

TANZANIA / JUDGMENT

Land Case No

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1 January 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LAND DIVISION) AT DAR ES
SALAAM LAND CASE NO.42 OF 2023 ABDIEL ALPHONCE MSHANA..... 1st
PLAINTIFF/1st DEFENDANT GLOBAL WEB LIMITED..... 2nd
PLAINTIFF VERSUS BATULI NASSORO SEIF..... 1st DEFENDANT/
PLAINTIFF ABG AFRICAN LINK TRADERS LIMITED..... 2nd DEFENDANT SADIKI
SULEIMAN KUMBATA @ SADIQ S. KUMBATA..... 3rd DEFENDANT THE REGISTRAR OF TITLES
(RT)..... 4th DEFENDANT ATTORNEY GENERAL (AG) (As Necessary
party)..... 5th DEFENDANT AMANA BANK (as a necessary party)..... ..6th
DEFENDANT NATIONAL COMMERCIAL BANK OF AFRICA..... -/2nd DEFENDANT

JUDGMENT

20/11/2024 & 20/01/2025 GWAE, J It is clear from the plaintiffs' amended plaint duly filed 17th April 2024 and the 1st and 2nd defendants' joint amended written statement of defence that, the 2nd plaintiff, Global Web Limited and the 2nd defendant, ABG African Link Traders Limited were at some point in time in business partnership mainly dealing with printing and supplies. The said existence of relationship i is said to have stemmed from the close relationship that existed between the 1st plaintiff, Abdiel Alphone Mshana ("Mshana") and the 1st defendant, Batuli Nassoro Seif ("Batuli") who are directors and shareholders of their respective registered companies. However, between 2013 to 2018 the relationship between Mshana and Batuli became acrimonious especially when the said Mshana was duly issued with default notice by Commercial Bank of Africa (2nd defendant to the counterclaim filed by the 1st defendant herein) via her Receiver Manager one Abduel Gilead Kitururu for the disbursed loan facility, security being a landed property on Plot No. 703 Block 'F' Msasani Village area-Kinondoni Municipality in Dar es salaam City registered with CT No. 55461 (herein "the Suit property"). It is further the version of the plaintiffs that, immediately after receipts of the default notice, the 1st plaintiff entered into the agreement with the 1st defendant that, Mshana would be given a total of Tshs. 220, 000,000/= in order to repay the outstanding balance with the Commercial Bank of Africa on conditions that, the same would be repaid within three (3) years and the Certificate of Title of the suit property would be returned in the 1st plaintiff's name. According to Abdiel Mshana, the loan given to him was fully repaid 2 through 2nd plaintiff to the 1st defendant via 2nd defendant's account and remaining balance (Tshs. 31,248, 000/=) was paid to Walter Mapunda as construction costs of a house located at Kijitonyama, which is owned by the 1st defendant. On the other hand, it is the

1st and 2nd defendants' stance that, they purchased the suit property from the Receiver Manager through a contract entered on 15th April 2013 and that, there was no any point in time they entered into loan agreement/contract with the plaintiffs herein. It is also the contention of the 1st and 2nd defendant that, the plaintiffs did not pay any amount of money to them. Following to above conflicting stances by the plaintiffs and 1st and 2nd defendants briefly outlined herein, the plaintiffs have now knocked the doors of the Court by joining the 3rd defendant (1st defendant's husband) who at once instituted a case before this court (Land Case No. 179 of 2018, 4th and 5th defendant as necessary parties and 6th defendant since she is a holder of the certificate of title of the suit property issued by the 1st defendant as security for the loan in favour of the 2nd defendant from 3rd March 2016 to date. The plaintiffs are thus praying for judgement and decree against the defendants jointly and severally as follows; 3

1. Declaration orders that, the suit property belongs to the 1st plaintiff
2. Declaration that, the 1st defendant discharged his liability in respect of the agreement dated 2nd April 2013 entered into by and between the 1st plaintiff and 1st defendant
3. The suit property be registered in the name of the 1st plaintiff hereof
4. An order that, the 4th defendant to re-register and issue the Certificate of Title (CT) in the name of the 1st plaintiff
5. An order against the 6th defendant for immediate release of the
6. Perpetual injunction restraining the defendants from making any change and or action of whatsoever way and in whatsoever manner be it by selling mortgaging or disposing it by way of transfer in whatsoever manner to any person (s)
7. Costs of the suit to be borne by the defendants
8. Any other reliefs (s) that this Honourable Court may deem fit and just to grant In the joint amended written statement of defence, the 1st defendant filed her amended counter-claim against the 1st plaintiff and the defunct Commercial Bank of Africa (Tanzania) now NCBA as the one who appointed the Receiver Manager, one Abduel Gilead Kitururu to sell the suit property mortgaged by the 1st plaintiff. She is therefore praying for the judgment and 4 decree as follows;-
 - a. A declaration that the 1st defendant/ plaintiff to the counter claim is the lawful owner of the suit land after having purchased it on 15th April 2013 from Abduel Gilead Kitururu of Amicus Attorneys who was appointed by Commercial Bank of Africa to be Receiver Manager
 - b. An order for the 1st plaintiff/1st defendant to the counterclaim to hand over vacant possession of the disputed property

