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Recovery of Debts Due to Banks: A Need for Debts Recovery Tribunal and Securitisation Law in Tanzania - A Leaf Plucked from Indian and UK Jurisprudence

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Like any other developing countries, Banks are the foundation of the Government's financial sector in Tanzania. They have been playing a positive role in promoting the country's economy. So, the development of banking institutions is one of the essential ingredients that play a crucial role in stimulating the financial institution's development and economic growth simultaneously in Tanzania. Banks and financial institutions at present experience considerable difficulties in recovering loans and enforcement of securities charged within them. The existing procedure for recovery of debts due to banks and financial institutions has blocked a significant portion of their funds in productive asserts, the value of which deteriorates with the passage of time, in this context therefore, Effective legal machinery and timely dispute resolution mechanisms between banks and customers are necessary for the growth of the banking sector. This article, therefore, is devoid of substantiating the need for a specialized Tribunal for recovery of debts due to Banks in Tanzania jurisdiction and the need for securitization Law.

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INTRODUCTION

Existing Legal Framework for Debt Recovery Due to Banks and Financial Institution in Tanzania

In Tanzania, the recovery of debts due to Banks and financial institutions disputes are dealt either with the District Land and Housing Tribunal, High Court Commercial Division, High Court Land Division, or the Subordinate Court as the case may be:

Firstly, Section 22 (1) and (2) of *The Land Dispute Courts' Act*¹ empower the Minister to establish in each district, region, or zone, as the case may be, a court to be known as the District Land and Housing Tribunal and that court established shall exercise jurisdiction within the district, region, or zone in which it is established. In line with the provision of section 33 (1) of *Land Disputes Courts Act*² Tribunal shall have and exercise original jurisdiction in all proceedings under the Land Act, the Village Land Act, the Customary Leaseholds, and in all such other proceedings relating to land under any written law in respect of which jurisdiction is conferred on a District Land and Housing Tribunal by any such law. So, according to that law, the district land and housing tribunal is involved in determining cases involving banks and financial institutions only when the claim is based on rights over mortgaged property. To make it clearer, when there is a mortgagor and mortgagee relationship, that is to say, a banker as a mortgagee and the customer as a mortgagor and the cause of action accrue from the mortgage transaction, that

will be a land dispute and has to be dealt with District land and housing tribunal.

Secondly, another avenue is through ordinary civil courts by way of summary procedure Order XXXV of The Civil Procedure Code³ *inter alia* provides that where the plaintiff desires to proceed in accordance with the Order, apply to- suits arising out of mortgages, whether legal or equitable, for- payment of monies secured by mortgage, delivery of possession of the mortgaged property to the mortgagee by the mortgagor or by any other person in or alleged to be in possession of the mortgaged property; redemption; or retransfer or discharge; so, in other words Banks can claim recovery of debts due by instituting a summary suit in civil courts.

Banking litigation in Tanzania in, as far as the jurisdiction of courts is concerned, has triggered not only the bench but also the bar. Recovery of debts due to banks and financial institutions takes several forms, as was clearly explained in the case of *The National Bank of Commerce Limited vs. National Chicks Corporation Limited and Others*,⁴ the Court of Appeal held *inter alia* that when the claim arose from the loan agreement which created a contractual relationship relating to the business that is to say the cause of action arose from a commercial contract. That claim falls squarely in the purview of the area of specialization of the High Court (Commercial Division) as stipulated in item (iii) of Rule 2 of the High Court (Commercial Division Procedure) Rules, 2012. The court went further and observed that there is; therefore, no mortgagor-mortgagee relationship between the appellant and the four respondents, and the cause of action did not, therefore, accrue from the mortgage transaction.

¹ (Cap 216 R: E 2019)

² Ibid

³ (Cap 33 R: E 2019)

⁴ Civil Appeal NO. 129 OF 2015

The mortgaged properties are a subject of the case because they were used as security. And therefore, they are liable to be sold to repay the loan and interest if the appellant's claims are proven against the 1st respondent without resorting to a civil action. For the sake of convenience, that is observing the specialization of the Divisions of the High Court, and considering that the underlying contract being of commercial nature and the claim being payment of loaned amount and interest thereon; therefore, the matter was rightly instituted in the Commercial Division of the High Court.

