IN THE HIGH COURT OF TANZANIA

(Dar es Salaam District Registry)

AT DAR ES SALAAM

CIVIL CASE NO. 52 OF 2011

KAMBEMBE ENTERPRISES LTD .....PLAINTIFF

VERSUS

N.B.C LIMITED.....1ST DEFENDANT

SADOCK MAGAI.....2ND DEFENDANT

06/02/&13/04/2018

JUDGMENT

MWANDAMBO, J

The Plaintiff, a limited liability company has instituted the instant suit against the Defendants for an assortment of reliefs primarily, a declaration that the appointment of the 2nd Defendant as a receiver manager of the Plaintiff's business and assets is invalid and null and void. From that declaration, the Plaintiff prays for restraining and mandatory orders of injunction, specific and general damages. The Defendants vehemently resist the Plaintiff's claims and pray for dismissal of the suit with costs.

The dispute in this suit hasits genesis from credit facilities the 1st Defendant extended to the Plaintiff in July 2009 for Tsns 369,867,829/=. The facility was a combination of an overdraft facility of Tshs 300,000,000/= for the purpose of working capital and an existing term loan of TShs 69,867,829/=. The credit facility was evidenced by a duly signed letter issued by the 1st Defendant's Mlimani City Branch Manager dated 23rd July, 2009 following approval of the application for an overdraft facility by the Plaintiff. That letter was admitted in

evidence as exhibit P5. According to exhibit P5 the credit facility was secured by amongst others, a debenture over all fixed and floating assets of the PlaintiffCompany registered for unspecified amount.

Other terms included duration of the facility for one year expiring on 31st July, 2010 in relation to the overdraft facility and 30th June, 2011 in relation to the term loan. It was the parties' agreement that the Plaintiff would conduct its account satisfactorily which meant that the loan would have been fully repaid on the expiry date(s).Aithough there was a term for renewal of the facility, parties agreed that such renewal was not automatic meaning that the 1st Defendant could consider renewal having regard to the conduct of the Plaintiff's account. Otherwise it was agreed that the 1st Defendant reserved right to recall the facility and demand repayment of the outstanding amount together with accrued interest and other charges and fees immediately subject to a 21days' notice to the Plaintiff and the guarantors.

It is the Plaintiff's case that due to reasons beyond its control, it did not fully comply with the terms of the facility letter by paying the outstanding amount in full on the expiry date. As a result, on 17th August, 2010 after the expiry of the overdraft facility,it applied for 120 days extension within which to clear the outstanding liability. It is common ground that the Plaintiff was engaged in the business of car import for sale from Japan for sale in the local market. In the course of business the Plaintiff faced some problems in clearing its cars attributed to by its clearing and forwarding agent and that led to accumulated import and storage charges which could not be paid without an additional capital. According to the Plaintiff its cars had been stalled at Dar es Salaam port and some in Japan and so the Plaintiff sought a temporary overdraft facility of Tshs.200,000,000/= which could be applied towards paying import duties and demurrage charges. However, the Plaintiff avers that the 1st

Defendant turned down the request despite its initial approval which resulted in the Tanzania Revenue Authority (TRA) auctioning the Plaintiff's vehicles at the port. Subsequently, the 1st Defendant decided to exercise its rights under the facility letter and appointed the 2nd Defendant under a debenture (exhibit P12). According to the Plaintiff, the exercise of the said rights was wrongful because it was based on an instrument which was a forgery because no debenture was executed by the Plaintiff on 29 May 2009 and registered as such on 26 June 2009

It is the Plaintiff's further contention that the appointment of the 2nd Defendant as a receiver manager was invalid and null and void and so the taking over of the Plaintiff's assets. Further, the Plaintiff avers that no notice of appointment of the 2nd Defendant was served on the Plaintiff and instead, the 2nd Defendant invaded and trespassed into the Plaintiff's business putting it to a standstill and causing loss and damage.

