

TANZANIA / JUDGMENT

ABDUL OMARY MPURUTI V

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THE UNITED REPUBLIC OF TANZANIA IN THE HIGH COURT OF TANZANIA (DAR ES SALAAM SUB-REGISTRY) AT DAR ES SALAAM CIVIL APPEAL NO. 15154 OF 2024 (Arising from the judgment and decree delivered on 25/1/2017 by Hon. H.A. Shaidi, PRM, in Civil Case No. 235 of 2015 in the Resident Magistrate's Court of Dar es Salaam at Kisutu) ABDUL OMARY MPURUTI.....APPELLANT VERSUS AFRICAN MICROFINANCE LIMITED 1ST RESPONDENT NURU RAMADHANI NASSIB..... 2ND RESPONDENT

JUDGMENT

Date of last order: 11/2/2025. Date of Judgment:12/2/2025. B.E.K. Mganga, J. Brief facts of this appeal are that, Abdul Omary Mpuruti, the abovenamed appellant is married to Asha Abdul Mpuruti. It is said that the said Aisha Abdul Mpuruti, the wife of the appellant, is related to Nuru Ramadhani Nassib, the herein 2nd respondent. It is further said that, on 22nd May 2014, Nuru Ramadhani Nassib, the 2nd respondent signed a loan agreement with African Microfinance Limited, the herein 1st respondent. In the said loan agreement, the 2nd respondent secured 1 Twenty Million Tanzanian Shillings (TZS 20,000,000/=) only. It is alleged that, at the time of securing the said loan, the appellant and his wife, one Aisha Abdul Mpuruti, signed a letter as guarantors of the 2nd respondent and that, they pledged to the 1st respondent their landed property namely, house No. KN/MBB/MT13/25 with Certificate of occupancy No. 003078 situated at Mabibo within Kinondoni District as collateral. It happened that Nuru Ramadhani Nassib, the 2nd respondent, defaulted to repay the said loan to the 1st respondent and was thereafter untraceable. In order to recover the said loan, on 8th September 2015, 1st respondent filed Civil case No. 235 of 2015 before the Resident Magistrate Court of Dar es Salaam at Kisutu against the said Nuru Ramadhani Nassib, the beneficiary of the loan and Abdul Omary Mpuruti, the appellant and Aisha Abdul Mpuruti, the wife of the appellant as guarantors as 1st, 2nd, and 3rd defendants respectively claiming inter-alia, to be paid TZS 51,194,474/= being the outstanding loan. On 12th October 2015, the appellant and Aisha Abdul Mpuruti, his wife, filed their joint written statement of defence, disputing to have signed a letter as guarantors of the 2nd respondent. 2 On 25th January 2017, Hon. H.A. Shaidi, PRM, having heard evidence of the 1st respondent and that of the appellant and Aisha Abdul Mpuruti, the wife of the appellant, but in absence of evidence of Nuru Ramadhani Nassib who did not enter appearance despite of being served through substituted service in Mwananchi Newspaper, delivered his judgment holding