To cement to their decision, the Court of Appeal took a persuasive decision of the High Court in the case of *Britania Biscuits Limited vs. National Bank of Commerce Limited and Three Others*,⁵ where it was held that "It must be understood that any litigation whose cause of action accrued from mortgage transaction or a commercial contract, regardless of its aftermath to the landed property/real property is not necessarily a land matter that falls within the jurisdiction of the Land Division of the High Court." It is a result of commercial transaction, and it has to be dealt with by the Commercial Division of the High Court not the Land Division unless the transaction is conveyance...." Also, the case of *Exim Bank (T) Limited vs. Agro Impex (T) Limited and Two Others*,⁶ was quoted with approval where it was held that "On the plaint filed it clearly shows that the plaintiff is claiming a total of Tshs. 1,215,598,942.00 as the outstanding amount due and owing to the plaintiff arising from an overdraft facility extended by the plaintiff to the first defendant. The claim, therefore against the defendant, is founded on a credit facility. On the part of the second and third defendants, the cause of action is founded on a contract of guarantee. There is no doubt that the suit is purely founded on a contract. On looking at the prayers, you find that none is related to land. The mere fact that the second and third defendants have put some security for the loan does not turn the suit to be a land dispute. Additionally, in my view, suing on an overdraft facility *per se* does not turn the suit to a land dispute and give the court the necessary jurisdiction." The

most important part is that the learned judge of the high court went further to hold that "This suit would have been a land matter if the plaintiff had pleaded to enforce mortgage terms as per the sections 128, 129, 130 and 132 of the Land Act, by taking possession of the mortgaged property, selling the same, appointing a receiver and leasing the mortgaged land. Short of that, as to what is pleaded in the plaint, it will remain to be a suit based on contract on which this court lacks jurisdiction to try it". This brief introduction of banking litigation in Tanzania jurisdiction gives us a turning point to address, is the system of recovery of debts due to Banks and financial institutions effective?

In recent years courts and Tribunal have witnessed a bulk log of cases in their registries and the issue has been of the judiciary, government, and public concern. The President (Late) John Pombe Joseph Magufuli's concern over delays in the resolution of the land dispute (including mortgage) by District Land and Housing Tribunal (DLHT) has finally been working on.⁷ This follows the Judiciary's decision to take over the determination of such cases, which were handled by Land Tribunals countrywide. Our concern here is mortgage dispute which involves bankers and customers as lenders and borrowers. The Judiciary took the stand and issued a statement by the Judiciary's Directorate of Information and Communications; the Chief Justice, Prof. Ibrahim Juma, stated that:

*the Judiciary would begin to hear such land cases effective from the next year of 2020/2021. Chief Justice said that from the year 2020/2021 the Judiciary would assume such a role, and courts would begin to hear land disputes handled by the DLHTs. So, we have an added burden, and Magistrates will be assigned to handle such cases. This area has many cases, challenges, and complaints.*⁸

Unfortunately, from the Chief Justice suggestions, we would say delays and bulk log of the case is not only happening in the District Land and Housing Tribunal but in ordinary civil courts as well. So, the abolition of such litigations from District Land and

⁵ Land Case No. 4 of 2011[HC] (unreported)

⁶ Land Appeal No. 29 of 2008, (HC) (unreported).

⁷ Fautine Kapama, *Heat on Loan Defaulters*, www.dailynews.co.tz, 18 May 2020

⁸ Fautine Kapama, *Heat on Loan Defaulters*, www.dailynews.co.tz, 18 May 2020

Housing Tribunal and shift all pending cases to ordinary civil courts will not help to cure the entire problem instead it will increase delays of cases.

From this point, we argue that the system of tribunals in our country hold water in, as far as the administration of Justice is concerned, courts alone cannot discharge this duty take into consideration the circumstance of our country where courts personnel are not enough, so, effective, and well-contracted tribunals are needed to supplement this whole issue of the dispensation of Justice in a timely manner.

India Jurisprudence on Recovery of Debts Due to Banks and Financial Institutions

The Banks and Financial institutions were finding it difficult due to considerable delay in recovering their dues and enforcement of securities charged with them. In India, the judicial system takes a lot of time to dispose of the suits filed before them. Therefore, it is felt necessary by the banks and financial institutions that special courts or tribunals may be constituted., which may deal with their cases against their borrowers for recovery of the dues.⁹ In India, after the nationalization of the banks, the money of the banks was public money. Therefore, it became more necessary that the funds of the banks and financial institutions may not be locked for the long term. It will be in the interest of the banks, business entrepreneurs, and the public that the money of the banks and the financial institutions may be circulated fast.¹⁰ The issue was of great concern not only to the Government but also to the Reserve Bank of India. This led to the formation of several committees, *inter alia*, a committee chaired by Shiri T. Tiwari which examined the legal implication and other difficulties faced by banks and financial institutions and suggested that certain measures for the problem of recovery of debts due to banks and the financial institutions, one of the measures suggested was that setting up of special Tribunals for recovery of debts due to banks and financial institutions by following summary procedure. To implement the economic policies and give effect to the recommendations of the Tiwari Committee, the Narasimhan Committees, and the