By reason of the Defendant's acts, the Plaintiff prays for the following reliefs:-

a) *A declaration that the appointment of Sadock Dotto Magai, as a receiver and manager by the 1st Defendant is unlawful, null and void as the power to appoint such receiver is not contained in a valid debenture.*
b) *A Declaration that, Sadock Dotto Magai, the purported receiver and manager is unlawfully interfering with the business and trading of the Plaintiff.*
c) *An order that the Sadock Dotto Magai the purported receiver and manager be perpetually restrained whether by himself, his agents, servants or otherwise howsoever from interfering, dealing with or closing down the Plaintiff's business in any manner whatsoever.*

d) A mandatory injunction be issued to compel Sadock Dotto Magai, the purported receiver and manager and his agents and servants to vacate the Plaintiff's business premises.

e) Special damages in the sum of Shilling USD 1,500,000/= 14(c) above.

f) An order that the Defendants pay to the Plaintiff damages for a losses suffered of the appointment of the purported receiver and manager.

g) General damages for trespass and interference of the Plaintiff's business.

h) Further and or other relief, including all further necessary or appropriate accounts, inquiries and directions.

i) Costs.

Not amused, the Defendants have taken great exception to the Plaintiff's claims asking for an order dismissing the suit. Specifically, the 1st Defendant denies that it approved any extension of the overdraft facility or having approved an additional facility of 200,000,000/=. On the contrary, it is the 1st Defendant's case that approval of the additional loans was subject to the Plaintiff submitting information for its consideration which upon consideration established that the Plaintiff was no longer viable and hence the refusal to approve the application

In relation to the appointment of the 2nd Defendants as a receiver manager of the Plaintiff's assets, the 1stDefendant contends that the appointment was a result of the Plaintiff's default and in accordance with a valid debenture instrument.The 2nd Defendant has specifically denied having trespassed into and invaded the Plaintiff's business and causing loss whatsoever.

From the foregoing, the Court framed the following issues for determination

1. *Whether the 1st Defendant extended to the Plaintiff time to repay the overdraft facility of Tshs 300,000,000/= granted vide letter date July 23, 2009 following default in repayment thereof.*
2. *Whether the appointment of the 2nd Defendant as receiver Manager was lawful,*
3. *Whether the 1st Defendant was under an obligation to approve an addition facility;*
4. *Whether the 2nd Defendant carried out his duties according to law.*
5. *Whether the Plaintiff suffered loss at the hands of the Defendants and if so, to what extent.*
6. *What reliefs are the parties entitled to.*

It will be noted that the 1st Defendant had raised a counter –claim against the Plaintiff but in a ruling delivered on 12 September, 2014 this Court (Mgaya, J) ordered the same to be split from the Plaintiff's suit and that its determination should await the finality of Land Case No. 60 of 2011. This explains why the issues framed are confined to the plaint and the written statements of defence without reference to the counter –claim.

During the trial,the Plaintiff prosecuted its suit through two witnesses namely; Ombeni Mfariji Luka (PW1) and Hosea Yona Mndambi (PW2) in their capacities as Managing Director and Manager of the Plaintiff respectively. In the process, the two witnesses tendered a number of documentary exhibits some of which featurepredominantly in this judgment. The Defendants for their part had Venant Laurent (DW1) who testified as Loan Recovery Manager of the 1st Defendant and Sadock Dotto Magai who stood witness box in defence of a case against him in his capacity as the 2nd Defendant sued as a receiver Manager of the Plaintiff's business and assets. The defence witnesses too tendered several documentary exhibits as will be shown later in this judgment.

. It is also noteworthy that the Plaintiff chose to dispense with exercising its right to cross – examine DW2 by its absence during the resumed hearing which the court found unwarranted and went ahead marking the defence case closed."

