

TANZANIA / JUDGMENT

t postal bank ltd vs dn bahram co ltd 4 others 2010 tzhccomd 10 18 october 2010

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IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT OAR ES SALAAM
COMMERCIAL CASE NO.106 OF 2003 TANZANIA POSTAL BANK
APPLICANT !DECREE HOLDER VERSUS

1. D.N. BAHRAM AND CO. LTD 1ST RESPONDENT!JUDGMENT DEBTOR
2. DADRAHMAN NURMOHAMED BAHRAM 2ND RESPONDENT !
JUDGMENT DEBTOR
3. MERBIBI DADRAHMAN BAHRAM 3RD RESPONDENT !
JUDGMENT DEBTOR
4. MATHEW THOMAS MBATTA 4TH RESPONDENT !JUDGMENT DEBTOR
5. JOSEPH SIMBILIGUNGA MWACHULLAH 5TH RESPONDENT !
JUDGMENT DEBTOR Date of last order - 17/06/2010 Date of final submissions - 26/08/2010
Date of ruling - 18/10/2010 MAKARAMBA, l.: This is a ruling on an application the Applicant/
Decree Holder filed in this Court on the 6th day of March, 2009, under a Certificate of
Urgency. The Application was preferred under Section 68(e), Order XXI Rules 9, 20(1)(a),
35(1) and 40 of the Civil Procedure Code Act [Cap.33 R.E. 2002] seeking for the following
orders:
 1. That this Honourable Court be pleased to make an order that the Defendant/Judgment
debtors jointly and severally show cause as to why the decrees dated 19/11/2004 and
21/03/2005 should not be executed.
 2. That the Respondents/Judgment debtors jointly and severally be ordered to make payment
of the decretal amount due to the Applicant forthwith.
 3. That the Honourable Court be pleased to make an order that the ~d and :J'd Respondents be
examined as to their properties and means of satisfying the decrees dated 19/11/2004 and
21/03/2005.

4. That the Honourable Court be pleased to make an order that the ~d/ :J'd/ 4h and gh Respondents jointly and severally show cause as to why they should not be committed to prison for non-compliance with the court decrees dated 19/11/2004 and 21/03/2005.
5. Costs to the Applicant
6. Any other reliefs this Court may deem just to grant. The Application is supported by the affidavit sworn on 10/2/2009 by Advocate Casmir Nkuba, the Company Secretary of the Applicant, which was filed in court on 6th March 2009, and the Reply to Counter Affidavit sworn on 28th June 2010 by the same Casmir Nkuba and filed in court on 28th June 2010, which the Applicant's Counsel adopted to form part of the Applicant's submissions. In the course of making his submissions, however, the Applicant's Counsel abandoned the prayers contained in the Chamber Summons in paragraph (2), (3) and (4) and did not therefore make any submissions in respect of those prayers. The Application by consent of the learned Counsel for the parties was disposed of by way of written submissions. Advocate Seni Songwe Malimi from the firm of Kisarika, Malimi and Mlola Advocates appeared for the 1st Respondent. Masaka & Co. Advocates appeared for the 2nd and 3rd Respondents and Koga Advocates for the 4th and 5th Respondents. In the Affidavit of Casmir Nkuba, the principal officer of the Applicant, a factual background to matter is succinctly provided. Most of the contents in the Affidavit do not appear to be in controversy, save for some few matters particularly those contained in paragraph 9 and 15 of the Affidavit respectively. The 2nd and 3rd Respondents/Judgment Debtors as Directors of the 1st Respondent took out a joint Counter-Affidavit, wherein they admit all of the contents of paragraph 1 to 14 of the Affidavit and those in paragraph 16 of the said Affidavit, save only that the 2nd and 3rd Respondents claim that the loan was advanced to the 1st Respondent, a limited liability company, whose liabilities are limited to its assets, and therefore save for the 1st Respondent, the 2nd and 3rd Respondents are not liable to satisfy the decree passed in favour of the Applicant. However, the 2nd and 3rd Respondents do not seem in their submissions to have pursued further this line of argument. It would seem however, that the 2nd and 3rd Respondent while trying to shift the burden of liability to repay the loan to the 1st Respondent, which they admit of being its directors, contended that they did not fail to satisfy the decree made in favour of the decree holder but what they wanted was to be allowed by the Court to satisfy the decree by way of installments due to the fact that the 1st Respondent's business is now dwindling and it is not therefore possible to settle the whole of the debt at once. The 4th Respondent, MR. MATHEW THOMAS MBATA in his counter-affidavit contends that the alleged irrevocable and unconditional guarantees executed by the directors of the 1st Respondent in favour of the Applicant was fraudulently executed between the Applicant and the 2nd and 3rd Respondents as the pledged securities (Motor Vehicles) are not registered in the names of the 1st Respondent or the 2nd and 3rd Respondents, and therefore to this extent the loan agreement together with the guarantee agreement is null and void. The 4th Respondent claims further that at the time they executed the irrevocable and unconditional guarantees guaranteeing the full payment of the loan they were not aware of the fraudulent transactions between the Applicant and the 1st, 2nd and 3rd Respondents otherwise they could not have

