The issue is the effect of such non-compliance with the rule in the circumstances of the case. Mr Mnkonje for the first respondent was firmly of the view that as the record of appeal did not contain a statement of the address for the second respondent, the appeal was rendered incompetent. According to him the requirements of rule 89(1)(b) are mandatory because the word "shall" is used in the rule. Suffice it for us to observe that not in every situation that an irregularity or non-compliance with a rule renders the appeal incompetent simply because the word "shall" is used in the rule. As held by a Single Judge of this Court in *VIP Engineering and Marketing Limited v. Said Bakhressa Limited* (1) irregularities or non-compliance which do not go to the root or substance of the matter can be overlooked provided there is substantial compliance with the rule read as a whole and no prejudice is occasioned. In this case having regard to the fact that the respondents were served with the memorandum and record of appeal in terms of rule 90(1), we do not think that in the circumstances of the case, failure to furnish the statement of address in the record was fatal to the appeal and that prejudice was occasioned to the respondents.

Finally, we wish to observe on what the appellant is expected to do in order to comply with rule 79 when the respondent does not respond to the notice of appeal. In the instant case, as the respondents had not furnished full and sufficient address for service in response to the notice of appeal, the record should have shown the last known address, namely the address used in the notice of appeal. This again, as already shown was not done. So, in this regard, there was non-compliance with the rule which, nonetheless we have held was not in the circumstances of the case fatal to the appeal.

All in all therefore, for the foregoing reasons we are satisfied that ground one of the preliminary objection is well founded, the appeal was instituted out of time, it is incompetent. The preliminary objection is sustained and the Notice of Appeal is struck out under rule 82 with costs.

ABDALLA YUSSUF OMAR *v.* PEOPLE'S BANK OF ZANZIBAR AND ANOTHER

COURT OF APPEAL OF TANZANIA AT ZANZIBAR

(Ramadhani, Lubuva and Munuo, JJ.A.)

CIVIL APPEAL No. 93 OF 2002

(From the Judgment of the High Court for Zanzibar at Vuga, Oredola, D.C.J., dated 14 March 2002 in Civil Case Number 43 of 2000)

Contract – Loan agreement – Default to pay consecutive installments – Whether the failure constitutes breach of contract.

Contract – Loan agreement – Power of sale of mortgaged property securing the loan – When the power of sale is exercisable.

Torts – Defamation – Advertisement of sale of mortgaged property over the radio – Whether the advertisement is defamatory of the defaulting borrower.

The appellant had obtained a loan in the sum of TZS. 15 000 000 from the first respondent on 28 January 1999 repayable within six months together with interest at the rate of 24% per annum. He mortgaged his house as security. After drawing TZS. 14 000 000 of the loan he failed to repay within the stipulated period. He obtained extension and entered into a new agreement which required him to repay the loan by twenty six monthly installments of TZS. 654 610 55 each from December 1999, and any outstanding balance was to be paid by January 2002. The new agreement gave the first respondent the right to sell the mortgaged property. When the appellant failed to pay seven consecutive installments the first respondent gave the appellant seven days' notice of its intention to sell the mortgaged property and instructed the second respondent to auction the mortgaged house. The sale of the property was announced over the radio, which publicity the appellant claimed defamed him. He then sued both respondents jointly and severally, claiming TZS. 15 000 000 from both respondents and TZS. 20 000 000 damages for breach of contract and, from the first respondent only, TZS. 15 000 000 as compensation for special and general damages. The trial

judge found either party had breached the loan agreement in that the appellant had failed to repay the loan while the first respondent had prematurely exercised its power of sale before January 2002.

Held: (i) The terms of the loan agreement required the appellant to repay the loan in twenty six monthly installments and the remaining balance by January 2002;

(ii) The trial judge was wrong to hold that the first respondent had prematurely exercised its power of sale since payment was due from December 1999 and not January 2002, which was the end of the repayment period;

(iii) By failing to repay any of the installments due until May 2002, when he was served with a demand notice the appellant was in breach of the loan repayment terms and the bank was entitled to exercise its power of sale of the mortgaged property;

(iv) The advertisement of the sale of the mortgaged property over the Radio was not defamatory since the first respondent had a legal right to exercise a right of sale

Appeal dismissed

Mr Uzzi K Haji, for the Appellant

Mr Ali H Hassani, for the first Respondent

Mr Mbwezeleni, for the second Respondent

JUDGMENT

(Dated 11 December 2003)

Munuo, J.A.: The appellant, Abdallah Yusuf Omari, through the services of Mr Ussi K Haji, learned advocate, is appealing against the dismissal of Civil Case Number 43 of 2000 in the High Court of Zanzibar, before Oredola, Deputy Chief Justice, as he then was. In the said case, the appellant sued the first respondent, the Peoples Bank of Zanzibar for:

(a) TZS. 20 000 000 damages for breach of contract and

(b) TZS. 15 000 000 compensation for special and general damages.