High-Level Committee, the Central Government introduced the draft bill in the Lok Sabha n 13.5.1993. since the parliament was not in session, the President of India promulgate "The recovery of Debts Due to Banks and Financial Institutions Ordinance, 1993" on 24.6. 1993. Subsequently, the bill was enacted replacing the ordinance and bring it into force from 24.6.1993 itself, this special enactment aims to fasten recovery of dues of the banks and financial institutions.¹¹

The statement of object and reasons for the enactment of this Act is that during that time banks and financial institutions experienced considerable difficulties in recovering loans and enforcement of securities charged with them. The existing procedure for recovery of debts due to banks and financial institutions has blocked a significant portion of their funds in unproductive assets, the value of which deteriorate with passage of time¹². So, to address this concern, the committee on financial system headed by Shri M. Narasimhan has been formed and as the result, the committee considered setting up of the special Tribunal with special powers for adjudication of such matters and speedy recovery as critical to the successful implementation of the financial sector reforms. An urgent need was, therefore inevitable through which the dues to the banks and financial institutions could be realized without delays. The Recovery of Debts Due to Banks and Financial Institutions Act, 1993 was enacted for the purpose of providing the establishment of Tribunal for expeditious adjudication and recovery of debts due banks and financial institutions and for matters connected therewith or incidental thereto.

The Recovery of Debts Due to Banks and Financial Institution Act, 1993: A Bird's Eye Overview

The provision of this Act is intended to provide a simpler and speedy remedy for recovery of debts as due from any person to banks or financial institutions. The Act providing for a speeder remedy is calculated to ensure speedy justice, it is therefore aimed at avoiding the dilatory procedure of an ordinary civil suit. In this Act, a "debt" it means any

⁹ Tannan, M.L., (Ed.). (2003) Tannan's *Baning Law and Practice in India*, (20th Ed.). Vol 1. India.

¹⁰Ibid

¹¹ Ibid

¹² Tannan, M.L., (Ed.). (2003) Tannan's *Baning Law and Practice in India*, (20th Ed.). Vol 1. India.

liability (inclusive of interest) which is claimed as due from any person by a bank or a financial institution or by a consortium of banks or financial institutions during the course of any business activity undertaken by the bank or the financial institution or the consortium under any law for the time being in force, in cash or otherwise, whether secured or unsecured, or assigned, or whether payable under a decree or order of any civil court or any arbitration award or otherwise or under a mortgage and subsisting on, and legally recoverable on, the date of the application 1 [and includes any liability towards debt securities which remains unpaid in full or part after notice of ninety days served upon the borrower by the debenture trustee or any other authority in whose favour a security interest is created for the benefit of holders of debt securities. The debt includes mortgage debt and the debts is an essential ingredient of a mortgage. There can be a debt without a mortgage but there can be no mortgage without a debt. If the debt is repaid the mortgage ceases to be a mortgage. Even if the term debt would not have been defined in the Act the mortgage would have been included within the meaning of debt. This is the general law and settled trends of judiciary opinion. It should be clear up to this juncture that the recovery of debts due to banks in this Act it includes mortgages which in our case it is a cause of action under the Jurisdiction of the District Land and Housing Tribunals in Tanzania perspective.

The Debts Recovery Tribunal under the Act has exclusive jurisdiction to deal with any application by the banks for recovery of debts when the debts exceed 10,00,000/= Lakhs India Rupee, except for the Supreme Court and the High Court while exercising jurisdiction under Article 226 and 227 of the Constitution¹³ in relation to the matters of recovery of debts to banks and financial institutions. To be more specific, Article 226 empowers the high courts to issue, to any person or authority, including the Government (in appropriate cases), directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, *quo warranto*, certiorari or any of them whereas Article 227 determines that every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it

exercises jurisdiction (except a court formed under a law related to armed forces). Whenever a bank or a financial institution has to recover any debt from any person, it may make an application to the Tribunal within the local limits of jurisdiction. What should be borne in mind is that the Debts Recovery Tribunal was meant to be a tribunal and not a court, the proceedings before the same are initiated on by application as we have already mentioned, the tribunal does not pass decree, what it does is issue of certificate which is liable to be executed by through Recovery Officers. The procedure contained in the Act is summary procedure *per se*. the provision of section 19 of the Act if it could be read between the lines it says the tribunal does not contemplate the oral evidence save for exceptional circumstances.

