

TANZANIA / JUDGMENT

abeid mwaulasi mlowe and another vs nmb bank plc and others 2021 tzhc 9223 11 november 2021

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IN THE HIGH COURT OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA (IRINGA DISTRICT REGISTRY) AT IRINGA LAND CASE NO. 03 OF 2019 ABEID MWAULASI MLOWE 1st PLAINTIFF AYUBU MLOWE 2nd PLAINTIFF VERSUS NMB BANK PLC 1st DEFENDANT DOLPHIN GENERAL BUSINESS ENTERPRISES CO. LTD..... 2nd DEFENDANT 11/10 & 11/11/2021

JUDGMENT

MATOGOLO, J. The first plaintiff one Abeid Mwaulasi Mlowe and the 1st defendant NMB BANK PLC on 3rd day of November, 2015 entered into loan agreement as borrower and lender respectively while the 2nd plaintiff was the guarantor, under which the first defendant NMB BANK PLC, granted the first plaintiff a loan amounting 200,000,000/=, repayable for the period of two years and the 1st plaintiff was supposed to repay Tshs.10,277,184/= Monthly. Both parties executed the loan agreement and 1 | Page the security for the loan offered by the 1st plaintiff (Mortgagor in favour of the 1st defendant (Mortgagee) was a landed property located at Plot 7 Block S in Makambako Urban Area and Plot 21 Block CC Mkwawa area in Iringa Municipality owned by the 2nd plaintiff. Upon default of repaying the loan the 2nd defendant upon instruction by the 1st defendant intended to auction the House located at Makambako but the same exercise did not succeed after the 1st plaintiff rushed to the court and an injunctive order was issued hence this suit. The Plaintiffs are praying for judgment and decree against the defendants as follows:-

- (a) A declaration that the acts of the defendant is illegal and unprocedural;
- (b) A declaration that the plaintiffs are lawful owner of the houses in dispute;
- (c) An order that the 1st plaintiff be given time to complete payment of the loan to the 1st defendant;
- (d) Costs of this suit to be borne by the defendants and;

- (e) Any other relief this court may deem fit and just to grant. At the hearing this case parties were represented by Advocates, the Plaintiffs were represented by Mr. Cosmas Charles learned Advocate while Mr. Steward Ngwale learned advocate represented the defendants. In order to prove their case, the prosecution side called no witnesses apart from the plaintiffs themselves and tendered no exhibit. While the 2 | Page defence side also called no witness apart from the 1st defendant and tendered one exhibit. PW1 Abeid Mwaulasi Mlowe on his side testified that, he is doing timber business. His business is located at Mafinga, in the course of business, he applied for a loan from NMB Makambako branch. It was on 03/11/2015 when they signed a loan agreement. In that agreement they agreed that he will be repaying Tshs. 10,277,184/= per month. It was a two years contract. He submitted repayment for six months, but later he was unable to pay. The loan was of Tshs. 200,000,000/= which was secured upon mortgaging his two houses one is situated at Iringa. Mkwawa Plot No. 21 Block CC. The other is at Makambako Plot No. 7 Block S. After fail to repay the loan as agreed, on 05/09/2019 he saw advertisement that the 1st defendant through Dolphin General business and Enterprises were intending to auction his two houses he pointed out as securities but they continued with negotiation. They were negotiating orally. He asked them to give him more loan but they refused. But he submitted to them another schedule for repaying the loan but they refused. He testified further that, he was informed by his daughter that she heard advertisement from the motor vehicle which was passing in the streets announcing that it will auction his houses. The 1st defendant wrote to him informing him to repay the loan within 60 days. Then he followed them and told them that his business is not good. 3 | Page In the loan agreement there were two houses which were mortgaged. It is upon such mortgage the defendants exercise his right to recover. PW1 testified that, he did not fail to repay the loan. But the system of repaying is not as they agreed. The mortgage was sold without being notified to him. He testified that he doesn't agree with the system of auctioning his property which was adopted by the 1st defendant. He therefore prayed to this court to order for the bank to follow the procedure of repaying the loan. At the time he obtained the loan he put their houses as securities. One is his and another is of his father. He prayed that one house be auctioned, that is house located at Makambako on Plot No. 7 Block S. The other house is the property of his father thus family house which is being used as family house. He went on testifying that, his father is Ayoub Mlowe who is the second plaintiff in this case. At the time he went to the bank, he asked them to auction one house and discharge the other house. But they told him that there must be fresh valuation of the house While being cross- examined by Mr. Steward Ngwale, he testified that, he has been a client with NMB PLC for about twenty years from 1995. From that time, he was obtaining loans from the Bank. The first house he mortgaged is that of Iringa. But later he built his house at Makambako which he also mortgaged even that of Iringa remained as mortgage. He 4 | Page testified further that, it is true that he is indebted to the Bank. His first loan is of 2015 for two years which was to be repaid in 2017. He repaid up to