The appellant jointly claimed from the Peoples Bank of Zanzibar and its agent, the second respondent, the Managing Director of Caravan Ltd., TZS. 30 000 000 compensation for defamation, interest and costs of the suit. The respondent jointly and severally denied the claim.

The appellant applied for and obtained a loan of TZS. 15 million from the first respondent, the Peoples Bank of Zanzibar, hereafter referred to as the bank. The terms of the loan agreement are reflected on the loan agreement, Exhibit P1 which is dated the 28 January 1999. The loan was to be repaid within six months with an interest rate of 24% per annum as stated under Clause 2(b) of Exhibit P1. The appellant mortgaged his Mtoni house as security. Thereafter the appellant drew TZS. 14 million from the bank but defaulted in repaying the loan so he sought extension of time to settle the same. The Bank and the appellant then made a new loan agreement, Exhibit P4. Clause 6 of the new loan agreement required the appellant to pay the debt within a period of 26 months with effect from December, 1999 in monthly installments of TZS. 654 610 55, and any remaining balance to be paid by January, 2002. Clause 7 of the new loan agreement, Exhibit P4, gave the bank power to sell the mortgaged house to liquidate the debt upon the appellant's failure to pay the loan as scheduled. Like under the previous loan agreement, Exhibit P1, the appellant failed to execute the terms of repaying the loan under the second loan agreement, Exhibit P4 whereupon the bank, after serving a seven days notice on the appellant, instructed its agent, the second respondent, the Managing Director of Caravan Ltd., to auction the mortgaged house to pay the overdue debt. The sale of the mortgaged house was announced over radio Tanzania, Zanzibar, which publicity, the appellant complained, defamed him. Hence the present suit for damages against the bank and its agent, the co-respondents. Before the sale of the mortgaged house the appellant got an injunction to restrain the respondents from selling the mortgaged house. To date the house has not been sold and the appellant has not repaid the loan.

The learned judge found either party had breached the loan agreement in that the appellant defaulted in paying the debt while the bank exercised its power of sale prematurely, before January 2002. The learned judge observed.

> Thus in essence and conclusion on this issue as a whole and as framed; I find and hold that there has been breaches of agreements on both sides, of the divide, that is, plaintiff and first defendant respectively. Howbeit, the resultant effects of the said breaches, will be pronounced upon at the end of this judgment ...

At the end of the judgment, the learned judge held:

> In conclusion, having considered, weighed, assessed and evaluated the totality of evidence adduced by the parties herein, coupled with the cogency of the evidence, credibility of witnesses and probability of the pieces of evidence in the light of surrounding circumstances, I am of the firm view point that there is lack of evidence to support, both case and claims of the plaintiff ... The plaintiff's case against both the first and second defendants is hereby dismissed with costs ...

Mr Ussi K Haji, learned advocate, as stated earlier on, represented the appellant. Mr Ali H Hassan, learned State Attorney, represented the first respondent, the Peoples Bank of Zanzibar. Mr Mbwezeleni, learned advocate, represented the second respondent, the Managing Director of Caravan Ltd. Counsel for the appellant had initially filed eight grounds of appeal but at the hearing of this appeal, he abandoned grounds 1, 2, 3, 4 and 7 and argued grounds 5, 6 and 8 of the appeal together. Grounds 5, 6 and 8 of the appeal state:

> 5. The learned Judge having held that the respondents were not entitled and could have no validity and legality to sell the appellant's mortgaged property before the month of January 2002 he ought to have held that their action amounted to a breach of the agreement.
>
> 6. Further the Court having made the decision as in para above, it ought to have held that to advertise the sale of the house of the appellant and labeling him as a bad debtor had injured his credibility and tarnished his business reputation.
>
> 8. The learned Judge had erred in law and facts and ought to have held that on the balance of probability the appellant was libeled by the respondents thus causing him damages.

In his submission, Mr Ussi Haji criticized the bank for advertising the mortgaged property for sale before the agreed time, which was, January 2002. The radio announcements, counsel for the appellant contended, defamed the appellant for their *innuendo* was that the appellant was neither a creditworthy nor trustworthy businessman, disrepute which seriously tarnished the appellant's business image and esteem. It was the view of the advocate for the appellant that the learned trial Judge should have awarded the damages the appellant claimed for defamation from the respondents. Counsel for the appellant prayed that the appeal be allowed with costs resulting in the judgment being entered for the appellant as prayed for in the plaint.