guaranteed the loan. In the Affidavit, the Applicant contested this claim by stating being a financial institution whose major business is lending to the public the Applicant cannot engage itself with any of the alleged fraudulent transaction. The Applicant claim further that the loan advanced to the 1st Respondent by the Applicant was secured not only by the motor vehicles but also by personal guarantees and landed properties of the 2nd, 3rd, 4th and 5th Respondents. This matter is at the execution stage. The 1st Respondent has failed to repay the loan advanced to it by the Applicant timely. The Applicant resorted to Court by instituting a suit whereby a judgment on admission was entered on the 19th of November 2004 in favour of the Applicant as against the 1st, 2nd and 3rd Respondents. Subsequently another judgment was entered on the 21st of March 2005 in favour of the Applicant against the 4th and 5th Respondents who were also guarantors of the said loan. It is these two decrees which are the subject of the present application. In order however, to appreciate the nature of the controversy in this matter, a brief background to it is apposite. Briefly, on the 10th of September 2002, the Applicant through a revolving credit facility, entered into a loan Agreement with the Respondents extending to the 1 Respondent a loan of Tshs.165,000,000j-, which was subject to be charged an interest of 16% flat rate per annum if the Respondents default in the payment of any part of the facility. The 2nd and 3rd Respondents being Directors of the 1 Respondent jointly and severally executed in favour of the Applicant an irrevocable and unconditional guarantee which guaranteed for full payment of the loan and subsequent interest thereto. The 4th and 5th Respondents offered their landed properties as a further security to the loan advanced by the Applicant to the 1st Respondents. According to the Agreement, the loan and its subsequent interest thereto was to be fully repaid on or before 3rd of December 2003 but contrary to the said Agreement the Respondents failed to repay the loan and as at 30th July 2003 the amount outstanding was Tshs.171,685,507.74. On 29th October 2004, this Court entered judgment on admission against the 1st, 2nd and 3rd Respondents and hearing thereafter judgment against the 4th and 5th Respondents. Immediately after the said judgments, the 1st, 2nd and 3rd Respondents filed an application before this Court praying inter alia for this Court to allow them to pay as per decree in monthly installments of Tsh.2,500,000j-, which application on the 11th March 2005 was dismissed by this Court. The 1st, 2nd and 3rd Respondents filed a memorandum of review but on the date set for its hearing, the Respondents did not enter appearance and the 1st and 2nd court dismissed the application for want of prosecution. The 1, 2 and 3 Respondents filed application to the Court of Appeal of Tanzania vide Civil Application No.113 of 2005 for extension of time to serve Notice of Appeal out of time against the decision which rejected their application to repay the loan in installments and for stay of execution of the judgments, which application was dismissed with costs by the Court of Appeal on 8 September 2005. The 1st, 2nd and 3rd Respondents undeterred filed yet another application in the Court of Appeal of Tanzania vide Civil Application No.133 of 2005 seeking for extension of time to appeal out of time. When this matter came for hearing on 4th February 2009, the Court of Appeal of Tanzania in its decision dated 21st February 2008 struck out the application (with leave to re-file) as being incompetent for non-appearance by the 1st, 2nd and 3rd Respondents and awarded the Applicant costs thereof. On the 9th

