

TANZANIA / JUDGMENT

nmb bank plc vs mafubilo general supplies ltd 5 others by way of counter claim rose mutagonga kundecha vs nmb bank plc 2 others 2023 tzhccomd 319 29 september 2023

COURT
TZHCCOMDDECIDED
29 September 2023

Source: media.tanzlii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA (COMMERCIAL DIVISION) AT PAR
ES SALAAM COMMERCIAL CASE NO. 93 OF 2021 BETWEEN NMB BANK
PLC..... PLAINTIFF VERSUS MAFUBILO GENERAL
SUPPLIES LIMITED..... 1st DEFENDANT IBRAHIM
ABDALLAH KUNDECHA (Personal legal representative of the late Abdallah Yusuph
Kundecha)..... 2nd DEFENDANT GRACE
IRIGO..... 3rd DEFENDANT JUMA BAKARI
SAID..... 4th DEFENDANT HUSNA JAFFARI
MAFUBILO..... 5th DEFENDANT ROSE MUTAGONDA
KUNDECHA..... 6th DEFENDANT BY WAY OF COUNTER
CLAIM ROSE MUTAGONDA KUNDECHA..... PLAINTIFF VERSUS NMB BANK
PLC..... 1st DEFENDANT MAFUBILO GENERAL
SUPPLIES LIMITED..... 2nd DEFENDANT JUMA BAKARI
SAID..... 3rd DEFENDANT

JUDGEMENT

i Date of last order: 22.9.2023 Date of Judgement: 29.9.2023 AGATHO, J.: The plaintiff, NMB BANK PLC a public company engaged in the business of providing banking services in accordance with the laws of the United Republic of Tanzania, by a plaint instituted the instant suit against the above-named defendants praying for judgment and decree against the defendants jointly and severally for the following orders:

- i. Declaration that the 1st defendant is in breach of the facility letters and amendments.
- ii. Declaration that the 2nd and 3rd defendants are in breach of the mortgage and variation deeds.
- iii. Declaration that the 4th and 5th defendants are in breach of the deed of guarantee.
- iv. An order for payments of TZS. 1,346,750,179.91 say (Tanzania Shillings One Billion Three Hundred Forty -Six Million Seven Hundred Fifty Thousand One Hundred Seventy -Nine Shillings and Ninety-One cents and USD 558,514.11 only against the

defendants jointly and severally.

- v. An order allowing the plaintiff to proceed with recovery against mortgage securities to wit, Plot No 256, Block C, Mbezi and Plot No 573 Block G Tegata, Kinondoni Municipality. vi. Interest on the decretal sum at the commercial rate of 18% per annum above the normal interest rate on the outstanding amount from the date of filing this suit to the date of judgement. 2 vii. Interest on the decretal sum at the court rate of 12% from the date of judgement to the date of full satisfaction. viii. The defendants jointly and severally be ordered to pay the costs of this suit, ix. General damages for breach of contract to be assessed by this honourable court.
- x. Any other reliefs as the court may find just, convenience and equitable to grant. Upon being served with plaint, on 13th December,2021 the 1st ,3rd ,4th and 5th defendants filed amended joint written statement of defence admitting the outstanding amount, on rider that the same was not settled because the whole arrangement was frustrated by 1st defendant business difficulties and eventually, prayed that the suit for plaintiff be dismissed with costs. On the other hand, the 2nd defendant on 18th November,2021 filed its separate written statement of defence disputing plaintiff all prayers on ground that 2nd defendant has never consented to deed of variations. Whilst the 6th defendant on 8th March,2022 filed written statement of defence disputing the plaintiff claim on the ground that the 2nd defendant is not privy to loan agreement and even the signature appearing on the facility letter dated 4th July ,2018 and 20th September,2018 does not belong to the 2nd defendant as such 2nd defendant is not a guarantor of the said loans and simultaneously, raised a counter claim against the plaintiff praying for judgement and decree in the following order:
 - i. The legal mortgage registered in respect of a certificate of title No. 165183, Plot No.256 Block "C" Mbezi area Kinondoni Municipality dated 6th June 2017 and dully registered on 5th 3 September, 2017 as security for credit facilities extended to Juma Bakari Said t/a Mafubilo General supplies whose aggregate sum is not exceeding TZS. 600,000,000.00 be discharged.
 - ii. The 1st defendant be ordered to hand over to the plaintiff certificate of Title No. 165183, Plot No.256 Block "C" Mbezi area Kinondoni Municipality.
 - iii. The plaintiff be awarded costs of this suit. The brief facts as to the genesis of this suit are imperative to be stated for better understanding the nitty-gritty of the suit. It is on the record that, the 4th defendant sought to purchase the 2nd and 6th defendants' house through his funds. However, later on given the financial constraint, apparently his funds could not meet the contract price and therefore it was resolved that, the 4th defendant seek bank loan. Following that arrangement 4th defendant trading as Mafubilo general suppliers requested for TZS.600,000,000 and the plaintiff advanced the loan as requested. Facts go that, sometimes in 2017, the 4th defendant changed its business from sole proprietorship to a company called Mafubilo general supply Limited. In the same vein, 1st defendant applied a term loan to the tune of TZS. 600,000,000 and an overdraft to the limit of TZS. 300,000,000 and the same were extended to the 1st defendant in accordance with terms and conditions contained in offer with reference NMB/ AGRI/MGS/OD/2017/05/17. Further facts were that, again at the request of the 1st defendant