that, Abdul Omary Mpuruti, the appellant and Aisha Abdul Mpuruti, stood as guarantor to the loan 1st respondent advanced to Nuru Ramadhani Nassib and that, they signed a letter of guarantee attaching the photo of the said Aisha Abdul Mpuruti. The trial Magistrate further held that, the herein 1st respondent acted on the guarantee and issued the afore mentioned loan hence liability is on the shoulders of the herein appellant and his wife Aisha Abdul Mpuruti. The trial court, therefore, ordered sale of the house of the appellant and his wife that was pledged as collateral to the said loan. Appellant was aggrieved with the said judgment and decree hence this appeal. In the memorandum of appeal, applicant raised only one ground namely, "that, the trial Court erred in law and facts by entertaining the matter which it has no jurisdiction to entertain." When this appeal was called on for hearing, Mr. Godfrey Francis, learned advocate entered appearance and argued for and on behalf of 3 the appellant. On the other hand, Ms. Masecha Mlaki, learned advocate entered appearance and argued for and on behalf of the 1st respondent. I should point out that, 2nd respondent did not enter appearance and that, on 17th September 2024, this court (Hon. Mkwizu, J) issued an order for this appeal to be heard in absence of the 2nd respondent. Arguing in support of the appeal, Mr. Francis submitted that, the dispute that was filed at Kisutu is purely land matter because appellant testified that he did not allow his house to be security of the loan that was issued to Nuru Ramadhani Nassib, the 2nd respondent by the 1st respondent. Counsel submitted that, section 4(1) of the Land Dispute Court Act, Cap. 216 vests jurisdiction over the District Land and housing Tribunal. He strongly submitted that, the Resident Magistrate Court of Dar es Salaam at Kisutu had no jurisdiction to hear and determine the matter and order sale of house KN/MBB/MT13/25 situated at Mabibo area within Kinondoni District. Counsel for the appellant concluded that, since the court had no jurisdiction, the trial and subsequent orders are a nullity. With those submissions, counsel for the appellant prayed the court to allow this appeal with costs. Resisting the appeal, Ms. Mlaki, counsel for the 1st respondent submitted that the appeal is devoid of merit because the case that was 4 filed at Kisutu is not based on land rather, it is on recovery of TZS 51,194,474/= loan that was secured by residential licence No. KN/MBB/MT13/25 that the appellant and his wife guaranteed. Counsel for the 1st respondent added that, the main issue before the trial court was enforcement of loan agreement and not rights on land. She cited the case of case of Avit Thadeus Massage v. Isdory Assenga, Civil Appeal No. 6 of 2017, CAT (unreported) to support her submissions that, a claim of loan secured by land is not a land matter but a contractual dispute because, the use of land does not change the nature of the dispute. She went on that, the issue of loan in the appeal at hand did not change the nature of that dispute into land dispute. She also submitted that, appellant's liability as guarantor was properly proved hence, he was liable for the loan. With those submissions, Ms. Mlaki prayed that the appeal be dismissed with costs for want of merit. I should point out that, after a reply to submissions on behalf of the 1st respondent, counsel for the appellant did not have rejoinder. I have examined pleadings of the parties, evidence that was adduced before the trial court and considered respective submissions made in this appeal and wish to point out from the start, that, the whole dispute was not on right to land rather, it was on loan recovery as it was 5 correctly submitted by counsel for the 1st respondent. My conclusion is supported by pleadings of the parties namely, the plaint of the 1st respondent and the joint written statement of defence by the appellant and his wife Aisha Abdul Mpuruti. In paragraph 3

and 7 of the plaint, 1st respondent pleaded as follows: - “3. That the Plaintiff’s claim against the defendants jointly and severally is for payment of the sum of Tanzania Shillings 51,194,474/= being outstanding balance of loan extended to the 1st defendant and which remains unpaid to date, payment of general damages to the tune of TZS 10,000,000/= for the foreseeable loss due to default to honour the loan agreement, the payment of interests at the commercial rates from the date of default till to the date of full payment.

7. That it was further agreed that the 1st Defendant shall have a guarantor for the loan issued and thus on 28th May 2014 the Plaintiff received a letter of guarantee from 2nd and 3rd Defendants being husband and wife guaranteeing the 1st Defendant to obtain the loan of Tshs. 20 million(sic) from the Plaintiff. In that letter the 2nd and 3rd Defendants did pledge their landed property identified as house No. KN/MBB/MT13/25 located at Mabibo Ward, Kinondoni Municipal with Certificate of occupancy No. 003078 as collateral to secure the loan.” (Emphasis is mine). On the other hand, in their joint written statement of defence, the appellant and Aisha Abdul Mpuruti, in paragraphs 2 and 4 pleaded as hereunder: - “2. That the contents of paragraph 3 are vehemently denied and further that the second and the third defendants are in no way liable to pay the amount claimed. The plaintiff is put into a very strict proof thereof. 6
4. That the contents of paragraph 7 are denied. The second and third defendants further state that they never issued any valid letter of guarantee recognized in law.” (Emphasis is mine). It is clear from the quoted pleadings of the parties that, the suit was on recovery/ repayment of loan and not right to the landed property of the appellant and his wife Aisha Abdul Mpuruti. In fact, in their joint written statement of defence, appellant and the said Aisha Abdul Mpuruti did not state that the dispute was on the afore mentioned landed property. In addition to the foregoing, in his evidence, Severen Modest Mmasi (PW1) the only witness for the 1st respondent, stated that the suit was on recovery of loan advanced to Nuru Ramadhani Nassib and that, the 2nd and 3rd defendants, that is to say, the appellant and Aisha Abdul Mpuruti, were guarantors to the said loan. On the other hand, Abdul Omar Mpuruti (DW1) admitted to have given the certificate of the said house to Nuru Ramadhani Nassib so that the latter can assist them to obtain title deed. DW1 distanced himself with the letter of guarantee (exhibit P4) stating that neither himself nor his wife signed the said letter. On her part, Aisha Abdul Mpuruti (DW1), the wife of the appellant (DW1), like her husband (DW1) admitted to have given the certificate of their house to Nuru Ramadhani Nassib, her relative for reasons stated by DW1. In her evidence in chief, DW2 stated that Nuru 7 Ramadhan Nassib paid TZS 8,000,000/=. While under cross examination, DW2 admitted that the photo on exhibit P4 is hers and that, Nuru Ramadhani Nassib obtained those photos from DW1 and DW2 at the time the said Nuru Ramadhani Nassib was given the certificate with a view of obtaining titled deed on behalf of both DW1 and DW2. In their evidence, both the appellant (DW1) and Aisha Abdul Mpuruti, did not state that the dispute was on right to the said landed property to justify the claim in this appeal that the trial court lacked jurisdiction. From where I am standing, appellant cannot, at this appellate stage, even during hearing at trial, depart from what was pleaded. I am of that considered opinion