The decision of the tribunal can be challenged in the Debt Recovery Appellate Tribunal established under the provision of the Section 8 of the Act. Despite the fact that the provisions of the section 19 (24) of the Act provides that the application made to the Tribunal shall be dealt with it as expeditiously as possible and every efforts shall be made by it to complete the proceedings in two hearings, and to dispose of the application finally within one hundred and eight days from then date of receipt of the application, the requirement which was not attainable by the Debts Recovery Tribunal, so the Government decided to come up another enactment in 2002 to regulate securitization and reconstruction of financial assets and enforcement of security interest in order to supplement *the Recovery of Debts Due to Banks and Financial Institutions Act*.

The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002

Unlike in India jurisprudence, in Tanzania there is no legal provision for facilitation of securitization of financial assets of Banks and financial institutions, our existing legal framework relating to commercial transactions has not kept pace with the changing commercial practices and financial sector reforms. This has resulted in slow pace of recovery of defaulting loans and mounting levels of non-

¹³ The Constitution of India, 1950

performing assets of Banks and financial institutions.

Further, unlike international Banks, the Banks and financial institutions in Tanzania do not have power to take possession of securities and sell the, save for the procedure provided by the law. Section 125 of the Land Act,¹⁴ provides for the remedies of lender that 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. 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 sue the borrower for any monies due and owing under the mortgage; where the mortgage is not a small mortgage, appoint a receiver of the income of the mortgaged land, lease the mortgaged land or where the mortgaged is of a lease, sublease the land; enter possession of the mortgaged land; sell the mortgaged land. This legal framework and the procedure for the recovery of debts is not friendly to banks consider the fact that money invested by banks through loans tends to deteriorate with time.

In order to overcome these challenges, the central Government decided to constitute the Narasimhan Committee and Andhyarujina Committee. These committees *inter alia* have suggested that enactment of the new legislation for securitization and empowering banks and financial institutions to take possession of securities and to sell them without the intervention of courts.¹⁵ Acting on this recommendation the *Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act* was promulgated on the 21 June 2002 to regulate securitization and reconstruction of financial assets and enforcement of security interest and for connected therewith or incidental thereto.¹⁶ The

provision of the Act enable banks and financial institutions to realize long-term asserts, manage problem of liquidity, assert liability mismatches, and improve recovery by exercising powers to take possession of securities, sell them, and reduce non-performing assets by adopting measures for recovery or reconstruction.

We will discuss, albeit briefly the provisions of Section 13 and 17 of the Act, *in tandem* with the case of *Mardia Chemicals Ltd vs. Union of India*¹⁷. The constitutional validity of this Act was upheld by the Supreme Court of India. There was a failure on the part of borrower to discharge his liability in full within the period specifies. Notice of sixty days was given after all measures of section 13 (4) of the Act are taken, mechanism provided under Section 17 of the Act is for the borrower to approach the Debts Recovery Tribunal. Or measures taken under Section 13 (4) before date of sale or auction of property. Borrower would get reasonably fair deal and opportunity to get matter adjudicated upon before the Debts Recovery Tribunal (DRT).¹⁸ The supreme court held that impugned provisions of the Act were not unconstitutional as the object of the Act is to achieve speedier recovery of dues declared as Non Performing Asserts and better availability of capital liquidity and resource to help in growth of the economy of the country and Welfare of people in general to save public interest. The Constitutional validity of the Act and its provision was upheld except section 17(2) of the Act, which was declared *Ultra vires* Article 14 of the Constitution of India.

An Inspiration from the United Kingdom

By recognizing the importance of the financial sector, the British Government enacted The Financial and Markets Act in 2000 *inter alia* to make provision about the regulation of financial services and markets in The United Kingdom. The enactment confers extensive regulatory and supervisory powers over the whole financial services sector on the Financial Services Authority. Among many other functions of the Financial Service Authority under the law, it establishes one

¹⁴ (Cap 113 R: E 2019)

¹⁵ Tannan, M.L., (Ed.). (2003) Tannan's *Baning Law and Practice in India*, (20th Ed.). Vol 1. India.

¹⁶ Tannan, M. L. (Ed.) (2015). *Tannan's Banking Law* (1ST Ed.), LEXISNEXIS.