- c. An order for the rental arrears from April 2013 to April 2020 to the rate of USD 1200 per month and from May 2020 to the rate of USD 1500 until finalization of the case and hand over of vacant possession of the suit property to the 1st defendant/plaintiff to the counterclaim
 - d. Payment of general damages as may be assessed by this Honourable Court
 - e. Costs of the counter-claim and that of the main case be borne by the 1st defendant in the counter-claim
 - f. Any other relief (s) the Honourable Court deems proper to grant
- In his defence to the amended counter-claim, Mr. Mshana seriously refuted the suit property to have been sold to Batuli by stating that a contract signed before Kitururu was intended to re-enforce the contract between Batuli and him executed entered on 2nd April 2013 since the transfer would be impossible on the reason that, the same was mortgaged to CBA and on 5 the material date it was under receivership and that everything done was to rescue his house from being sold in the intended public auction by NCBA. Mr. Mshana further denied being a tenant on the reason that, he did not enter into any lease agreement with the 1st defendant/plaintiff and went on contending that, he is the lawful owner of the suit house in which he is dwelling. In his amended written statement of defence to the mended plaint, the 3rd defendant disputed every averment by the plaintiffs and insisted that, the suit property of the 1st defendant, which she obtained through purchase from NCBA Receiver Manager. The 3rd defendant also averred that, if truly as contented, the 1st plaintiff entered into agreement with the 1st defendant, the sale of the suit property could not be conducted except by way of bailout agreement. The 4th and 5th defendants to the main case similarly disputed the plaintiffs' claims, by stating through their joint written statement of defence that, the 1st defendant is the lawful owner of the suit property since according to the records kept by the RT, registration of her ownership was pursuant to the laws of the land. Similarly, the defence of the 6th defendant through her amended 6 Lu; //^ written statement of defence is to the effect that, the suit property is now registered in her name that is from 2016 to date as the 2nd defendant and her entered into loan facility agreement for unspecified amount and that, the 1st defendant pledged the suit property as mortgage for the loan advanced to the 2nd defendant. Throughout the trial of both main case instituted by the plaintiffs and counter-claim, the plaintiffs and 1st and 2nd defendants were represented by Mr. Amarndo Swenya rarely assisted by advocate Jerome Njiwa and Mr. Nehemia Nkoko, learned advocates the plaintiffs and 1st and 2nd defendants respectively whereas Mr. Boaz Msoffe, the learned state attorney appeared representing 4th and 5th defendants herein. Mr. Paschal Kihamba (adv) represented the 3rd defendant whilst Mr. Augustino Rutakolezingwa assisted by Mr. Francis Kajiru (both advocates) represented the 6th defendant and the 2nd defendant to the counter-claim. After failure of the mediation, the final conference was held in terms of Order VIIID Rule 40 of the Civil Procedure Code, Cap 33, Revised Edition, 2019 (CPC) and the following issues were framed;-