September 2008 upon application by the 1st, 2nd and 3rd Respondents, the Court of Appeal of Tanzania vide Civil Application No.32 of 2008 restored the said Civil Application No.133 of 2005. To date the judgments and decree of the Court against the Respondents have not been satisfied and the application by the 1st, 2nd and 3rd Respondents for stay of execution was refused by the Court of Appeal. The 1st, 2nd and 3rd Respondents submitted that they do not in any way dispute the liability to repay the loan and the accrued interest, but what they are asking for is to be allowed to repay the said loan in installments for the reason that the business of the 1st Respondent has dwindled over the period of the loan and the 1st, 2nd and 3rd Respondents cannot manage to pay the whole of the sum owing at a single transaction. They prayed that the decrees should not be executed against them but they should be allowed a period of time in which to settle the amount due. The 4th and 5th Respondents on their part strongly resist the execution of the judgments and decrees of this Court because after the finalization of the suit they discovered that all the properties, namely the landed properties and Motor Vehicles mortgaged by the Directors of the 1st Respondent who exactly enjoyed the loan are not registered in the name of the said Directors. The 4th and 5th Respondent allege that the loan agreement together with the mortgage agreement between the Applicant and the 1st, 2nd and 3rd Respondents is tainted with fraud for the reasons that it was impossible for the Applicant Bank to allow the borrower to mortgage the properties which are not registered in the names of the Respondent or its Directors. The 4th and 5th Respondents in their submissions gave the details of the ownership of six motor vehicles (as per Annexure "AA" a letter from TRA dated 29th of July 2008 on the legality/ownership and new registration numbers and one landed property addressed to Managing Director of M.M. Auctioneers & Debt Collectors), showing that ownership of the said properties is of some other people. The 4th and 5th Respondents submitted further and prayed that due to serious allegations as regards to the execution of the decrees dated 19th November 2004 and 21st March 2005, the Applicant be ordered by this Court to submit to this Court all original Registration Cards of Motor Vehicles and Certificate of Right of Occupancy of the mortgaged properties for inspection in order for this Court to satisfy itself on the allegations they have raised before this Court issuing execution orders. In this application the Applicant's prayer is for this Court to order the Defendant/Judgment debtors jointly and severally to show cause as to why the decrees dated 19/11/2004 and 21/03/2005 respectively should not be executed. As correctly submitted by the Applicant's Counsel, the 1st, 2nd and 3rd Respondents have not been able to set out reasons as to why the decree should not be executed against them but only say that they have failed to repay it. The Applicant's Counsel submitted further that it is about five years since they proposed to pay the decretal sum by installments but have failed to do so which goes to show that they are not serious otherwise they could have paid something and/or continued to pay. The Applicant's Counsel prayed that the provision of Order XXI Rule 21(1) should come into play. Rule 21(1) of Order XXI which provides for the procedure after issue of notice as follows: "(1) Where the person to whom notice is issued under rule 20 does not appear or does not show cause to the satisfaction of the court why the decree should not be executed, the court shall order the decree to be executed" (the emphasis is of this Court). The provisions of Rule 21(1) of Order XXI of the Civil Procedure

