

TANZANIA / JUDGMENT

20210902 TZHC Dar es Salaam

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IN THE UNITED REPUBLIC OF TANZANIA THE HIGH COURT OF TANZANIA {DAR ES SALAAM DISTRICT REGISTRY) AT DAR ES SALAAM CIVIL CASE No. 22 OF 2015 MIKIDADI SAID ULAYA PLAINTIFF Versus ZAINAB AHMED MLINDWA 1 st DEFENDANT DAR ES SALAAM COMMUNITY BANK 2 nd DEFENDANT

JUDGMENT

23 rd March, - 2nd September, 2021 J. A. DE - MELLO J; Plaintiff instituted a suit against the Defendants, seeking this Honourable Court to grant the following reliefs;

1. Payment of TShs. 50,000,000/= being amount paid to -DCB Commercial Bank PLC.
2. Payment of interest of 30% being commercial interest from the discharge date.
3. Payment of interest of 12% being court rate from the date of the judgment to the date of full payment.
4. Cost for the suit •
5. Any other relief court deem just to grant. However, the suit has been resisted by the 2nd Defendant on his Written Statement of Defence, leaving the 1st Defendant unheard, hence Ex Parte. The Court was satisfied that, all the means to serve and summon him, proved futile following, the last effort for publication on Mwananchi News Paper of 27 th July, 2017. The Plaintiff's side summoned two witnesses, whereas the 2 nd Defendant lined up only one witness. In support of the case the following exhibits were tendered and admitted as follows; Exhibit P1 - Discharge Mortgage Exhibit D1 - Term Loan Exhibit D2 - Mortgage of a Right of Occupancy Substantiating in chief, PW1 one Mikidadi Saidi Ulaya, seventy five (75) years, a retired District Commissioner of Kondoa, a Muslim affirmed and stated that, being familiar to the Defendant, he surrendered his Title Deed No. 100280 as collateral to enable her secure a TShs. 10,000,000/= for her business, from Dar Es Salaam Community Bank. The initial signed Mortgage Deed reflected the TShs. 10,000,000 / = as opposed to what he later came to establish was for TShs. 40,000,000/ =) fraudulently secured without his knowledge. It was disclosed following a demand notice he received from DCB Mnazi Mmoja Branch. From then he pursued Zainab Defendant to no avail, only to be informed that she has fled to Dubai.

Further search from Lands confirmed the same reflecting mortgaged the property situate at Temeke Municipality towards the said loan. Follow up from to the DCB

- Kinondoni, had the Managing Director, confirming the borrowed amount was TShs. 40,000,000/= million. He claimed to have been a good clothing customer of the Defendant and, trusted her, much as record from the Bank file had the Defendant recording him to be his husband. This being the case, he struggled to offset the loan to avoid disposal by the Bank of the mortgaged property, hence discharged. A copy of the said discharged of Mortgage was submitted and, admitted as exhibit P1 (original copy is at Lands for clearance). It is his prayers that, the bank formed party to the said fraud, hence liable. PW2 was Zulfa Edward Mpoli, 65 years, a housewife Muslim, affirmed and stated, PW1 the Appellant is her husband since 1964, whereby in the year 1976 he secured land in Dar es Salaam where they jointly built a house which they still reside in. She claimed neither to know Zainab Ahmed Mlindwa the Defendant, nor the loan secured by her, for the intended auction documents in relation to their matrimonial house, in which her husband is the mortgagor. She alludes to what PW1 shared that, it was one Jaffer . . I her husband's boss who intervened to rescue, the sale by paying TShs. 50,000,000/=-, which left them free and, s~being_evicted. She 3 declined to have endorsed any legal documents for spousal consent yvhatsoever. Resisting the suit, the 2nd Defendant only one witness termed DW1 was one Olen Anthony Misigaro, 42 years, a banker and, Christian was sworn and stated, to be working at DCB Uhuru Branch as
- a. Relationship Customer Manager, since 2011. He claimed to know Zainab Mlindwa as a bank customer one who approached the bank with the request of TShs. 40,000,000/ = million loan. H~ving fulfilled the requirements the loan was approved with the Mortgage on Tittle No. 100280, Plot No. 29 Block 7, Keko Juu sealed at a tune of TShs. 40,000,000/ = million, guaranteed by the Mortgagor none other than the Plaintiff himself. It was for one year term for repayment. By the end of the year, it had scaled to TShs. 56,000,000/ = following default on the part of the borrower and persistent absenteeism. The Bank and, as the law demands, issued notice to the guarantor within the percepts of the law for payment. The loan agreement was tendered and admitted as exhibit D1, a registered mortgage was also tendered and admitted as exhibit D2. It is on record that, on record this suit had on 18th April, 2018 framed three issues for determination to wit; I What amount did he plaintiff guaranteed and executed a loan issued to the 1st defendant by the 2nd defendant? 4 . I II. To what extent (if any) the 2nd defendant is liable to pay tlie plaintiff on account of the amount paid to her upon the i st defendant default to pay the guaranteed debt? III. What reliefs are the parties entitled to? While the Plaintiff asserts to have guaranteed TShs. Ten million (TSh~. 10,000,000 / = acknowledging to have offered his matrimonial residence as collateral in form of a mortgage. The fact which was highly opposed by the 2nd Defendant, as revealed form both the Loan as well as the Mortgage Deed for TShs. 50,000,000 / =. It is even a fact that, the Plaintiff, in failing to locate the 1 st Defendant managed to discharge the mortgage from own sources. From the Plaintiff's final closing submissions, claimed to have guaranteed TShs. 10,000,000/ =, on an arrangement from home, with a promise from the 1 st Defendant to return copies but, none. It is his further submissions that, a spousal consent

was missing for the Bank, to proceed as it did. This, he believes proved fraud and, collusion between the 1st Defendant and, the Bank hence violating section 114 (1), (a) and (b) of the Land Act, Cap. 113, R.E 2019. The provision states; "A mortgage of a matrimonial home including a customary mortgage of a matrimonial home shall be valid only if there is evidence that it has been assented to by the mortgagor and the spouses or spouses of the mortgagor living in that matrimonial home; or