Following the completion of the trial, the court ordered parties to file their written closing submission on a specified schedule. For reasons best known to the Plaintiff, it chose not to file any submissions and so the court will only consider the Defendants' submission's filed by Mr. Gaspar Nyika, learned Advocate from IMMMA Advocates. With the foregoing I will now move straight to a discussion of the issues.

The first issue is whether the first Defendant extended to the Plaintiff time to repay the overdraft facility of Tshs. 300,000,000/= granted vide letter dated 23rd July 2009, following default in repayment thereof. The Plaintiff's evidence on this is through PW1 who is on record stating as he that the Plaintiff made an application for an additional loan of Tshs. 200,000,000/= following poor performance of its account in relation to the approved overdraft facility of Tshs. 300,000,000/= granted through exhibit P5. According to PW1, the Plaintiff applied for another loan to enable her apply the proceeds thereof to clear import duties and freight charges for 130 cars imported from Japan. PW1 tendered in evidence a letter dated 08th September, 2010 which was admitted as exhibit P6. Earlier, by its letter dated 17th August, 2010 the Plaintiff wrote to 1st Defendant asking for extension of 120 days within which to clear the outstanding overdraft and regularize its account. The Court admitted a copy of the Plaintiff's letter as exhibit D1 at the instance of the Defendants' learned Advocate during cross-examination. According to PW1, the 1st Defendant approved the Plaintiff's request for an additional loan of Tshs. 200,000,000/= through a letter dated 09th September, 2010 admitted as exhibit P7.

It was PW1's evidence that despite the approval of the additional loan, the 1st Defendant did not disburse the proceeds thereof. In cross-examination, PW1 admitted that by a letter dated 17th August, 2010 (exhibit D1) the Plaintiff acknowledged indebtedness and asked for 120 days to clear the debt and that by that time, the 2nd Defendant was yet to be appointed as a receiver manager of its business and assets. In re-examination, PW1 stated that the Plaintiff failed to pay the loan in full because the clearing and forwarding Agent delayed in releasing vehicles from the port.

PW2 for his part had a similar version of evidence with PW1 in relation to the request for additional loan of Tshs. 200,000,000/= from the 1st Defendant. It was his evidence that the 1st Defendant had agreed to approve the loan subject to the Plaintiff making a written request which was done through exhibit P6 despite which the 1st Defendant reneged from its promise without regard to the Plaintiff's fulfillment of the conditions it had prescribed. During cross-examination, PW2 admitted that he had no proof of fulfillment of the terms and conditions for the approval of the additional loan on top of Tshs. 300,000,000/= overdraft facility.

DW1 for his part was emphatic that the Plaintiff was in default in repayment of the overdraft facility it extended through exhibit P5. Whilst acknowledging a request for an additional facility for Tshs. 200,000,000/= DW1 stated that the 1st Defendant failed to approve it because the Plaintiff failed to meet the terms and conditions.

Mr. Gasper Nyika, learned Advocate for the Defendantshas invited the Court to answer the first issue negatively primarily because the Plaintiff's has failed to discharge its burden of proof under section 110 of the Evidence Act Cap 6 [R.E 2002]. With respect, I am constrained to agree with the learned

Advocate's submission. It is glaringly clear that the duty to prove extension of the time for the repayment of the overdraft facility was on no other person than the Plaintiff who alleged its existence. Indeed, there is no dispute that the repayment of the overdraft facility per exhibit P5 expired on 31st July, 2010. It is equally not in dispute that the Plaintiff acknowledged that it was in default of repayment independent of the reasons thereof expressed in exhibit D1.It will be recalled that in terms of para 20 (b) of the overdraft facility letter (exhibit P5) renewal of an overdraft facility was not automatic and that the 1st Defendant had discretion to consider renewal taking into account the conduct of the account and benefit of the renewal to the bank.

In my view, although the Plaintiff did not ask for a renewal (which could have done pursuant to Para 21), request for extension of the repayment must be treated in the same manner and in this case the 1st Defendant declined the extension.In the absence of any express agreement to support an agreement for extension, I endorse the Defendant's submission that the Plaintiff has failed to discharge its burden and so the 1st issue is answered negatively.