because it is settled principle of law in our jurisdiction that, parties are bound by their own pleadings, and they are not supposed to depart therefrom. See the case of Ernest Sebastian Mbele vs Sebastian Mbele & Others (Civil Appeal 66 of

2019) [2021] TZCA 168 (4 May 2021), Salim Said Mtomekela vs Mohamed Abdallah Mohamed (Civil Appeal No. 149 of 2019) [2023] TZCA 15 (15 February 2023), and Registered Trustees of Islamic Propagation Center (ipc) vs The Registered Islamic Center (tic) of Thaaqib Trustees (Civil Appeal 2 of 2020) [2021] TZCA 342 (27 July 2021 to mention but a few. 8 It was correctly submitted by counsel for the 1st respondent that, a claim of loan secured by land is not a land matter but a contractual dispute because, the use of land does not change the nature of the dispute. That is a correct position of the law obtained in the case of National Bank of Commerce Ltd vs National Chicks Corporation Ltd & Others (Civil Appeal 129 of 2015) [2019] TZCA 345 (23 September 2019). In the said case, the Court of Appeal held inter-alia that: - "The claim arose from the loan agreement which created a contractual relationship relating to business between them. The cause of action arose from a commercial contract...The 2nd, 3rd and 4th respondents were impleaded as guarantors to the payment of the loan. Their liability comes to picture due to the alleged 1st respondent's default in repaying the loan and interests thereon otherwise the appellant have no direct claims against them and their mortgaged landed properties as security. Neither is the appellant's claims based on their rights over their mortgaged properties. 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 as Mr. Kamara sought to convince us. The mortgaged properties are a subject of the case because they were used as security. And, therefore, they are liable to be sold so as to repay the loan and interest in case the appellant's claims are proven against the 1st respondent without resort to a civil action... 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." 9 In the National Bank of Commerce's case (supra), the Court of Appeal cited with approval the holding of this Court in the case of Britania Biscuits Limited vs. National Bank of Commerce Limited and Three Others, Land Case No. 4 of 2011[HC] 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. 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..." In the National Bank of Commerce's case (supra), the Court of Appeal further cited with approval the holding of this Court in the case of Exim Bank (T) Limited vs. Agro Impex (T) Limited and Two Others, Land Appeal No. 29 of 2008, (HC) (Unreported) that: - "On the plaint filed it clearly shows that the plaintiff is claiming a total of Tshs.

1,215,598,942.00 being 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 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...This suit would have been a land matter if the plaintiff had pleaded to enforce mortgage terms as per the sections 128, 129, 1330 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.” In the National Bank of Commerce’s case (supra), the Court of Appeal having quoted decisions of this Court in the afore cited cases, added that: - “...save for the use of the word "jurisdiction" no better words can be used to explain the distinction between a land matter and a commercial matter for the purpose of categorizing them and determining the appropriate Division of the High Court specialized on a particular claim.” It is my considered opinion that, the quoted decision of the Court of Appeal has nailed to the fullest the only ground of appeal raised by the appellant in this appeal that the dispute was not a land matter. I therefore, hold that the trial Court had jurisdiction over the matter and dismiss this appeal with costs for want of merit. 11 Dated at Dar es Salaam on this 12th February 2025. B. E. K. Mganga JUDGE Judgment delivered on this 12th February 2025 in Chambers in the presence of Hilda Kikoti, advocate holding brief of Godfrey Francis, Advocate for the Appellant but in the absence of both the 1st and 2nd Respondents. B. E. K. Mganga JUDGE 12

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