- (a) any document or form used in applying for such a mortgage is signed by, or there is evidence from the document that it has been assented to by the mortgagor and the spouses or spouses of the mortgagor living in that matrimonial home; or
- (b) any document or form used to grant the mortgage is signed by or there is evidence that it has been assented to by the mortgagor and the spouse or spouses living in that matrimonial home". Thus in answering the first issue, I wish to refer exhibit D2 which is a Mortgage Deed from Certificate of Title Number 100280, Plot No. 29 Block '7' Keko Juu Area, Dar es Salaam, showing the Mortgagor (herein the Plaintiff) signing on every page of the deed, whose first page with bold letters it is clearly written; " ... term loan facility of Tanzanian Shillings Forty Million (Tshs. 40,000,000/=) with interest rate of 22% per annum extended Zainabu Ahmed Mlindwa ... " Below it, there is Mortgagor's signature, which is available in all the sixteen (16) pages of the said mortgage deed, in the name of the PW1, the Plaintiff. As regard to the issue of spousal consent, it is true that, any mortgage of a matrimonial home including, a customary mortgage of a matrimonial home shall be valid only if there is evidence that it has been assented to by the mortgagor and, the 'spouses or spouses' living in that, matrimonial home or any evidence section 114 (1), (a) and (b) of the Land Act, Cap 113, R.E 2019. However, we see a different clause under clause 5.0 of the mortgage deed (exhibit D2) which provides a different scenario altogether as I import; "the Mortgagor hereby warrants and represents that he is not married, and guarantees that his wife died sometimes in 22/7/2009 per his affidavit dated 08/04/2014" (emphasis is mine) While it is against the law, but, this is what is in place, alluding the wishes of the one Mortgaging, the Plaintiff himself, where the Mortgage Deed was brought to his home by 1st Defendant, which he signed at his home in the absence of his wife. (see page 1 of the Plaintiff's final closing submissions filed pursuant to the order dated 9th March, 2021). This leaves the Plaintiff with the duty to prove his allegation that, he signed for TShs. 10,000,000/= as opposed to the TShs. 40,000,000/=, in that vacuum. I do appreciate the parameters of the burden of proof initiated by the Law of Evidence Act, Cap. 6, R.E. 2019 in section 110 (1) and (2) which provides that; "110. (1) whoever desires any Court to give Judgment as to any legal rights or liability defendant on the existence of facts which he asserts must prove those facts exist." 7
- (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person" It is even the cardinal principle of the law that, when fraud is claimed in Civil cases, it attracts a higher standard of proof close to that in Criminal cases. See the cases of See the case of Anthony M. Masanga vs. Penina (Mama Ngesi) and Others, Civil Appeal No. 118 of 2014 (Unreported). A synopsis by the learned Author Sarkar in SARKAR ON EVIDENCE, 14th EDITION 1993 at page 1339 persuasively, commenting on Indian provision of the Law, similar to ours, on the burden of proof partly has the following; 11 ... that the

initial onus is always on the Plaintiff and if he discharges that onus and makes out a case which entitled him to relief, the onus shifts on to the Defendant to prove those circumstances, if any which would disentitle the Plaintiff to the same (BASIRUDDIN VS. SAAEBULLA, 32 CW No. 160). 11 The Plaintiff, ought to produce evidence to show the tempering of what he guaranteed and what was issued, against his knowledge. For example, he could produce a copy of what he signed on that day to rebut the exhibit D2, or institute a criminal suit on the account of forgery or obtaining credit by false pretence but, none of them done. Exhibit D2 proves to the contrary, as mortgage deed was signed in all sixteen (16) pages, admitted during cross examination that, the attached photograph is his, which then firmly proves that being an educated retired officer he took time to read through and comprehend what the intention was all about. Regarding the second issue, as to what extent (if any, it is obvious that, the 2nd Defendant is at large, for reasons well known to herself but, from the looks of the matter she is fully aware of what transpired from onset to the end. To implicate the 2nd Defendant in this suit is an afterthought considering the documentation and, all the evidence at hand, in his favour. The law is quite clear of the duty and, position of a Mortgagor when it comes to default by the Principal. Clause 2.1 expressly provides for payment of outstanding liability in case of default in which, clause 3.0 provides for bank's rights and liability, ultimately is clause 3.2 empowering the bank to sale/dispose the mortgaged property, clause 4.2 serves for the discharged in case the liabilities are settled. In as far as exhibit P1, and on realization of the same, the Plaintiff made good his obligation by paying TShs. 50,000,000/=. This brings us to the rationale of loans that Banks advances to its client, as was held in the case of Agency Cargo International vs. Eurafrican Bank (T) Ltd, Civil Case No. 44 of 1998, High Court of Tanzania at Dar es Salaam (unreported) which stated: "I find ... the respondent to continue being in banking business must have funds to lend and which has to be repaid by its debtors. If a bank does not recover its loans, it will seriously be an obvious candidate of bankruptcy ... It is only fair that banks and their customers should enforce their respective obligations under the bank system (at pp. 5 and 6)" I therefore exempt the 2nd Defendant from this liability that solely lies with the 1st Defendant, who unfortunately is at large. This disposes the 3rd issues on what are reliefs to the parties entitled to, as none is for the Plaintiff. Having said so, I find this suit with no merit as hereby dismiss the same in its entirety with cost. 10

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