1. Whether there was any valid contract between the 1st plaintiff and the 1st defendant to the main case relating release of the Plot No. 703 Block "F" Msasani Village Area-Kinondoni in Dar es Salaam City (suit property) whose certificate of title is withheld by Commercial Bank of Africa/NCBA Bank Tanzania Limited by way of mortgage where the 2nd plaintiff to the main case obtained a loan facility
2. If the 1st issue is answered in affirmative, whether the plaintiffs' suit is time barred or not.
3. Whether the 1st defendant to the main case and plaintiff to the counter-claim lawfully purchased the suit property from the 2nd defendant/ NCB Bank Tanzania Limited to the counterclaim
4. Reliefs the parties are entitled In establishing their case against the defendants and entering defence for the 1st defendant to the counterclaim, the plaintiffs summoned a total of five witnesses to wit; Mr. Abdiel Alphonse Mshana, Walter Joseph Mapunda, Musa Roma, Kosani Efron Musama and Emmanuel Sango who appeared for testimonial purpose as PW1, PW2, PW3, PW4 and PW5 respectively. The plaintiffs to main case were also able to support their oral evidence with the following exhibits. One, 2nd plaintiff's certificate of incorporation issued on the 26th February 1999 (PE1). Two, Memorandum of understanding between the 2nd plaintiff and 2nd defendant dated 27th May 2016 (PE2). Three, Certificate of Occupancy with title No. 55461 (PE3). Notice issued by Mr. Kitururu to the 1st plaintiff dated 25th March 2013 (PE4) and an agreement 8 between Mshana and Batuli duly signed 2nd April 2013 (PE5) Other exhibits tendered by the plaintiffs and admitted by the Court are; 10 payment vouchers bearing the name of Walter Mapunda (PE6), Notice to vacate from the suit land addressed to the 1st plaintiff dated 19th August 2018 (PE7) and followed by another notice issued on 18th December 2018 both under instruction of the 3rd defendant (PE8) and parties' pleadings in Land Case No. 179 of 2018 instituted by the 3rd defendant against the present defendant save 4th and 5th defendants (PE9) Further to that, the plaintiffs were able to produce other exhibits namely; 14 days' eviction notice dated 23rd April 2021, issued by property master addressed to the 1st plaintiff informing him to vacate as the suit property was disposed to Batuli since 2013 (PE10), 90 days' Statutory Notice 25th August 2022 addressed to RT and copied to Solicitor General and other defendants (PE11), Valuation report in respect of the suit property of prepared on dates of February 2023 the actual value of the suit property is Tshs. 706,000,000/= (PE12) and a disposition of the mortgaged property, to the 1st defendant by the Receiver Manager on 15th April 2013 in terms of section 132 (4) of the Land Act, Cap 113 R. E, 2019 (PE13) tendered through 3rd defendant (DW2). 9 The oral evidence adduced by the plaintiffs through their witnesses especially (PW1 and PW4) aforementioned is briefly to the effect, the 2nd plaintiff obtained loan facility from the NCBA and that the 1st plaintiff guaranteed it by depositing his CT with the lender. However, the 2nd plaintiff default repayment of the loan as result she was issued with default notice (DE4). It is also the evidence of the plaintiffs that subsequent to the issuance of the default notice of attachment, PW1 then approached the 1st defendant as his business partner through PE2 with a view of borrowing Tshs. 220, 000,000/= so that he could settle the

outstanding loan with the CBA (T). The 1st plaintiff and 1st defendant then entered into mutual agreement, which was reduced into writing on 2nd April 2013 (PE5) and witnessed by advocate Roma (PW3). The CT was handed over to the 1st defendant as guarantee of repayment of the loan repayable within three years period via the 2nd plaintiff's account for change of ownership reversible upon payment of the loan in full. PW1 also testified that, it was further agreed that, upon failure to repay the loan, the 1st defendant would pay him Tshs. 280, 000,000/= as top up of the purchase price. It is also the evidence of the plaintiffs that the loan advanced by the 1st defendant was repaid in full through 2nd defendant's account 17th April 2013

2017. PW1 endeavoured to substantiate his assertion by producing a bulk of bank statements but the same were rejected after the objection from the defence and concession by the plaintiffs' advocate on the ground that, there was no notice to rely on the secondary evidence that was issued by the plaintiff. PW1 similarly testified that, he repaid some of money (more than 30 Mil) for constructions costs of the 1st defendant's house located at Kijitonyama area. This piece of evidence was supported by PW2 who established that, he was being paid by the 1st defendant through payment vouchers (PE6) and some of the money was repaid through Hon. Katanga as rent and Tshs. 19,000,000/= under common trust that alleged to have existed between the 1st plaintiff and 1st defendant. It is further the plaintiffs' evidence through PW1 that, subsequent to the repayment of the loan through Exim Bank as orally substantiated by PW5, there were threats to evict the 1st plaintiff from the suit property via PE7, DE8 and DE10 herein on the pretext that, the 1st defendant purchased it. PW1 also testified that, the mortgaged Deed entered by the 1st defendant and 6th defendant is null and void since it contravened the agreement dated 2nd April 2013 (PE5). Additionally, it is the testimony of PW1 that, if PE5 was forged the 1st defendant would have taken legal action against him. PW1 finally stated that, the 1st defendant's claims on rental arrears are baseless since they did not enter such agreement and sought grant of reliefs in the plaint and dismissal of the orders sought by the 1st defendant to her counter-claim. However, when probed by Mr. Nkoko for the 1st and 2nd defendant on whether the amount of money allegedly paid to the 1st defendant through the 2nd defendant's account was necessarily aimed at settling the debt (Tshs. 220,000,000/= allegedly borrowed by him. DW1 lucidly replied that, the payments or repayments of the loan were effected in the 2nd defendant's name and not the 1st defendant's name and that the said might be related to the MOU of 2016 (PE2). After close of the plaintiffs case and defence for the 1st defendant to the counter-claim. The defendants were equally afforded an opportunity to enter their respective defence. Likewise, a total of five witnesses for the defence were called. It is as herein under; The 1st defendant who appeared before the Court as DW1 for herself and the 2nd defendant testified that, she purchased the house from NCBA via 12 Receiver Manager on 15th April 2013 after she was informed by her husband, 3rd defendant that the same was for sale following default to service the loan by the plaintiffs. Hence, she is the lawful owner of the suit house, which she has been pledging it as security for loan facilities she obtained in different Banks adding that as of now the

