tshs.138,060,000/= being 30% of the trucks purchase price.
- (ii) Tshs. 15,823,000/= being the insurance cover for the leased trucks.
- (iii) 24% interest from the date of contract to the date of judgment.
- (iv) 12% interest on a decretal sum from the date of Judgment to this date of payment.

The said 30% contribution of the vehicles purchase price which is Tshs. 138,060,000/= and the insurance charges, Tshs. 15,823,000/= are among the terms of contract that the plaintiff and the defendants had entered. Ordinarily the Plaintiff did breach the contract she had entered against the Defendant as stated but there is no evidence the matter is still unsettled. The evidence, including the testimonies of the plaintiff shows that the plaintiff had taken a total number of three lorries with trailers from the defendants to recover the debt and it is undisputable that part of the debt had already been paid. While the 2nd Defendant said it is over 100 million the plaintiff never mentioned the amount paid. This makes me to regard that the debt has been set off and hence nobody has a claim against the other. As stated in the

case of **ETIENNES HOTEL V. NATIONAL HOUSING CORPORATION (Supra)** that special damages must be specifically proved by evidence as per O.Viii, r.14(2)(a) of the Civil Procedure Code. Since the Defendant has failed to prove this claim as alleged in the counter claim he cannot be awarded.

In upshot I find the suit has no merit to either of the parties and the same is hereby dismissed. Each party to bear its own costs.



S.M. Kulita

JUDGE

31/12/2019