Before I discuss the second issue, I propose to deal with issue No. 3 which seeks the Court's determination whether the 1st Defendant had an obligation to approve an additional facility.

The evidence in respect of the issue has been summarized above and so I will not find it necessary to repeat it here. It is common ground that the Plaintiff asked for an additional temporary overdraft of Tshs. 200,000,000/= per exhibit P6 and in response to that request the 1st Defendant wrote to the Plaintiff vide exhibit P7 asking for submission of itemized documents to finalize the process of analyzing the request before approving the application. Both PW1 and PW2 claimed that they fulfilled all the terms and conditions contained in exhibit P7 but

DW1 denied that there was any compliance with the terms and conditions for the grant of the additional facility.

Mr. Gasper Nyika, learned Advocate for the Defendants submits that in the first place there was no agreement for the approval of an additional facility of Tshs. 200 Million. I respectfully agree with him. Judged from the evidence adduced by PW1 and PW2, there must have been prior discussion for an additional loan which prompted the Plaintiff writing formal application letter (exhibit P6).Be what it may, the learned Advocate for the Defendant has submitted further relying on DW1's evidence that the 1st Defendant was disabled from analysing the request for an additional loan because the Plaintiff did not submit the documents requested in exhibit P7. Once again I agree with that submission because apart from oral assertions in the witness box neither PW1 nor PW2did furnish any proof of submission of the documents the 1st Defendant required from the Plaintiff. Naturally, proof of submission of the requested documents could only be way of documents but none was tendered to substantiate the Plaintiff's assertions.

I am satisfied thus that in the absence of proof of submissions of the documents requested, the 1st Defendant could not analyse the request and so it had no obiigation to approve the request. In any event as submitted by Mr. Nyika, an application for an additional loan could (if approved) crystallise into a legally enforceable contract which must have been entered with free consent of the parties per section 10 of the Law of Contract Act Cap 345 [R.E 2002].That means that the 1st Defendant could accept or reject the application and so the question of an obligation does not arise. In the premises issue No. 3 is answered in the negative, I now revert to issue No. 2. The bone of contention in the second issue is whether the appointment of the receiver manager was lawful.

It is the Plaintiff's case that the appointment was unlawful because it was made ina debenture which was a forgery and which did not comply with the law for being registered belatedly. To substantiate that PW1 stated that his company issued a debenture on 19th May, 2008. However PW1 stated a top cover of the debenture on the basis of which the 1st Defendant appointed the 2nd Defendant shows that it was issued on 28th May, 2009 and registered on 26th June, 2009.PW1 tendered in evidence the said debenture and the Court admitted it as exhibit P12. In defence, DW1's evidence was that the Plaintiff issued the debenture (exhibit P12) on 28th May, 2009 and the 1st Defendant had it registered on 26th June, 2009 per exhibit D2. It was DW1's evidence that in view of the Plaintiff's default to pay the loan, the 1st Defendant instructed IMMMA Advocates to pursue the debt and sent demand notices to the Plaintiff but to no avail.DW1 tendered a copy of a letter dated 19th January, 2011 addressed to the Plaintiff and the Court admitted it as exhibit D3. As the Plaintiff did not pay the debt demanded, DW1 continued, the 1st Defendant appointed the 2nd Defendant as receiver manager of the Plaintiff's business and assets through a deed of appointment executed on 26th January, 2011 which was tendered in evidence and admitted as exhibit D4.In cross-examination, DW1 admitted that the top cover of the debenture (exhibit P12) indicated that it is dated 28th May, 2009 but the last page shows that it was executed on 19th May, 2008 which wasthe date of issue. DW1 admitted too that the top page had a different paper colour from the rest of the pages in exhibit P12 but stated that the variance did not affect the validity of the debenture. According to DW1 the Plaintiff signed the debenture on 19th May 2008 and the registration of it on 26th June, 2009 was beyond 42 days prescribed by the law but could not confirm if the delayed registration had any effect on the validity of exhibit P12.