2016. Since then he has never repaid. But he was informing the Bank. And he asked them to rectify the loan. The Bank tolerated him so that he can continue repaying. The advertisement was made in 2019 four years later. He admitted that the Bank has been lenient to him. PW1 went on stating that, he was not informed that the house is intended to be sold. He sat with the bank in April, 2019. The advertisement was made on 05/09/2019 four months later. He did not object for auction of the house because Dolphin Enterprises did not inform him formally. If for every lender once default to repay the loan then collateral is to be sold it would be no need of having mortgage. He went on testifying that, to rush to court is the way to escape liability. What he did for the bank to opt for one mortgaged house after re-evaluate the same. Had he repaid 6 million monthly to date he would have discharged the mortgage. He tried to look for a buyer of the mortgaged house but they failed to get. PW2 testified that, he is before this court because his house was sold in auction by the Bank. His complaint is that the bank NMB auctioned his house without informing him. The 1st plaintiff is his son who asked him to guarantee him in the loan he wanted to obtain from NMB bank. The auctioned house was a residential house he is living together with his grandchildren. As the guarantor he had never received any complaint from the bank that the person he guaranteed has defaulted to repay the loan. PW2 went on testifying that, the bank did not notify him on the auction. 5 [Page They just went to him and say they wanted to auction the house. There was no any reason given to him for doing so. He came to know that his house is to be auctioned after they went to him telling him that they were there to auction his house. His house has value which he could not remember. He testified further that, what he prays to this court is for a declaration that the auction which was conducted in selling his house was illegal. Secondly, that this court has to declare that the house belongs to him. Thirdly, this court should grant him costs of this case. PW2 while being cross- examined by the counsel for the defendants he testified that, he got information about the sale of his house on the date they went to auction his house. But he has no evidence to prove that. He doesn't know the amount his son obtained from the bank as a loan. He guaranteed him for the loan he obtained from the bank. He does not know the conditions for the loan his son was given. He went on testifying that, he knows his son offered two houses as collateral, his son's house and his house. It is true one house is at Makambako another is at Iringa. He doesn't know if his son knew that his house at Makambako was to be auctioned and he consented to that. He expected the bank to inform him of their intention to auction his house. He has never read the Written Statement of Defence by the defendants. There was an auction conducted. The house was sold at Tshs. 37,000,000/=. The same was sold at that price. He doesn't know who bought it. The purchaser has not entered into the house because he obtained court order. It was in May, 2018. He has no any evidence to prove that the house was auctioned in May, 2018 and the house was sold at Tshs. 37,000,000/=. He stated 6 | P a g e further that in his plaint he did not explain that, the house was sold at Tshs. 37 million. He does not remember the amount he claimed in his plaint. Equally he does not know why the bank wanted to sell his house. The bank ought to have consulted him before initiating process of auctioning his house as a collateral. He believes his son Abeid has not discharged the debt. He stated that, before the