Mr Ali Hassan, learned State Attorney supported the decision of the Trial Court. He maintained that the announcements over Radio Tanzania, Zanzibar, publicizing the sale of the mortgaged property were necessary and justified because the appellant had breached a fundamental term of the loan agreement, Exhibit P4, namely the appellant's default to pay installments of TZS. 654 610 55 for six consecutive months before the notice to sell the mortgaged property was served on him by the respondents. The appellant's breach of the said fundamental term under Clause 6 of the loan agreement, Exhibit P4, Mr Ali Hassan asserted, caused the bank to move the second respondent to sell the mortgaged property to settle the debt. It was the appellant's own failure to pay the debt which gave rise to the radio announcements so the said radio announcements were justified. The learned State Attorney urged the Court to dismiss the appeal with costs.

Mr Mbwezeleni, learned advocate for the second respondent, adopted the submission of the learned State Attorney. He pointed

out that the second respondent duly served a seven days demand notice on the appellant before publicizing the sale of the mortgaged property but the appellant did not respond to the demand notice. Counsel wondered why the appellant did not protect his business reputation by paying the due monthly installment or even paying the debt when the demand notice was served on him. Contending that the appellant was himself to blame for the radio announcements of the sale of the mortgaged property, Mr Mbwezeleni urged us not to interfere with the decision of the Trial Court.

The issue is whether by announcing the sale of the mortgaged property over Radio Tanzania, Zanzibar, the respondents defamed the appellant.

Like the learned trial Judge, we have to resolve the above question negatively. As counsel for the parties conceded, the appellant failed to repay the loan under the first loan agreement, Exhibit P1. The bank favoured the appellant with extension of time to pay the debt by entering into a new loan agreement, Exhibit P4. Under the new loan agreement, the period of paying the debt was enlarged to 26 months on monthly installment of TZS. 654, 610/55 as provided under Clause 6 of the material loan agreement Exhibit P4. Initially, the first loan agreement, Exhibit P1, had required the appellant to repay the loan within six months which he failed to do. But even after time had been enlarged under Clause 6 of the second loan agreement, Exhibit P4, the appellant did not make any attempt to pay the monthly installments. The bank then issued a demand letter, Ref. PBZ/DDB/CR/97-99/339 dated May 26 2000 Exhibit D1 in which it gave the appellant seven days to pay up the arrears of monthly instalments he had defaulted to pay for six months or else face legal action. The appellant did not respond so the bank moved their agent, the second respondent, to sell the mortgaged house by public auction to realize the debt.

We are of the settled view that Clause 7 of the loan agreement, Exhibit P4 gives the bank power to sell the mortgaged house. Exhibit P4 is written in Kiswahili but Clause 7 of the said agreement, translated into English provides:

> If the customer fails to pay the debt, the bank will sell the mortgaged house without the consent of the customer or Court. If the debt has not been satisfied, the bank will attach other properties of the customer to settle the debt.

It is our view that because the appellant failed to repay the loan by installments as scheduled, the bank properly exercised its power of sale under Clause 7 of the Loan Agreement, Exhibit P4. It is so because the appellant breached a fundamental term of the agreement, namely Clause 6 of the loan agreement. We wish to quote Clause 6 of the loan agreement in the Kiswahili text which states:

> Kwamba, mkopaji anaahiidi ya kwamba, kuanzia mwezi wa Desemba 1999 atakuwa akilipa si chini ya TZS. 654 610 55 kila mwezi, kwa muda wa miezi ishirini na sita (26), na hivyo kuweza kumudu kulipa deni hilo lililosalia ifikapo mwezi wa January 2002.

The English translation of the above would be:

> That, the borrower promises to pay the loan from December 1999 in monthly installments of TZS. 654 610 55 for twenty six months (26) and in that way manage to pay the remaining debt by January 2002.

We are clear in our minds that Clause 6 of the loan agreement, Exhibit P4, required the appellant to pay the debt by installments of TZS. 654 610 55 per month for 26 months and any remaining balance would be paid by January 2002. We think the learned judge misconstrued Clause 6 when he held that the date for payment would fall due in January 2002 because the date of payment was to commence in December 1999 and end in January 2002. We are also of the settled view that because the appellant failed to honour the terms of payment under Clause 6 of the loan agreement, Exhibit P4, the bank was justified in exercising its power of sale of the mortgaged property under Clause 7 of the said loan agreement.

Under the circumstances the appeal is devoid of merit. We accordingly dismiss the appeal with costs.