Code quoted above requires that a person against whom a notice to show cause has been issued to show cause to the satisfaction of the court why the decree should not be executed, failure of which the court is obliged to order the decree to be executed. As correctly submitted by the Applicant's Counsel, the obligation for a borrower to pay cannot be avoided, as was vividly stated in EDWARD NYALUSAVS N.B.C. 1997 LIMITED AND ANOTHER Civil Case No. 213 of 1998 (unreported) as quoted with approval in the ruling of the High Court in the case of HOTEL PAN AFRICA LIMITED VS N.B.C. LIMITED Civil case No.52 of 2002 (High Court of Tanzania DSM (unreported), whose copy the Applicant's Counsel availed to this Court. The 1st, 2nd and 3rd Respondent do not however, dispute their liability to repay the loan and the accrued interest. They are only asking this Court to make an order for them to repay the loan by installments. As correctly submitted by the Applicant's Counsel, this is not the first time the 1st, 2nd and 3rd Respondents are making this kind of request to this Court. Previously the 1st, 2nd and 3rd Respondents had been granted this chance but failed to do it. Instead, as the Applicant's Counsel rightly submitted, until Civil Application No.133 of 2005 was struck out by the Court of Appeal on 4th of February 2009, the 1st, 2nd and 3rd Respondents in their bid to resist the decrees, resorted to endless applications both in this Court and in the Court of Appeal. Indeed, as correctly submitted by the Applicant's Counsel it is now over six years since the Applicant got the fruits of its litigation but the Applicant has failed to execute the judgments and decrees it obtained against the Respondents. The Applicant's Counsel submitted further that it is high time now after six years of being deprived of the fruits of its litigation, the Applicant, as was stated by the Court of Appeal of Tanzania in PETER P. TEMBA t/a MAHENGE TIMBER & ENT VS DAR ES SALAAM CITY COUNCIL & HASSAN IBRAHIM SOBO Civil Application No.149 of 2009 (per Kalegeya, J.A.) quoting with approval from the case of MRS WAJIBU MAGUNGU & OTHERS VS NBC Civil Application No.176 of 2003 (unreported) and ABDUL HAMID MOHAMED KASSAM & ABDULLATIF I. MURUDEKER VS AMAN MOHAMED & 2 OTHERS, Civil Application No.176 of 2006, should enjoy the fruits of its litigation unless the Respondents show justification for the Applicant to continue to be deprived the fruits of its litigation. As correctly surmised by the Applicant's Counsel, the 1st 2nd and 3rd Respondents have failed to show cause why execution of the decrees against them should not be ordered by this Court. On the allegations of fraud raised by the 4th and 5th Respondents in their Counter Affidavit and submissions, the Applicant's Counsel submitted and correctly so in my view, that this is clearly an afterthought since the 4th and 5th Respondents instead of bringing it at the first instance of the case, they have raised it now only as a defence to the execution process, contrary to the law. In buttressing his point on this issue, the Applicant's Counsel cited in his submissions the work of the learned authors D.L. McDonnell et al in the book Kerr on the Law of Fraud and Mistake, 11th Edition, Universal Law Publishing Co. Pvt Limited, 2005, Chapter VII at page 416 (excerpts of which was availed to this Court), to the effect that the proper method of impugning a judgment for fraud is by action although in exceptional case it may be done upon a motion for a new trial. As correctly submitted by the Applicant's Counsel, the allegations of fraud by the 4th and 5th Respondents on the part of Applicant's officers are criminal in nature for which separate proceedings ought to have properly been