same is mortgaged to the Amana Bank, 6th defendant. DWI further resisted that, she did not enter into any agreement with the 1st defendant. She challenged the weight of PE5 on the contention that it is not signed by her on each page. Moreover, DWI stated that, the 1st plaintiff who was dwelling at the time of her purchase of the suit property approached her to be a tenant of the disputed property. They (DWI and 3rd defendant) accepted his request and due to the nature of his child who was insane. They allowed the 1st defendant to continue living therein as tenant and he be paying USD 1200. However, Mr. Mshana did not pay any single cent to date. DWI further denied to have instructed the plaintiffs to construct a house at Kijitonyama. When DWI cross-examined by the plaintiffs' counsel as whether there were money deposited to the 2nd plaintiff's account, she contended 13 that, the same was in the usual transactions which were in respect of their the business undertakings. In defending his case, the 3rd defendant appeared as DW2 and gave his affirmed testimony, mostly similar to that of DW1. It is as follows; that the suit property belongs to his wife, the 1st defendant after payment of the purchase price in full on 18th April 2013. DW2 went on testifying that, she has been sued by the 1st plaintiff following his acts of issuance of the eviction notices aforementioned (PE7, PE8 and PE10) and his failure to repay the rental arrears. DWI also seriously disputed his knowledge as to the agreement between the 1st plaintiff and 1st defendant (PE5). Furthermore, DWI testified that, he happened to sue the 1st plaintiff and 1st defendant vide Land Case No. 179 of 2018 and the 1st defendant and him, have never owned a house at Kijitonyama. When probed by the counsel for the plaintiffs on whose possession before execution of disposition of the Right of Occupancy in question (PE 13) and his knowledge of PE5, DWI replied that, the same was in the possession of the Commercial Bank (Tanzania). He also questioned that, if at all there was a private arrangement between Mshana and Batuli as alleged by the 14 plaintiffs, he as the 1st defendant's husband would have been involved in the said agreement. The 2nd defendant, NCBA (T) to the counter-claim also entered his defence through her Manager one John Njau, DW3) who cemented that, the 2nd plaintiff was given loan facility and that same was secured by depositing the Certificate of Title of the suit property. He also testified that the suit was sold by the Commercial Bank of Africa via her Receiver Manager and the one who purchased it was the 1st defendant and transfer of the same was effected in her name. In his defence, the 6th defendant paraded her sole witness, a legal department manager (DW4) who testified that, the 2nd defendant is their outstanding customer since 2013 and that she obtained loan facility in 2016, mortgage being the suit property there was a mortgage deed to that effect. He then produced the Mortgage Deed executed on 3rd March 2016 the same was admitted in evidence as DEI. Lastly, the 4th and 5th defendants summoned their witness known by the name of Waziri Masoud Mganga, land officer (PW5), who admittedly testified that, it was the 4th defendant who effected transfer on 19th April 15 2013 of the suit to the 1st defendant, Batuli after she purchased it from NCBA (T). DW5 substantiated his evidence by producing the Certificate of Title of the suit property (DE2) and prayed for an order dismissing the plaintiffs' claims against the 4th and 5th defendants. After close of the parties' case, the counsel for the parties were granted leave to file their final submissions, which I shall accordingly consider as guidance towards composition of this judgment. I