bank decided to auction his house they were supposed to tell him. He has never written any letter relating to the loan. He does not know the amount so far repaid to the bank. He does not know anything on the remaining debt. As the guarantor of Abeid Mlowe he prayed for the house located at Makambako to be auctioned to cover up the debt. But if the same cannot satisfy the debt then his house can also be auctioned. In his defence the 1st defendant through Keneth John Hankungwe, DW1 stated that he is working with NMB PLC Makambako since 2015. Previously his working station was Sumbawanga. He knows the plaintiffs Abeid Mwaulasi Mlowe is a customer and borrower of NMB. He is indebted with NMB. Ayoubu Mlowe is a guarantor of Abeid Mlowe. Abeid Mwaulasi Mlowe obtained loan facilities of the amount of Tshs. 200,000,000/= which was extended to him in 2015 upon mortgaging two houses, one house is located at Makambako in the name of Abeid Mwaulasi Mlowe. Another house is located at Iringa in the name of the guarantor Ayobu Mlowe. The agreement was that the loan was to be repaid within 24 months. He was supposed to repay Tshs. 10,2771,184/= to every month. The 1st plaintiff repaid his loan for seven months only but after that he stopped payment. DW1 went on testifying that, they issued a notice to him notifying him to 7 | P a ge repay the loan in full within 60 days. DW1 tendered in court the said Notice which was admitted as exhibit DI. DW1 went on testifying that, the notice was issued and received by the 1st plaintiff on 14/11/2016. After the 1st plaintiff was issued with that notice, he went to them as a bank asking to be allowed to continue repaying the loan. But he did not do so. He said to date the 1st plaintiff is indebted to the Bank in the sum Tshs. 183,200,000/=. There after the 1st plaintiff after he was issued with a Notice by the Broker he rushed to file a case in court seeking for an injunctive order. The house intended to be auctioned is that located at Makambako because it was the parent collateral and in case the amount realized would not be sufficient they would proceed with another collateral. The auctioneer was Dolphin Auction Mart who was assigned by the bank to auction the collaterals involved in the loan. Dolphin Auction Mart did not succeed to auction the house as there was an injunctive order by the court. DW1 went on stating that, they have never advertised to auction the second plaintiff's house located at Iringa. This is because before the collateral is advertised for sale a notice must be issued to the owner. They had never advertised sale of the 2nd plaintiff house. The same was not sold. He went on testifying that, normally if there is an auction of a collateral the successful bidder had to pay 25% of the purchase price the same day auction was conducted which is to be deposited in a special account for debts collection. The remaining amount is to be paid within 14 days from the date of auction. He said there was no any amount deposited in the special account for debt collection. For that he prayed for this court to dismiss this claim so that the plaintiffs can 8 1 Pa ge continue repaying the loan. The 1st plaintiff is not denying the debt. While being cross- examined by Mr. Cosmas Charles DW1 testified that, he has been at Makambako NMB PLC branch since 2015. As a guarantor you can guarantee a borrower by depositing collateral. If the collateral is a house you must have title of the house with its value capable of repaying the loan. The guarantor's duty is to make sure that the loan is repaid. He must make follow up to make sure that the borrower he had guaranteed is repaying the loan. The guarantor signs a mortgage deed and surrender

collateral. In the mortgage deed, there are conditions. In case of default to repay the loan the guarantor has to communicate with a borrower, to be close to him to make sure he repays the loan because is also a party to the loan. As lenders where there is default by the borrower to repay the loan they issue Notice to the guarantor notifying him of the default by borrower to repay the loan. In this case they first notified the borrower as he agreed for his house located at Makambako to be auctioned. But before it was auctioned he rushed to the court to seek injunction. The house of the guarantor was not advertised for sale after the house of Makambako was advertised for sale. They extended loan to Abeid Mwalulasi Mlowe for more than four times but in the previous loans he was repaying on time that is why they continued to extend loans to him. He said there is no record to the effect that they aimed start to auction a house located at Makambako but the borrower himself volunteered for that house to be sold first but before it was sold he rushed to obtain court injunction. The Notice which they 9 | Page issued to the borrower is in respect of the collateral (house) located at Makambako. After passing through the evidence adduced by both parties as well as final submission by the plaintiffs, this court has now to determine the issues framed and agreed by the parties as follows:-