on 20th September, 2018 the plaintiff approved post import loan of USD 180,000 and overdraft up to USD 650,000. However, upon the borrower's request to amend the 4 facility dated 4th July, 2018 and 20th September, 2018, on 1st August, 2019 the plaintiff advanced overdraft up to TZS. 300,000,000, import loan of TZS. 386,000,000 and controlled overdraft facility of USD 552,000 which was to last up to 31st December, 2019 the same were extended to the 1st defendant in accordance with terms and conditions contained in offer letter dated 4th July, 2018. As security for the facility, the landed property of the 3rd and 2nd defendants as listed in the plaint, debenture deed, personal guarantees and indemnity of directors in favour of the plaintiff were put as security. Unfortunately, the defendant defaulted in repayment of principal sum plus accrued interest, which act constituted an event of default. Even Efforts by the plaintiff through his lawyers to have the money repaid were in vain. Hence, this suit claiming for payments of an outstanding of TZS. 1,346,750,179.91 and USD 558,514.11 as per 27th July, 2021 and other consequential prayers as contained in the plaint, hence this judgement. When the matter called for hearing, the plaintiff was in the legal services of Mr Godwin Nyaisa, Messrs Kavola Semu and Custer Lufungulo, learned advocates. On the adversary part, the 1st 3rd, 4th, and 5th defendants has been in the legal services of Mr. Amon Ndunguru, learned advocate. Whilst the 2nd and 6th defendants were in the legal representation of learned counsel Senan Mponda. Before hearing started, during final pre-trial conference, the following issues were framed, recorded and agreed between the parties for the determination of this suit:

- a. Whether the 1st defendant breached the facility and their amendments
- b. Whether the late Abdallah Yusuph Kundecha now represented by the personal legal representative, the 2nd defendant and the 6th defendant mortgaged the 5 property registered under CT No 165183 plot No 256, Block "C" Mbezi area Kinondoni Municipality to the plaintiff?
- c. Whether the 6th defendant consented to mortgage property registered under CT 165183, Plot No 256 Block "C" Mbezi area Kinondoni Municipality to the plaintiff.
- d. Whether the late Abdallah Yusuph Kundecha now represented by the personal legal representative, the 2nd defendant and the 6th defendant consented to the deed of variation and amendments of the facility letter executed between the plaintiff and the 1st defendant.
- e. If the answer to issue number one and three are in affirmative, whether the 2nd, 3rd and 6th defendants breached the mortgage deed and their variation.
- f. Whether the 4th and 5th defendants breached the directors personal guarantee and indemnity deed.
- g. What reliefs parties are entitled. At the outset and before going into the testimonies of the parties, I would like to point out that on 22nd June, 2023 when this suit was called on for hearing, Mr. Amon Ndunguru the learned counsel for the 1st 3rd 4th and 5th defendants, informed the court that, the 1st, 3rd, 4th and 5th defendants will not appear for cross