instituted in court to prove them, and not by bringing them up by way of Counter-affidavit and at the execution stage as the 4th and 5th Respondents have done. Making reference to allegations of fraud in civil proceedings, the Applicant's Counsel submitted that the position of the law as stated in R.G. PATEL V LAUI MAHAN]I [1957] E.A 314 and reiterated in OMARI YUSUPH V RAHMA AHMED ABDULADR [1987] TLR 169, is that allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt but rather something more than a mere balance of probabilities required in ordinary civil cases. I am at one with the Applicant's Counsel that the allegation of fraud raised by the 4th and 5th Respondents in their Counter affidavit against the 1st, 2nd and 3rd Respondents and the Applicant not only fall short of the required standard of proof but are misconceived. The claims by the 4th and 5th Respondents that there was fraud on the Motor Vehicles for the 1st Respondent in this matter are unfounded. As such the 4th and 5th Respondents are personally liable to pay the loan under the guarantee and mortgage executed by them. In my considered view, and with due respect to the 4th and 5th Respondents, it is not the burden of the Applicant to prove the fraud allegation but it is upon the 4th and 5th Respondents to do so since they are the ones who came up with the allegation, which unfortunately they have failed to prove and have elected to shift this burden onto the Applicant. The 4th and 5th Respondents do not contest the fact of them being the guarantors of the loan facility the Applicant advanced to the 1st Respondent. The evidence on record shows that the 4th and 5th Respondents offered their landed properties as a further security to the loan advanced by the Applicant to the 1st Respondents. None of the properties the 4th and 5th Respondents claim that belong to some other people and not the 1st, 2nd and 3rd Respondents are owned by the 4th or the 5th Respondents either. If such properties belong to other persons other than the 4th and 5th Respondents or the 1st, or 2nd or 3rd Respondents, as the 4th and 5th Respondents contend, I find it rather strange and awkward for the 4th and 5th Respondents to act as the devil's advocate in trying to argue their case on the basis of the weakness of the case of some other persons not in this suit. The 4th and 5th Respondents allege that the Agreement was fraudulently executed since the pledged securities were not in their names, and that to this date the decree has not been executed because there is nothing to attach as the alleged securities do not belong to the 1st, 2nd and 3rd Respondents. As the Applicant's Counsel correctly submitted, the loan was secured not only by the said Motor Vehicles and landed property which the 4th and 5th Respondents are now crying fraud, but by some other landed properties including the properties of the 4th and 5th Respondents which they have not been able to establish that those properties do not belong to them. A closer look at the Application for execution the Applicant filed in this Court on the 9th of September 2009, for the amount of Tshs.237,799,295.85 contains a schedule of the properties mortgaged to the Tanzania Postal Bank to secure the revolving credit facility and its respective owners. In order to appreciate the gist of the fraud allegations by the 4th and 5th Respondents that the property in the securities mortgaged to secure the loan facility was not of the 1st, 2nd and 3rd Respondents a brief excursion on the said properties gives the following picture: A: Landed Properties

1. Property on Plot NO.55 Block "U" Rujewa Urban Area, Mbeya - C.T. No.4166 Land Office No.72417. The record on file shows that this property was subject of a mortgage dated on 5th of October 2001 between DADRAHMAN NURMOHAMED BAHRAN (mortgagor/jowner) and Tanzania Postal Bank (mortgagee) to secure a revolving credit facility of Tshs.115,000,000/- The record on file also shows that by Memorandum of Variation of Mortgage dated 10th September 2002 between DADRAHMAN NURMOHAMED BAHRAM and Tanzania Postal Bank, transferred the facility to M/s D.N. Bahram & Co. Ltd and the mortgagor agreed to vary the amount secured by the Mortgage from Tshs.115,000,000/- to Tshs.165,000,000/-
2. Property on Plot NO.796/1 Block "A" Kimara Matangini, Dar es Salaam - C.T. No.41552 Land Office No.142273. The record on file shows that this property was a subject of a mortgage deed dated 22nd October 2001 between MATHEW THOMAS MBATTA (mortgagor/jowner) and Tanzania Postal Bank to secure a banking loan facility of up to Tshs.100,000,000/-extended to DADRAHMAN NURMOHAMED BAHRAM. The record on file also shows that by Memorandum of Variation of Mortgage dated 10th September 2002, MR. BAHRAM transferred the facility to M/s D.N. Bahram & Co. Limited and the Mortgagor consented whereupon the credit facility was enhanced up to the tune of Tshs.165,000,000/-
3. Property on Plot No.17 Block "w" Magomeni Area, Dar es Salaam - C.T. No.51436 Land Office No.190831 - The record on file shows that this property was a subject of a Mortgage Deed dated 10/09/2002 between JOSEPH SIMBILIGUNGA MWACHULLAH and Tanzania Postal Bank to partially secure Banking facility of up to Tshs.165/000,000/- which was extended to M/s D.N. Bahram & Co. Limited.
4. Certificate of Title No.4890 - DLR Farm NO.80 Itumba Village, Mbeya District is in the name of DADRAHMAN NURMOHAMED BAHRAM.
5. Certificate of Title No. 36619 Plot 17 Block "c" Chang/ombe Area Dar es Salaam City is in the name of DADRAHMAN NURMOHAMED BAHRAM. B: Motor Vehicles:
 1. Mitsubishi Truck 18 tons with Reg. NO.TZE 612 (the TRA letter dated 29/07/2008 shows the owner as DML/D/NUR MOHAMED but it is not yet registered in the new number system).
 2. Scania Tanker 18 tons with Reg. No. TZC 7774 (the TRA letter indicates that details of this number will be soon available).
 3. Scania Truck 18 tons with Reg. No. TZ 71634 (The TRA letter dated 29/07/2009 shows the owner as CRDB/NUR MOHAMED B. JAN MOHAMED and the new Reg. No. as T.451 AGT with new owner being Dipin Jadavji Patel of Arusha as from 25/4/2005).
 4. Scania Truck 18 tons with Reg. NO.TAT 884 (the TRA letter shows the owner as Mr. DADKARIM and the car is now registered as No.T.890 ACR and owned by IMRAN NZAR BAHRAN of DSM as from 24/4/2008).
 5. Scania Truck 18 tons with Reg. No.TZB 570 (The TRA letter shows the owned as CRDB/ DAHRAM TRANSPORT LTD. and the car is not yet registered in new number system).