Answering questions in re-examination, DW1 stated that the 1st Defendant received exhibit P12 on 28th May, 2009 for a loan issued in 2009. DW2 for his part stated that following his appointment as a receiver manager he caused his appointmentadvertised in newspapers before visiting the business premises of the Plaintiff. A copy of the advertisement from the Citizen Newspaper was tendered and admitted as exhibit D5.In essence, DW2's evidence was that his appointment was made through a valid debenture and so his taking over of the assets of the Plaintiff was in order.

The learned Advocate for the Defendants submitted and indeed not surprisingly that the appointment of the receiver manager was lawful because it was done under a valid debenture duly registered under section 96 (1) of the Companies Act, Cap 212 [R.E 2012].It was thelearned Advocate's further submission that the 1stDefendant was a holder of a valid debenture dated 28th May, 2009 and registered on 26 June, 2009 under which it had power to appoint a receiver upon occurrence of events of default by the Plaintiff. The learned Advocate contended that the allegations of forgery of the debenture leveled by the Plaintiff have not been proved and so the Court should answer the issue in the affirmative.

The Plaintiff's complaint is that it never issued any debenture in favour of the 1stDefendant on 28th May, 2009 capable of registration by the Registrar of Companied on 25th June, 2009 per exhibit D2 from which a valid appointment of a receiver could have been lawfully made. There is no dispute that exhibit P12 contains two different dates that is to say; 28th May, 2009 on thecover page and 19th May, 2008 at the last page. Indeed, the evidence of execution is shown the last page. It will be recalled that DW1 had difficulties in reconciling the variance in the dates in the cover page and the last page although to him that would not have any bearing on the debenture. In another breath, DW1 admitted

that the Plaintiffsigned the debenture (exhibit P12) on 19th May, 2008 but the 1st Defendant had it registered on 26th June, 2009 beyond42 days prescribed by the law. To appreciate the Plaintiff's complaint I find it necessary to have an understanding of what it means by the term debenture. The meaning and essence of debentures were discussed by the Court of Appeal of Tanzania in**Shinyanga Region Trading Co. Ltd & Another V. National Bank of Commerce** [1997] TLR 78 in which the said Court expressed itself thus:-

> *".....Debentures then are species of documents issued by companies evidencing their indebtedness which [the indebtedness], is normally but not necessarily secured by a charge over the company's property. Debentures which do not provide a charge are called naked debentures. In sum then debentures are a class of securities issued by companies...."* (at page 84)

Having put the law in perspective, the Court of Appeal underscored consequences flowing from non registration of a debenture in the following terms:

> *"....Sections 80 and 79 of the Companies Ordinance, are quite clear as to the registration of charges and the consequences of non-registration, that if the charge is not registered within forty two days, it becomes void, and the loan so secured becomes immediately payable. Therefore, since this debenture was not registered under s 80 within forty two days, it became void at the end of that period. The respondent's overdraft facility became unsecured, the debenture as it were passed out of existence. All that the respondent was left with was his contractual rights to recover the debt under ordinary civil litigation..." (at page 91).*

It is to be noted that section 96 (1) and (2) are identical to section 79 (1) of the repealed Companies Ordinance. There is no disputed thus that a debenture is createdor issued and executed by a Company to secure its indebtedness to a lender as it were in the instant suit. To become valid, the debenture must be registered with the Registrar of Companies pursuant to section 96 (1) of the Act within 42 days of its issue failing which the charge against the assets of the Company issuing the debenture (in this case the Plaintiff) becomes void. Section 97 (5) (b) of the Act stipulates that the date of execution of instrument creating a charge as the date of its creation.It will be clear from the above that 19th May, 2008 is the date of creation of the charge per exhibit P12 and in terms of section 96 (1) of the Act such a charge must have been registered with the Registrar of Companies within 42 days reckoned from 19thMay, 2008.