shall determine issues as framed. Starting with the first issue on whether there was any valid contract between the 1st plaintiff and the 1st defendant to the main case relating release of the Plot No. 703 Block "F" Msasani Village Area-Kinondoni in Dar es salaam City (suit property) whose certificate of title was withheld by Commercial Bank of Africa/NCBA (Tanzania) Limited by way of mortgage where the 2nd plaintiff to the main case obtained a loan facility. It is the evidence by the plaintiffs that, the first plaintiff and first defendant entered into a valid contract (PE5) on 2nd April 2013, the contract which was aimed at rescuing the suit property from being auctioned by NCBA following the failure to service the loan. However, the 1st defendant seriously refuted such assertion by starting that, she purchased the property from 16 NCBA's Receiver Manager as clearly substantiated by the Deed of Disposition (PE13). Since the plaintiffs' assertion is seriously denied by the 1st defendant, it follows that, the burden of proof rests on the shoulders of the one who asserts such existence as required under provisions of section 110, 111 and 112 of the Tanzania Evidence Act, Cap 6, R. E, 2019 (TEA). This ancient rule has been consistently emphasized by our courts tying up those who institute cases before courts of law to meet such requirement. For instance, the Court of Appeal of Tanzania in Paulina Samson Ndawaanya vs. Theresia Thomas Mdahaha (Civil Appeal No. 45 of 2017) TZCA 453 (11 December

- 2019) held; 'The burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it..... It is ancient rule founded on the consideration and should not be departed from without strong reason.' Likewise, in the case of Agatha Mshote vs. Edson Emmanuel & Others (Civil Appeal No.121 of 2019) [2021] TZCA 323; (20 July 2021 TANZLII), it was stated; "In view of what we have endeavoured to discuss, the appellant failed to prove her case on the balance of 17 probabilities and it cannot be safely vouched that she had discharged the burden as required under section 110 of the Evidence Act. That said, since the burden of proof never shifts to the adverse party until the party on whom the onus lies discharges that burden, as earlier stated, the weakness of the respondents' case, if any, cannot salvage the plight of the unproven appellant's case." See also the case of The Manager, NBC-Tarime vs. Enock M. Chacha (1993). Guided by the above principle of law, I am therefore duty bound to carefully examine the evidence adduced by the parties during trial. The fact that, the 1st plaintiff and 1st defendant to the main case entered into the agreement executed on 2nd April 2013 is mainly established by PW1 and supported by PW3 as well as the documents itself (PE5). On the other hand, DWI Batuli strongly disputes existence or involvement in the said contract. Thus, the 1st plaintiff and 1st defendant are in serious battle, which requires serious attention of the Court. Looking at the contract allegedly entered between the 1st plaintiff and 1st defendant, it is certainly observed that, the same is purporting to have been signed by the contracting parties and witnessed by PW3. However, the DWI patently denied to have signed PE5 (See paragraph 8 of the 1st and 2nd 18 defendants' joint amended WSD) and evidence adduced during trial. Equally, DWI lucidly challenged absence of her initials in PE5 as the case for the 1st plaintiff whose initials are patently indicated. The plaintiffs were under onus to prove their case, ought to have paused some necessary

questions as to the signature appearing in PE5 pertaining omission to indicate initials in each page. In this regard, DWI was not cross-examined at all implying that there is no dispute that she did not sign the document (PE5). It is trite law that, failure to cross-examine a witness in a particular statement denotes that he tacitly, accepts the truth of the witness's evidence on the matter. This was the position of the Court of Appeal of Tanzania in the case of Shadrack Balinago vs. Fikiri Mohamed @ Hamza & Others (Civil Appeal No. 223 of 2017) [2018] TZCA 215 (9 October 2018) where it was held that; "As rightly observed by the learned trial judge in her judgment, the appellant did not cross-examine the first respondent on the above piece of evidence. We would, therefore, agree with the learned judge's inference that the appellant's failure to cross-examine the first respondent amounted to acceptance of the truthfulness of the appellant's account." 19 See also judicial jurisprudence in Ismail Selemani Nole vs. The Republic, Criminal Appeal No. 117 of 2013 [267V/TZCA 285 (22 November

- 2014) where it was held that a decision not to cross-examine a witness at all or on a particular point is tantamount to an acceptance of unchallenged evidence as accurate. Similarly, I have also compared the signature appearing in PE5 alleged of the 1st defendant from other signatures of the 1st defendant appearing on the WSD vide Land Case No. 179 of 2018 (PE9), Mortgage Deed between the 6th defendant and 1st defendant (DEI), Disposition of the suit property (PE13) as well as her signature appearing in the 1st and 2nd defendants' joint amended written statement of defence filed on 6th June 2024 and found differences especially in alphabet "B". In PE5 alphabet "B" is not seen unlike to other documents filed in court. Though I am not a handwritings expert nonetheless I think I am entitled to at least physically compare the signatures in dispute. My comparison is justified by section 75 (1) of TEA which reads 75.-(1) In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal, admitted or proved to the satisfaction of the court to have been written or made by that person, may be compared with the one which is to be proved, although that signature, writing or 20 seal has not been produced or proved for any other purpose." The Court of Appeal in the case of DPP vs. Shida Manyama @ Suleiman Mabuba, Criminal Appeal No. 285 of 2002 (CA-M2), observed that:- "Generally handwriting or signature may be proved on admission by the writer or by the evidence of a witness or witness in whose presence the document was written or signed. This is what can be conveniently called direct evidence which offers the best means of proof... More often than not; such direct evidence has not always been readily available. To fill in the lacuna/ the evidence Act provides three additional types of evidence or modes of proof. These are opinions of handwriting experts (S.47) and evidence of persons who are familiar with the writing of a person who is said to have written a particular writing of a person who said to have written a particular writing (S.49). The third mode of proof under S.75 which unfortunately; is really used these days, is comparison by the court with the writing made in the presence of the court or admitted or proved to be the writing or signature to the person." The noted differences in signature together with the omission or absence of the 1st defendant's initials in each page of the