6. Toyota Land Cruiser Station Wagon Reg. NO.TZB 6585 (the TRA letter shows the owner as HALID J.LUSEEKO of DSM but the car is not yet registered in the new number system). The above record which is on file shows very clearly that the landed property owned by the 4th and 5th Respondents as guarantors are Property on Plot No.17 Block "w" Magomeni Area, Oar es Salaam
- C.T. No.51436 Land Office No.190831, which is owned by the 5th Respondent, JOSEPH SIMBILIGUNGA MWACHULLAH; and Property on Plot NO.796/1 Block "A" Kimara Matangini, Oar es Salaam - C.T. No.41552 Land Office No.142273 which is owned by the 4th Respondent, MATHEW THOMAS MBATTA respectively. The 4th and 5th Respondents do not dispute that they are guarantors for the loan facility the Applicant extended to the 1st Respondent and the mortgage deed on record as indicated above proves this undisputed fact. In any case as correctly submitted by the Applicant's Counsel, the properties the 4th and 5th Respondents mentioned in their submissions as not being owned by the 1st, 2nd and 3rd Respondents do not form the only security for the loan. In any event as correctly submitted by the Applicant's Counsel, defects in some of the securities do not in my view invalidate the other securities and the loan agreement. The dispute was concluded th th almost seven years ago and judgments and decrees passed. The 4 and 5 Respondents have come up with allegations of fraud essentially seeking to reopen the issue of validity of the security for the loan which they themselves do not dispute. In any event even if this Court would have wished to buy the argument by the 4th and 5th Respondents on the alleged fact of ownership of some of the securities by some other persons, the 4th and 5th Respondents have not been able to establish the fact of lack of ownership in their properties which they offered as guarantee for the loan facility. In any event the letter from TRA dated 29th of July 2009 was addressed to the Managing Director, MM Auctioneer & Debt Collectors Co. Ud., showing change of ownership and registration of some of the motor vehicles but not the landed properties subject of mortgage. In the upshot and for the foregoing reasons, the Application is hereby granted. Execution of the judgments and decrees of this Court dated 19/11/2004 and 21/03/2005 against the 1st, 2nd and 3rd Respondents and against the 4th and 5th Respondents respectively shall proceed. The Applicant shall have its costs for this application. It is accordingly ordered. R.V. MAKARAMBA JUDGE 18/10/2010 Ruling delivered this 18th day of October 2010 in the presence of Mr. Mlola, Advocate for the Applicant and Mr. Mohamed Bash for the 1st/2nd and 3rd Respondents, and Mr. Mlola for Mr. Kogas, Advocate, for the 4th and 5th Respondents. R.V. MAKARAMBA JUDGE 18/10/2010 Word count: 4/372

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