examination and prayed that the filed witness statements be given lesser weight as per Rule 56(2) of this court's rules. Mr. Senen Mponda, learned advocate for the 2nd and 6th defendants objected to the prayer and prayed that the matter to proceeds ex-parte against the 1st ,3rd ,4th and 5th defendants. The prayer to proceed expert against the 1st ,3rd ,4th and 5th defendants was granted and subsequently the respective witness 6 statements were expunged from the court record. This tells why this is ex parte judgment against 1st ,3rd ,4th and 5th defendants. The plaintiff in proof of his case, paraded two witnesses, the first witness to testify was one, Rabisante Boko (hereinafter referred to as "PW1"). PW1 under oath and through her witness statement which was received by this court and adopted as her testimony during examination in chief told the court that, she is a Senior General relationship Manager of the plaintiff, hence conversant with the facts of this suit. It was the testimony of PW1 that sometimes in June 2017 the 4th defendant trading as Mafubilo general suppliers requested for TZS 600,000,000 as working capital the same was approved with condition that it should be repaid within one month. It was further testimony of PW1 that, sometimes in 2017, the 1st defendant changed its business from sole proprietorship to a company called Mafubilo general supply Limited with two Directors, the 4th defendant Juma Bakari Said and Husna Jafari Mafubilo holding 60% and 40% shares respectively. PW1 tendered in evidence certificate of incorporation of Mafubilo General supplies limited dated 12.4.2017 and the Memorandum and article s of association which was admitted and marked as exhibitP6. Further testimony of PW1 was that, at the request of the 1st defendant the plaintiff vide facility letter dated 4th July,2018 in terms and condition contained in offer letter with reference NMB/AGRI/MGS/OD/2017/05/17 extended a term loan to the tune of TZS. 600,000,000 and an overdraft up to TZS. 300,000,000 with condition that the same should be repaid within 36 months and 12 months respectively with interest base rate of 18% and interest margin of 2% per annum accruing daily and chargeable 7 monthly. PW1 tendered in evidence offer letter for overdraft and term loan which were collectively admitted as exhibit Pl. It was further testimony of PW1 that, the 1st defendant on 20th September,2018 requested for post import loan of USD 180,000 and over draft up to USD 650, 000 which were approved with the condition that, it should be repaid within 6 months with interest 18% and 8% respectively. PW1 tendered in evidence offer letter of credit/post import loan and controlled loan dated 20.9.2018 which was admitted and marked as exhibit p2. PW1 added that at the request of the 1st defendant to review the previously loan, the plaintiff vide facility letter dated 1st August,2019 amended the facility letter dated 20th September,2018 and 1st defendant was availed with post import loan to the tune of TZS. 386,000,000 and controlled overdraft up to USD. 552,000 which was to be repaid on or before 31st December,2019. PW1 tendered in evidence first amendment to the banking offer letter dated 4.7.2018, second amendment to the banking offer letter 4.7.2018, first amendment to the banking offer letter date 20.9.2018 and second amendment to the banking offer letter 20.9.2018 which were admitted and collectively marked as exhibitP5. PW1 went on telling the court that, the said loans were secured by landed properties of the 3rd and 2nd defendant on plot No 256 Block "C" registered under CT 168153 Mbezi Area Kinondoni Dar es salaam and plot No 573 Block "G" Tegeta Kinondoni Municipality registered under CT No

41907. PW1 went on telling the court that, the said securities were accordingly perfected after obtaining the spousal consent of the 6th defendant, Rose Mutagonda the wife of the 2nd defendant in respect of TZS. 184,000,000 and the Spousal consent of Grace Irigo the wife of the 3rd defendant in respect of TZS. 360,000, 000. PW1 tendered in evidence 8 Mortgage deed dated 06. 6.2017, Land form No 41 dated 30.08.2017, Mortgage deed dated 06. 6.2017, Land form No 41 dated 13. 7.2018, Land form No 41 dated