1. Whether the plaintiffs were served with notice of default.
2. To what reliefs are parties entitled. With regard to first issue as to whether the plaintiffs were served with notice of default. There is no dispute that 1st plaintiff on 3rd day of October, 2015 he applied and obtained a loan from NMB Makambako branch amounting to Tshs. 200,000,000/=. In the said loan he mortgaged two houses as a security, one house located at Makambako on Plot No. 7 Block S and another one is at Mkwawa on Plot No. 21 Block CC the house of his father. It was agreed that, he will be repaying Tshs. 10,277,184/= per month as it was a two years contract. Upon default to repay on 05/09/2019 he saw an advertisement that the 1st defendant through Dolphin General business Enterprises were intending to auction his houses. Having heard the evidence of both sides, now the issue that, calls the attention of this court is whether the plaintiffs were served with a notice of default. Under section 127(1) of the Land Act (Cap 113 R.E 2013) provides that; "Where there is a default In the payment of any interest or any other payment or any part 10 1 P a g e thereof or in the fulfillment of any condition secured by any mortgage or in the performance or observation of any covenant, express or implied, in any mortgage, the mortgagee shall serve on the mortgagor a notice in writing of such default' As to the above cited provision it is undisputed fact that, the one ought to be issued with the notice is a mortgagor and not the guarantor. In the case of National Bank of Commerce Limited versus National Chicks Corporation Limited and 4 Others, Civil Appeal No. 129 of 2015 CAT at Dar es salaam at page no.37 (unreported) the court held that:- "it seems that the notice was issued by the appellant to the respondent, and if it didn't what is the effect. This needed the evidence by either side so as to enable the court to fairly and sufficiently determine It" In the instant case the evidence is quite clear from DW1 who testified that, the 1st defendant NMB Makambako Branch issued a notice of default of 60 days to the 1st plaintiff one Abeid Mwaulasi Mlowe after he has failed to repay the loan, the evidence by DW1 was corroborated by the notice which was tendered in court

and admitted as exhibit "DI", even the 1st plaintiff himself admitted to have been saved with the notice of default. The first plaintiff cannot be heard alleging that he was not issued with the 11 | P a g e notice. Such allegations seem to be an afterthought which cannot be entertained by this court. With regard to the 2nd plaintiff, as it was clearly stated by DW1 in his evidence, it is not a requirement of the law to issue the guarantor with default notice, the notice of default is only issued to the mortgagor. Hence it was not wrong for the 1st defendant not to issue a notice of default to the 2nd plaintiff. I am satisfied that the 1st plaintiff was issued with the default notice by the mortgagee. Thus, the first issue is affirmatively answered and in favour of the defendants. The plaintiffs' allegation that, the act by the defendants is illegal and unprocedural is not correct as the procedure was followed as stipulated under section 127 (2) (d) of the Land Act, which provides that:- "(d) after the expiry of sixty days following receipt of the notice by the mortgagor, the entire amount of the claim will become due and payable and the mortgagee may exercise the right to sell the mortgaged land" In the instant case the 1st defendant served the 1st plaintiff with sixty days' notice, upon receipt of notice the 1st plaintiff did not repay the amount he was indebted, that is why the 1st defendant exercised the right of selling the mortgaged property. Section 126 of The Land Act provides that:- "Where the mortgagor is in default, the mortgagee may exercise any of the following remedies;