¹⁷ (2004) SC

¹⁸ Tannan, M.L., (Ed.). (2003) Tannan's *Baning Law and Practice in India*, (20th Ed.). Vol 1. India.

compensation scheme and one Ombudsman scheme.¹⁹ A voluntary Banking Ombudsman Scheme was established on the initiative of the clearing banks to deal with complaints about banking services. In England it was one of a number of ombudsman schemes that existed in the financial sector providing extra judicial, alternative dispute resolution (ADR) procedures in relation to specific complaints, through the medium of independent adjudicators.²⁰ Again, in accordance with the underlying policy of consolidating regulatory provisions across the whole financial services sector in England, the Financial and Markets Act of 2000 was enacted and it provides for the creation of the single one-top ombudsman scheme providing for alternative dispute resolution for customers of Financial Service Authority- authorized firms' quickly and with minimum formality'.²¹ This new scheme, called the Financial Ombudsman Service (FOS), is said to be the largest ombudsman scheme in the World.²² The Act provides for three types of jurisdictions: compulsory jurisdiction,²³ consumer credit jurisdiction, and voluntary jurisdiction. Authorized persons must submit to the first two jurisdictions. The third is a voluntary scheme as far as banks are concerned.

Practical Significance of Debts Recovery Tribunal in Tanzania

On several occasions, the Late President Magufuli raised his concern over delays in the resolution of land disputes, which he said was not fair to parties. The Head of the state was not happy with the way District Land Housing Tribunals were handling the disputes. Land disputes in this context are under the Land Act of 1999 include a mortgage. He said that "Perhaps a special team should be formed to address this challenge".²⁴ He went further to say that, "I am not sure if these District Land and Housing Tribunals are doing their job well. Time has come to make the Judiciary oversee them effectively because they are tarnishing the image of the Judiciary itself".²⁵ The response of the Judiciary to that concern of President was that Chief Justice was

recorded to say that from the year 2020/2021 the Judiciary would assume such a role and courts will begin to hear land disputes handled by the District Land and Housing Tribunals. So, we have an added burden, Magistrates will be assigned to handle such cases. He said this area has many cases, challenges, and complaints. Up to this juncture we would say the abolition of the District Land and Housing Tribunal as the Government and Judiciary suggest it will not resolve the issue of delay of cases in our Judicial system instead it will increase the problem tremendously, due to shortage of magistrates and judges in our court, the need for well-organized, specialized, and effective Tribunals to supplement this role of dispensation of Justice is inevitable. Like the two jurisdictions, we have discussed in this paper, and for a uniform mechanism for banking litigation a separate Tribunal specialized in recovery of debts due to Banks with different procedures in a way of alternative dispute resolution will help ordinary courts and the District Land and Housing Tribunals to function effectively and dispensing justice in a timely manner. Now, therefore, instead of abolition of DLHT and vest its burden to the ordinary courts which itself it is a brink of paralysis due to a bulk log of cases which lead to the failure of timely Justice which is the fundamental aspect in The Constitution itself under Article 107 A,²⁶ let us establish in every district a specialized separate Tribunal for all Banking Litigations.

Conclusion

The law in this area is not settled yet, it is unclear and to go in *tandem* with the development of banking sector in Tanzania is in dire need of clear, well organized, and effective specialized tribunal to deal with banking litigation specifically on debts recovery which will be beneficial by reducing the burden to the District Land and Housing Tribunal but also to the courts which will not be burdened to hear debts recovery cases. Now, therefore, Since, The Indian Banking law is based on a very large extent, though not entirely upon the English Banking Law, as *plethora* of authorities may reveal,

¹⁹ Section 4 (ix) of The Financial and Markets Act, 2000

²⁰ Tannan, M.L., (Ed.). (2003) Tannan's *Baning Law and Practice in India*, (20th Ed.). Vol 1. India.

²¹ Section 228 FSMA

²² Jones, R & Morris, P: A brave new World in Ombudsmanry? 2002 PL 640

²³ Sections 226, 228, 229

²⁴ Fautine Kapama, *Heat on Loan Defaulters*, www.dailynews.co.tz, 18 May 2020

²⁵ Fautine Kapama, *Heat on Loan Defaulters*, www.dailynews.co.tz, 18 May 2020

²⁶ The Constitution of United Republic of Tanzania, 1977

which is to some extent suite the circumstance of our country it is the high time now for the Government to adopt this measures and good practices that has been adopted by the Indian government long time ago.