19. 7.2018, 1st deed of variation dated 13.7.2018, Land form No 41 dated 02. 10.2018 and Land form No 41 dated 02. 10.2018 admitted and marked as exhibitP3 collectively. Testifying further, PW1 told the court that, apart from mortgage securities, the 1st defendant loan was secured by first ranking debenture created over all assets of the first defendant covering the facility over 125% and directors personal guarantee and indemnity issued by the 4th and 5th defendants covering the facility over 125%. PW1 tendered in evidence certificate of registration of charges, director's personal guarantee and indemnity, first deed of variation dated 24.10.2018, which were admitted in evidence and marked as exhibitp4. PW1 went on to tell the court that, the principal borrower defaulted in payment of the two facilities. As an effort to remedy the situation, repayment tenor was extended up to 31st December, 2019. However, the 1st defendant could not fulfil its obligation, subsequently at the request of 1st defendant payment tenor was extended for 6 months. PW1 went on to tell the court that, following 1st defendant's default the plaintiff issued various demand letters informing of the default and sought payment of the outstanding loans which kept on accruing penalties and interest on daily basis. Not only that, but PW1 further told the court that, the plaintiff issued statutory notices in relation to mortgage requiring the mortgagor to remedy the situation. PW1 tendered in evidence notice of default dated 17.6.2020, Land form No 54a dated 18.6.2020 addressed to Abdallah Kundecha, land form 54a dated 18.6.2020 addressed to Grace Iringo, a letter dated 17.6.2020, police loss report dated 9 22.7.2020 and the authenticity of printed police loss report admitted and collectively marked as exhibitp8. According to PW1, despite all notices issued the 1st defendant failed and/or neglected to pay the outstanding amount due which as of 27th July 2021 stood at TZS. 1,346,750,179.91 and USD 558,514.11 as indicated in the bank statement. PW1 tendered in evidence loan statement for Tanzania currency, customer account statement for USD currency, certificate of authenticity, letter dated 24.7.2020, reply to notice of default, board resolution dated 5.8.2019 commitment letter dated 24.12.2019 and board resolution dated 24.12.2019 which were collectively admitted as exhibitP7. On the basis of the above testimony, PW1 prayed that this court be pleased to enter judgement and decree against all defendants as prayed in the plaint. Under cross examination by Senen Mponda, learned advocate, PW1 admitted that the landed property was to secure only TZS. 184,000, 000. PW1 when pressed into question admitted that beneficiary of the loan was Juma Bakari Said, trading as Mafubilo general suppliers and not the 1st defendant. PW1 when referred to paragraph 8 of his witness statement read it and told the court that Juma Bakari Said changed from sole proprietor to Limited liability company. PW1 when further pressed into question told the court that, guarantors consented to secure the loan by signing deeds of variation. PW1 when shown

Land form No 41 dated 6.6.2018 told the court that it was signed by Abdallah Kundecha and Rose Mutagonda and the second one was signed by Grace Irigo and John Gunga. However, she was quick to point that she has no knowledge why the signature signed by Grace Irigo and John Gunga are different. Under re-examination by Mr Nyaisa learned advocate PW1 told the court that, two mortgage deed of Abdallah Kundecha and Grace Irigo were registered as collateral loan to 1st defendant. PW1 when pressed into question told the court that, the beneficiary of 2017 loan was Juma Bakari Said. However, she pointed that there is relationship between Juma Bakari Said t/a Mafubilo general supplies and Mafubilo general supplies Limited. The next witness to testify was one Dr Onesmo Michael Kyauke (hereinafter referred to as "PW2"). PW2 under oath and through his witness statement which was received by this court and adopted as his testimony during examination in chief told the court that, he is an advocate of the High court and court subordinate thereto with roll number 1379 also Notary and commissioner for oaths. It was the testimony of PW2 that on 5th August, 2019 Juma Bakari Said in company with Husna Jafari Mafubilo, Kundecha Abdallah Yusuph and Grace Irigo did visit his office and one Juma Bakari introduced the 5th defendant as co-director of the 1st defendant and the 2nd and the 3rd defendant as guarantors of the 1st defendant loan. It was further testimony of PW2 that he witnessed the signing of the first and second amendments to the banking offer letter dated 4th July, 2018 and banking offer letter dated 20th September, 2018 by fixing his stamp and signature thereto on 5th August, 2019. Under cross examination by Mr Ndunguru advocate, PW2 when referred to his witness statement told the court that, first and second amendments are names of the document. PW2 when pressed into questions told the court that, the said documents were signed by four persons in different capacities for example Juma Bakari Said and Husna Jafari Mafubilo as directors while Grace Irigo and Abdallah Kundecha as guarantors. Under cross examination by Mr. Mponda learned advocate for 2nd and 6th defendants, PW1 told the court that, the identity card he saw was written Abdallah Yusuph Kundecha while the person named here is Abdallah Kundecha however he was quick to point that, in his witness statement he has not stated if the individual were known to him personally or were introduced by Juma Bakari Said. PW2 when referred to the second amendment to the banking offer letter dated 23.12.2019 told the court that it was attested on 24.12.2019 and could not have indicated that Abdallah Kundecha was introduced because it was his second visit. Under re-examination by Mr Nyaisa learned advocate PW2 told the court that, there are different names in exhibit p5 and in witness statement and he did not indicate if they were known to him or identified because he knew them. The end of the plaintiff's case. In defence, defendant was defended by two witnesses. The 1st witness was one Ibrahim Abdallah Kundecha (hereinafter referred to as "DW1") DW1 under oath and through his witness statement and additional witness statement were adopted in these proceedings as his testimony in chief told the court that, he is a personal representative of the Abdallah Yusuph Kundecha, hence conversant with the facts of the case. It was the testimony of DW1 that on 24th February, 2017 his father entered into sale agreement with Juma Bakari Said in respect of house situated at plot No 256 Block "C" Mbezi beach with CT No 165183 Kinondoni Municipality, Dar es Salaam. According to DW1, the late Abdallah