contract as well as failure to cross-examine DWI on whether the signature appearing on PE5 is hers or not, create doubts as to whether the 1st defendant really entered into an agreement with a view of salvaging the suit property from being attached and sold by NCBA. Assuming that, the above defects are curable and therefore the 1st plaintiff and 1st defendant executed PE5 as alleged by the plaintiffs, in my considered view, it is still inconceivable if there was valid contract between the contracting parties. I hold that view simply because in law, the 1st plaintiff could not pass any good title to the 1st defendant or any other person since the suit property was mortgaged to the NCBA (2nd defendant to the counter-claim). How could the 1st defendant have better title on 2nd April 2024 than that of NCBA while the CT (PE3 and DEI) demonstrate that from 20th January 2009 to 19th April 2013 the CT of the suit property was in the name of the NCBA as mortgagee denoting that NCBA has an interest which could be disposed of without her involvement. My holding is fortified by the decision of this court in Farah Mohamed vs. Fatuma Abdalla [1992] TLR 205 where his lordship, Mrosso J as he then was held "(i) A right of occupancy or an offer of a right of occupancy cannot be inherited by the mere possession of documents of title; 22 (ii) He who doesn't have legal title to land cannot pass good title over the same to another; (iii) Documents purporting to transfer ownership of a right of occupancy must be registered otherwise those documents are invalid and ineffectual." In our instant case the certificate of title in respect of the suit property was deposited by the 1st plaintiff to NCBA as security for the loan facility advanced to the 2nd plaintiff, the fact which is not disputed at all. Hence, the NCBA had a better title prior to 2nd April 2013 until on 19th April 2013 when the mortgage was discharged and the 1st defendant was registered as the rightful owner. In my considered view, the registration of mortgage interest in favour of the NCBA in the title of the suit property was conclusive proof and indefeasible against any other person unless the mortgage was discharged upon repayment of the loan (See Bank of Africa-Uganda vs. Ganyana (Civil Suit No. 477 of 2011 [2017] UGCommC 3 (24 February 2017), 24 February 2017). It is perhaps instructive to adhere to the rule "nemo dat rule" whose rationale is that, the transferor of goods cannot pass a better title than he himself possesses. (See also judicial precedents in The Registered Trustee 23 of Evangelical Lutheran Church in Tanzania, Easter & Coastal Diocese vs. Grace William and two others (Civil Appeal No. 366 of

2020) [2023] TZCA 17469 (3 August 2023) and Bishopsgate Motor Finance Corporation Ltd. vs. Transport Brakes Ltd. ([1949] 1 K.B. at

- p. 336. The position of the law was equally strengthened by Mr. Roma, the learned advocate who appeared as PW3, when cross cross-examined by the counsel for the 1st and 2nd defendant, he stated and I quote; "During execution of PE5, the Bank was the owner of the property in question. Mshana had no good title to pass to anybody during execution of PE5." The next point or sub-issue) to be looked into is, whether there is a proof that, the plaintiffs paid the 1st and 2nd defendant the amount of money allegedly advanced to them. According to PW1's oral evidence, the plaintiffs fully repaid the loan through the 2nd defendant's account withheld by NCBA. However, in my considered view, this fact has not satisfactorily