Mr. Nyika, would have Court treat the registration of the debenture on 26th June, 2009 as evidenced by exhibit D2 by reference to the date inserted at the cover page of exhibit P12 as conclusive proof of a valid charge against the Plaintiff and so the legality of the appointment the 2nd Defendant. With respect that argument falls on the basis of section 97(5) (supra) against exhibit P12 which shows that the debenture was executed on 19th May, 2008. As seen earlier the date reflected in the last page of exhibit P12 was the date of its creation pursuant to Section 97 (5) (b) of the Act. Consequently, the date inserted at the cover page of exhibit P12 has nothing to do with the date of creation of the debenture and indeed, exhibit D2 could not have operated to extend the time for the registration of the charge issued more than one year before the issue of exhibit D2. In other words the presentation of exhibit P12 for registration on 26th June, 2009 was an exercise in futility and the issue of exhibit D2 was of no avail to the 1st Defendant. It goes without sayingthus that the

delayed registration of exhibit P12 was null and void. It amounted to non registration whose consequences are spelt out under section 96 (2) of the Act. In the absence of a valid charge (debenture) the 1st Defendant had no power to appoint the 2nd Defendant as a receiver manager of the Plaintiff's assets upon occurrence of events of default in repayment of the loan.

In terms of section 96 (2) of the Act, the overdraft facility became unsecured and the only recourse the 1st Defendant had was to demand immediate payment failing which pursue recovery of the debt through civil litigation as expressed by the Court of Appeal in **Shinyanga Region Trading Co. Ltd Case** (supra).In consequence, I have no hesitation in holding as I do that the appointment of the 2nd Defendant as receiver manager was unlawful. Having so found and held, I do not find it necessary to discuss the other complaints raised by the Plaintiff through PW1 regarding forgery because that will not have any bearing on the determination of the second issue.

I will now turn my attention to issue No. 4which seeks a determination whether the 2nd Defendant carried out his duties according to law. I must confess that the issue presupposes that the 2nd Defendant was lawfully appointed as a receiver manager of the Plaintiff's business and assets which is not the case on the basis of my answer to issue No. 2 above. In the premises a discussion whether the 2nd Defendant carried out his duties according to law become superfluous. I will accordingly refrain from discussing the issue.

The fifth issue is whether the Plaintiff suffered loss at the hands of the Defendants and if so, to what extent? The evidence of the Plaintiff in this issue was that as a result of the 2nd Defendant's invasion of its business it suffered loss by way of 112 vehicles worth United States Dollars 1,305,200 based on a list of the said vehicles admitted in evidence as exhibit P13. According to PW1, the

Plaintiff lost a commission from the sale of the vehicles and loss from the real estate agency business amounting to USD 1,500,000. In cross examination, PW1 admitted that the agreement the Plaintiffhad with Tigo for sites acquisition expired on 11 September 2009 before the appointment of the 2nd Defendant as receiver manager. According to PW2, the Plaintiff had imported cars from Japan and 45 of them were awaiting clearance at Dar es salaam port and 22 were at its yard which the 2nd Defendant sold to third parties. However, PW2 was unable to substantiate his claim on the existence of 22 cars at the Plaintiff's yard.

The learned Advocate for the Defendants has invited the court to find that the Plaintiff has not proved any loss sustained but even if there was any proof, the claim for USD 1,305,200 has not been specifically pleaded and strictly proved and so it should not be considered. The learned Advocate cited **James Funke Gwagilo V.Attorney General** [2004] TLR 161 in which the Court of Appeal underscored the function of pleadings being to give notice of the case which has to be met and that a party must therefore so state his case that his opponent will not be taken by surprise.I endorse the submission because it accords with the law.