Kundecha agreed to guarantee the 4th defendant loan vide facility letter dated 4th July, 2018 and 20th September, 2018 not exceeding TZS. 600,000,000 so as to procure the house. It was further testimony of DW1 that, the late Abdallah Kundecha guaranteed the loan by Juma Bakari Said t/a Mafubilo General supplies and not the 1st defendant. According to DW1 the 1st defendant was not privy to that arrangement. DW1 tendered in evidence sale agreement dated 24.2.2017 which was admitted and marked as exhibit DI. It was the testimony of DW1 that, it was by consensus the 4th defendant to pay TZS. 3,000,000 for the purpose of processing title. DW1 went on telling the court that, the signature of the 6th defendant appearing in written statement of defence, in the counter claim and that in mortgage deed signed on 6th June, 2017 does not bear the signature of single person. DW1 added that the signature of the 6th defendant is similar to that of John Gunga the husband of Grace Iringo. Testifying on the deed of variations DW1 told the court that, the variation dated 13.7.2018 was taken for registration on 30th August, 2017 before variation and more so the jurat is defective as it does not indicate the name of deponent or the person who introduced the deponent to advocate. According to DW1 the signatures of 2nd defendant and 6th defendant were forged as such the amendments were not sanctioned or consented by the late Abdallah Kundecha. DW1 added that the plaintiff fraudulently forged the document because the amount guaranteed is TZS. 360,000,000 but supporting document show that the amount guaranteed is TZS. 900,000,000. On that note he urged this court to dismiss the suit with costs and grant 6th defendants' prayers in the counter claim. 13 Under cross examination by Mr Nyaisa learned Advocate, DW1 when shown exhibit p6 read it and told the court that, the objective of the Mafubilo General Supplies limited was to acquire and take over the business now carried under the name of Mafubilo general supplies, and this company took over assets and liabilities of Mafubilo general supplies. DW1 when pressed with question told the court that, there was two securities mortgage deed dated 6.6.2017 and deed of variation of

2018. However, he was quick to point that the signature appearing on the deed of variation was forged because there are two different signatures. DW1 when pressed with more questions told the court that he is not a fingerprint expert but through his eyes he could see that the signatures were forged. Under re-examination by Mr. Mponda learned advocate, DW1 told the court that, his main contention is that the signatures appearing in the first deed of variation does not belong to his parents. DW1 when pressed with questions admitted that clause 3 of the MEMARTS tell it all that, the 1st defendant took over assets and liabilities of Mafubilo General supplies. The next witness was one Rose Mutagonda Kundecha (hereinafter referred to as "DW 1") DW1 under oath and through her witness statement and additional witness statement that were adopted in these proceedings as her testimony in chief told the court that she is the 6th defendant and plaintiff in the counter-claim, and she was the wife of the late Abdallah Kundecha the 2nd defendant hence conversant with the facts of the instant suit. The rest of the testimony of the DW2 is replica of that DW1 on the amount guaranteed, on 14 defective jurat, on forged signatures and on the amount claimed against the 3rd defendant. DW2 tendered in evidence land form No 41 as exhibit D2. Under