been proven since there are no documents to substantiate the plaintiffs' stance. More so, the plaintiffs' assertion that they paid the 1st and 2nd defendants through the account owned by the 2nd defendant in NCBA is found rebuttable since the 2nd plaintiff and 2nd defendant were business partners as sufficiently testified 24 by PW1, DW1 and DW2 and MOU (PE2). Hence, even if there would be documentary evidence to that effect, yet that could not be sufficient evidence to rely unless the purpose of money deposited was clearly specified, which is not the case here. In this regard and for clarity, parts of the evidence adduced by PW1 when cross-examined by the 1st and 2nd defendants' counsel is reproduced "The payments or repayments of the loan were effected in the name of the 2nd defendant and not the 1st defendant. If there any transactions done between the 2nd plaintiff and 2nd defendant, the same were related with the MOU (PE2) of 2016). PE2 is not related to the disputed transactions." Similarly, PW4 coherently testified that, the 1st defendant deposited the purchase price of the suit property on 18th April 2013 that is Tshs. 190, 000, 000/= into the 2nd plaintiff's account No. 10397610019. That means the DW1's evidence that he fully repaid the debt is not worth of belief by this court to form basis of holding that, the 1st and 2nd defendant received the amount allegedly advanced to the 1st plaintiff. For easy of reference, PW4's part of evidence is quoted herein under 2; "The said 2nd plaintiff defaulted servicing the loan and the Bank wanted to realise her money through the security. Eventually, the bank exercised her statutory power to sell the 25 mortgaged property. There was certain amount of money that was paid into NCBA Bank through the 2nd plaintiff's account from ABG African traders that was Tshs. 190, 000, 000/= on 18th April 2013." In the light of the above pieces of evidence adduced by the PW4, diligently examining the testimony by PW1 as well as the testimony of DW3 in that regard, I am unable to unhesitatingly hold that, the 1st plaintiff to the main case was given loan by the 1st and 2nd defendants, which he had fully repaid. On the strength of the foregoing deliberations, I therefore find that there was no valid contract entered by one Mshana and Batuli to the main case and if at all there was an agreement in terms of the contract executed on 2nd day of April 2013 such agreement was illegal and unenforceable. Consequently, the 1st issue is answered negatively. Now coming to the 2nd issue herein. Since the 1st issue is definitely determined not in affirmative, therefore, it follows that, the court should not be incarcerated determining it. Nonetheless, since there was contentious issue on breach of the contract allegedly executed on 2nd April 2013 by the 1st plaintiff and 1st defendant. Hence, I should bother dealing with the issue 26 on the limitation of time on that aspect. In law, limitation of time on a claim of recovery of a piece of land is 12 years as provided under Item 23 of Part I to the schedule of the Law of Limitation Act, Cap 89, Revised Edition, 2019 and the fact that there had been pendency of proceeding vide Land Case No 179 of 2018, which in itself excludes such period in terms of section 19 of LLA, the plaintiffs suit is thus not time barred. However, if the 1st defendant would claim breach of contract by the 1st defendant in her amended counter-claim, the 1st plaintiff would be held liable for having not repaid the alleged loan within the agreed period of three (3) years since the time could start running against him from 18th April 2013 when 190,000,000/= was evidently deposited to the 2nd plaintiff's account and ending on 18th April 2016 and not 2017 as wrongly testified, PW1. As it

is trite law that, parties are bound by their own pleadings unless they are permitted to depart from the same by way of an amendment. Thus the parties herein could raise issue breach of lease agreement, which was pleaded. (See National Insurance Company vs. Sekulu Construction,

(1984) TLR 157). 27 Now to the 3rd issue on whether the 1st defendant to the main case and plaintiff to the counter-claim lawfully purchased the suit property from the 2nd defendant to the counterclaim According to the parties' pleadings (See para 12, 13 of the amended plaint and paragraph 5 of the 1st and 2nd defendants' joint amended WSD), the oral evidence adduced by both sides and documentary evidence (PE3 & DE2), it goes without saying that, it was the 2nd pdefendant who obtained loan from NCBA and the 1st defendant stood as the guarantor by pledging the suit land as security. It is further evident that, the plaintiff defaulted repayment of the loan as portrayed by the Notice of sale of the suit property dated 25th March 2013 (PE4). Similarly, it is plainly clear through the Deed of Disposition of the suit property dated 15th April 2013 (PE 13) strangely witnessed by PW3 who is also said to have witnessed the agreement (PE5) between the 1st plaintiff and 1st defendant. Moreover, it is satisfactorily adduced that, it is the 1st plaintiff who was the registered as the owner of the suit property until 19th April 2013 when the 1st defendant came to mortgage to Equity Bank and later on to the 6th defendant in securing loan facility in favour of the 2nd defendant since 3rd 28 March 2016 to date. The deed of mortgages to NCBA, Equity Bank and eventually to the 6th defendant, did not and do not vest any transfer of mortgaged property except power and remedies in case of default by the borrower, as was the case here and that is in terms of section 57 of the Land Registration Act, Cap 334, Revised Edition, 2019 which provides; "57. A mortgage shall, when registered, have effect as a security and shall not operate as a transfer of the estate thereby mortgaged, but the lender shall have all the powers and remedies in case of default and be subject to all the obligations that would be conferred or implied in a transfer of the estate subject to redemption." Guided by the above provision of the law, the NCBA therefore rightly exercised its power of sale to the 1st defendant after default to service the loan on the part of the 2nd plaintiff. The contention by the plaintiffs through their cross-examination to DW5 followed by the closing submission by their learned advocate, if there were other transfer documents such as confirmation of citizenship, Deed of Sale and related transfer documents in the registration of the 1st defendant's name as baseless. I hold that decision as the defendant's name is registered as the owner of the suit property apart from the lenders (Banks) and since 29 the name of the 1st plaintiff's name was replaced thereof, it is my firm view that, it is the 1st defendant who lawfully purchased the suit and whose name is registered as the owner taking into account that the registration was completed as plainly adduced by DW5, the evidence which is supported by DE2 (See Leopold Mutembei vs. Principal Assistant Registrar of Titles & 2others, Civil Appeal No. 57 of 2017 (unreported-TZCA). However, such question was rightly responded by the land officer (DW5) who stated that such documents were not disputable. Consequently, the 3rd issue is determined in affirmative. Coming to the last issue on relief the parties are entitled