It is very clear in this case that the Plaintiff has not pleaded loss on account of cost of 112 vehicles anywhere in its plaint. That claim which by its very nature is in the form of special damages must have been specifically pleaded and strictly proved. Thelaw is very well settled on the requirement to plead special damages specifically and one need not cite any authority. Nonetheless, I will nonetheless cite a few of them. These are; In **Stanbic Bank Tanzania Ltd V. Abercrombie & Kent (T) Ltd,** CAT Civil Appeal No.21 of 2001 (unreported) cited by the learned Advocate for the Defendants and **Nyakato Soap Industries Ltd vs Consolidated Holding Corporation, Civil**

Appeal No. 54 of 2009(unreported) cited with approval a passage by Lord McNaughten in **Bolag V. Hutchson** [1950] AC 515 thus:

> *"Special damages are....such as the law will not infer from the nature of the act. They do not flow in the ordinary course. They are exceptional in their character and, therefore, they must be claimed specially and provedstrictly..."* (reproduced at page 11 Nyakato Soap Industries case)

The learned Advocate cited **Zuberi Augustino V. Anicet Mugabe** [1992] TLR 137 at p. 139 BCin which theCourt of Appeal expressed a similar stance in relation to the nature of special damages and the manner of pleading and proving them during the trial. I need not say anything more than agreeingwith the submissions by the learned Advocate that the claim for special damages on account of cost of 112 vehicles has no legs to stand on and so it has not passed the test of consideration in this case as one of the losses claimed to have been suffered by the Plaintiff at the hands of the Defendants. Even if I were to hold otherwise, the claim could fail in any event. This is so simply because the only material available to prove existence of the said vehicles is a list admitted in evidence as exhibit P13.As was held by the Court of Appeal in **Nyakato Soap Industries Ltd** case(supra), exhibit P13 is not evidence obtained in the ordinary course of business but a fishing expedition to justify the claim for special damages. Worth for what it is, exhibit P13 has no evidential value from which the court can safely make a finding holding the Defendants liable for special damages.

In any case, the learned Advocate argued and I think rightly so, that even if the Plaintiff had specifically pleaded the claim of USD 1,305,200 on account of special damages for the cost of 112 vehicles, that claim could not succeed. This

is so because the alleged loss (if any) arose as a result of the delay in the clearance of the said vehicles resulting into the TRA auctioning them well before the appointment of the 2nd as a receiver manager of the Plaintiff's business and assets. The record shows that the sale of the Plaintiff's vehicles occurred well before the appointment of the 2nd Defendant and so there can be no basis linking the Defendants with the loss of the vehicles. It is equally clear from the record that the claim on 22 vehicles allegedly sold by the 2nd Defendant have not been proved because by PW2's own evidence, he had no proof to substantiate that loss and so it remains to be a will claim as it were.

Furthermore, the learned Advocate has invited me to hold that the loss on the real estate business has not been proved and I am in agreement with that submission. An examination of the site acquisition contract (exhibit P14) shows that it expired in February 2009 well before the grant of the overdraft facility to the Plaintiff through exhibit P5. In the absence of a valid agreement in force on the date the 2nd Defendant entered the Plaintiff's business as receiver manager, there can be no basis upon which the Court can hold the Defendants liable for the alleged loss. In the upshot, the answer to the 5th issue must be in the negative and I so hold.

Lastly on the reliefs. The Plaintiff has made a long list of reliefs and invites the court to grant judgment on all of them. I have already answered the 2nd issue affirmatively and there will be a declaration that the appointment of the 2nd Defendant as a receiver manager of the Plaintiff's assets and business was unlawful and null and void as the power to appoint him was based on an invalid debenture. Having declared the 2nd Defendant's appointment as null and void, his entry into the business and trading of the Plaintiffwas unlawful. By the 2nd Defendant's evidence he vacated from the Plaintiff's premises after eight months and so the orders for injunction per prayers (c) and (d) areovertaken by the

events. In view of my answer to issue No five, the claim for special damages prayed in (e) and (f) must fail. I will now consider whether the claim for general damages for trespass and interference of the Plaintiff's business has any merit.