- (a) Appoint a receiver of the income of the mortgaged land. 12 | P a g e
- (b) Lease the mortgaged land or where the mortgaged land is of a lease, sublease the land.
- (c) Enter into possession of the mortgaged land, and
- (d) Sell the mortgaged land, but if such mortgaged land is held under customary right of occupancy, sale shall be made to any person or group of persons referred to in section 30 of the Village Land Act, 1999 (Cap 114). Basing on the above cited provision, the 1st plaintiff as mortgagee was correct to appoint the receiver to exercise the right of selling the mortgaged house. The 1st defendant was exercising powers conferred to him under section 126(d) and section 132(1) of the Land Act. The plaintiffs have failed to prove their case on balance of probabilities that notice of default was not served to him in terms of the dictates of the law, instead the 1st defendant has managed to prove that, upon default by the 1st plaintiff to repay the loan they issued him with a default notice of 60 days and upon expiry of those days they appointed a receiver to sell the mortgaged property located at Makambako owned by the 1st plaintiff. Now coming to the second issue as to what reliefs parties are entitled. It is not in dispute that, the 1st plaintiff secured loan from the 1st defendant and he mortgaged two houses as a security and. the loan was supposed to be paid within 24 months, but the 1st plaintiff repaid only for 7 months. To that extent the 1st plaintiff breached the loan agreement, under such circumstances there is no way this court can interfere as the 1st defendant followed all procedures provided after the 1st plaintiff has 13 | P a g e defaulted to repay the loan, as it was held in the case of Joseph Kahungwa versus Agricultural Inputs Trust Fund and 2 Others, Civil Appeal No. 373 of 2019, CAT (unreported) in which at page 30-31 the Court referred the case of National Bank of Commerce vs. Dar es Salaam Education

and Office Stationery [1995] TLR. 272 where it was held that:- " Where a mortgagee is exercising its power of sale under a mortgage deed the court cannot interfere unless there was corruption or collusion with the purchaser in the sale of the property". For that reason, it is my opinion that, the 1st defendant after the 1st plaintiff has defaulted to repay the loan has a right conferred by the law to sale the mortgaged property and as the 1st defendant followed all procedures as required by the law, this Court cannot interfere with the rights conferred by the law to the Mortgagee upon default by the Mortgagor to repay the loan. In the case of General Tyre East Africa Limited v. HSBC Bank PLC[2006] TLR 60 it was held:- "(a) The court's jurisdiction to interfere in the case of a contract by granting an interlocutory injunction is limited to cases where it is clear that a breach must result from the act of the defendant. In the instant case no breach will result from the act of the 1st defendant/respondent of appointing a receiver as it is his contractual right.

- (b) Banks/Lenders and their customers/borrowers must fulfill and enforce their respective contractual obligations under the various lending/securlties agreements entered into by the parties, to restrain a debenture holder from exercising his contractual rights and enforcing his security is not only unreasonable but contrary to the express contractual terms of the agreement entered into by the parties which, in this case were clearly admitted by the applicant himself.
- (c) a grant of a restraining order in this case would be contrary to general accepted banking principles and securities law". This applies to the present suit, the parties had entered into loan agreement in which they agreed on the terms and conditions pertaining to that loan agreement. Each party was bound to abide to the agreed terms and conditions of the agreement, failure to do so is a breach of contract the other party is entitled to enforce what has been agreed. It is my considered view that, the plaintiffs failed to prove their case on the balance of probability. The suit is hereby dismissed with costs. 15 | Page DATED at IRINGA this 11th day of November, 2021. 11/11/2021 Date: 11/11/2021 Coram: Hon. F. N. Matogolo - Judge L/A: B. Mwenda 1st Plaintiff: Present 2nd Plaintiff: Present 1st Defendant: 2nd Defendant: Absent but represented by Mr. Stephano Steward Ngwale C/C: Charles Mr, Cosmas Charles - Advocate: My Lord I am appearing for the Plaintiff. Mr. Stewart Nawale — Advocate: My Lord I am appearing for the defendants. Mr, Cosmas: My Lord the suit is for mention on our part we are ready. 16 | Page Mr. Stewart Nuwale: My Lord we are also ready. COURT; Judgment delivered F. N. MATOJSOLO JUDGE 11/11/2021 17 | Page

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