In law, the relief refers to the redress or assistance that a party to a judicial proceeding seeks from a court. Essentially, the one who loses his or her case should not be entitled to any relief as the case on the part of the plaintiffs to the main case. Equally, a party who wins the case is the one who is entitled to reliefs sought. However, there are reliefs, which require proof in order that, the court may justly grant the same for example, specific damage, and rental arrears. In our case, the 1st defendant/plaintiff, Batuli has prayed for payment of rental arrears from 2013 to date against the 1st defendant to the counter-claim. On the other hand, Mr. Mshana, PW1 30 seriously disputed the existence of such lease agreement. In my view, this fact ought to have sufficiently established rather than mere assertions that the 1st plaintiff/1st defendant approached DWI and DW3 requesting them to be their tenant in the house which they purchased from NCBA. If three notices to vacate (PE7, PE8 and PE10) were positively responded by the 1st plaintiff/1st defendant and the same being indicative that, the 1st plaintiff/1st defendant was the tenant in the disputed house, the court's finding would be in favour of DWI. Nevertheless, I am of the formed decision that, the plaintiff to the counter claim must have suffered damages following her non-use of the suit property for quite a long time that is since she purchased it on 15th April 2013 to date. Having deliberated as herein, I therefore make the following orders; A. That, the plaintiffs' suit is entirely dismissed and the defendants to the main case shall have their respective costs of the case borne by the plaintiffs B. The 1st defendant/plaintiff's counter claim succeeds and fails to the extent as herein under;

- i. That, the plaintiff to the counter-claim is hereby declared the lawful owner of the disputed property located on Plot No. 703 Block T' Msasani Village-Kinondoni Municipality 31 in Dar es salaam City registered with Certificate of Title No. 55461, which she purchased on 15th April 2013 from the Receiver Manager, Abduel Gelead Kitururu working under the instructions of the National Commercial Bank of Africa (2nd defendant to the counter claim)
- ii. The 1st defendant to the counter-claim is ordered to promptly give vacant possession in favour of the plaintiff
- iii. The plaintiff to the counter is not entitled to the claimed rental arrears due to lack of evidence substantiating the existence of tenancy & landlord relationship between Mshana and her.
- iv. That, the plaintiff to the counter claim is awarded general damages to the tune of Tshs. One hundred and fifty million shillings (say Tshs. 150,000,000/=)
- v. Costs of the counter-claim shall be borne by the 1st defendant to the counter-claim It is so ordered DATED at DAR ES SALAAM this 20th January 2025 32 Court: Right of Appeal fully explained. M. R.GW, JUDGE 20/01/2025 Court: Judgement delivered in chamber No. 2 this 20th January 2025 in the presence of the parties' advocates namely;- Mr. Mr. Paschal Kahimba for the 3rd defendant but also holding brief of Mr. Nkoko- for the 1st and 2nd defendants, Mr. Francis Kajiru for the 6th and 2nd defendant to the counter claim who is also holding brief of Mr. Armando Swenya for the plaintiffs as well as in the presence of 1st plaintiff and 3rd defendant. The parties are at liberty to collect their copies of judgment, decree and decree, electronically or in hard copies form or both and they are available from today JUDGE 33

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Prepared on 13 October 2026 · Esheria