I have declared that the appointment of the 2nd Defendant was invalid on account of an invalid debenture. That means the 1st Defendant had no recourse to the debenture but pursuing recovery of the unsecured debt through ordinary litigation. Having so held,in the ordinary course of events, the 2nd Defendant's entry into the Plaintiff's business constituted a tort of trespass which is actionable per se without any proof of actual damages on the authority of CRDB **(1996) Ltd V. Boniface Chimya** [2003] TLR 413. DW2 admitted that he remained the receiver of the Plaintiff's business for eight at the instance of the 1st Defendant who acted wrongfully on the pretext of enforcing a contractual right which it did not have. Naturally, it cannot be denied that that act must have caused damage to the Plaintiff's business warranting an award of general damages. However, there is no gainsaying that the Plaintiff was in default of its contractual obligations to pay the loan on the date it became due. On the other hand by operation of law the Plaintiff had a statutory duty to register the debenture it created on 19 May 2008 registered with the Registrar of Companies pursuant to section 100 of Cap 212. The section stipulates:

> "**100**.-*(1) It shall be the duty of a company to deliver to the Registrar for registration the particulars of every charge created by the company and of the issue of debentures of a series, requiring registration under this Part, but registration of any such charge may be effected on the application of any person interested therein.*
>
> *(2) Where registration is effected on the application of some person other than the company, that person shall be entitled to recover*

from the company the amount of any fees properly paid by him to the Registrar on registration.

(3) If a company fails for a period of forty-two days, or such extended period as the court may have ordered, to deliver to the Registrar for registration the particulars of any charge created by the company, or of the issue of debentures of a series requiring registration, then, unless the registration has been effected on the application of some other person, the company and every officer or other person who is a party to the default shall be liable to a default fine."

The Plaintiff admits to have executed a debenture on 19 May 2008 as security for its indebtedness to the 1st Defendant for the current and future credit facilities. The creation of the debenture for the overdraft facility of TShs 300,000,000/= is expressed indicated at para 6(i) of exhibit P5. By that time the period for the registration of exhibit P12 had long expired but neither did the 1stDefendant nor the Plaintiff make any effort to regularize the anomaly. The 1st Defendant's effort to register the debenture on 26 June 2009 was, as stated earlier an exercise in futility. Believing that it had a valid debenture, the 1st Defendant appointed the 2nd Defendant as receiver of the Plaintiff's assets upon the Plaintiff's default to repay the loan. The Plaintiff has admitted its default and indebtedness to the 1st Defendant. The 2nd Defendant acted as such and ceased office after 8 months. In the circumstances, much as the appointment of the 2nd Defendant was null and void and so the taking of possession and control of the Plaintiff's business for 8 months have been held to be invalid, the Plaintiff is not the right person to be awarded damages for trespass and interference of its

business. If any damages will be awarded, it must be nominal damages because doing otherwise will be tantamount to assisting a defaulting party to benefit from his own default. Having regard to the foregoing, I would award the Plaintiff nominal damages in the sum of TShs500,000/= (say Five Hundred Thousand shillings) only on account of trespass. As for costs, the Plaintiff has not succeeded in its substantive claims and so it cannot be awarded costs in full. An award of half the costs will meet the justice of the case.

In the event and for the foregoing reasons, judgment is hereby entered for the Plaintiffas follows:

(a) A declaration that the appointment of the 2nd Defendant as a receiver and manager by the 1st Defendant was unlawful, null and void.

(b) A Declaration that, 2nd Defendant's interference with the business and trading of the Plaintiff was unlawful.

(c) General damages in the sum of Tshs 500,000/= for trespass. That sum shall carry interest at the rate of 7% per annum from the date of judgment till final satisfaction.

(d) Half of the costs of the suit.

Order accordingly.

L.J.S. Mwandambo

JUDGE

13/04/2018