cross examination by Mr Stephen Awesso learned advocate, DW2 told the court that, she is not related to Mafubilo General supplies, but she knows the directors of Mafubilo General Supplies. DW2 when pressed with more questions told the court that she consented to the first loan, which was taken by Juma Bakari Said trading as Mafubilo General supplies and not the 1st defendant (Mafubilo General Supplies Limited). DW2 when referred to exhibitp3 identified it as mortgage deed and told the court that, Mafubilo General Supplies limited took over the business and liability of Mafubilo General supplies. DW2 when further pressed into question told the court that she has no problem with first loan document, but she believes that the document for second loan is not genuine for want of signatures. DW2 when asked on forged document she replied that she is yet to report forgery to the police. DW2 went on telling the court that, in the deed of variation the signature of late Abdallah Kundecha was forged and the argument that Abdallah Kundecha guaranteed the subsequent loan is fabricated because she is not aware of any deed of variation. However, she was quick to acknowledge that she is aware with the land form No 41 dated 30.8.2017 and 2.8.2018 only. DW2 when pressed with more questions told the court that the photo on the document belongs to her but she did not sign the document. Under re-examination by Mr. Mponda learned advocate DW2 told the court that, she consented to the first loan which was taken by Juma Bakari Said for the purpose of buying the said house (mortgaged property). DW1 went on telling the 15 court that, in her knowledge the first loan has nothing to do with the subsequent loan taken by the 1st defendant. DW1 when further questioned told the court that, one does not need to be an expert to see the difference of signatures. DW2 when shown exhibit D2 identified it and told the court that the signature appearing in land form dated 30.8.2017 does not belong to late Abdallah kundecha while the signature appearing on the second page of the land form No 41 belong to her (DW2). This marked the end of hearing of defence case and same was marked closed. At the outset and before going into the determination of issues, I would like to point out that, a counter claim is the suit against the claim of plaintiff and can be filed regarding a cause of action accruing to defendant against plaintiff as such the defendant has no independent right to maintain counter claim against co- defendants. In my literal interpretation of Order VIII Rule 10 of the Civil Procedure code [Cap 33 R.E. 2019] the 6th defendant cannot raise counter claim against the co-defendant the 4th defendant in which the cause of action is not accruing from defendant against plaintiff. Now back to our case ta hand. The learned advocated for parties prayed to exercise their rights under rule 66(1) of the HCCD Procedure Rules to file final closing submissions. I granted the prayer. I express my sincere gratitude to them for their industrious input on the matter. I will, in the course of answering issues, consider them but will not be able to reproduce them verbatim but it suffices to say the same were well taken in determining this suit. However, in the circumstances what is serious dispute between parties is the signature appearing on the deed of variation. That being in mind, is high time to answer the issues now. 16 The first issue was couched thus, whether the 1st defendant breached the facility and their amendments. I should make It clear, based on the evidence, it is not disputed by the 1st 3rd 4th and 5th defendants that 1st defendant breached the facility also this issue was only

argued by the plaintiff counsel which indicates that the defendants had nothing to submit on it. Without much ado I fully agree with the only submissions by Mr. Nyaisa that the first defendant breached the facility and their amendments. The second issue was couched thus, whether the late Abdallah Yusuph Kundechea now represented by the personal legal representative, the 2nd defendant and the 6th defendant mortgaged the property registered under CT No 165183 plot No 256, Block "C" Mbezi area Kinondoni Municipality to the plaintiff? Having carefully considered both the pleadings, the testimonies of the respective parties' witnesses and documentary evidence tendered in their totality, I should make it clear, that this issue was raised out of context because there is no dispute between the parties that the 2nd defendant and the 6th defendant mortgaged the property registered under CT No 165183 plot No 256, Block "C" Mbezi area Kinondoni Municipality to the plaintiff. But under microscopic view, that issue could loosely make sense as the 2nd and 6th defendants refused to recognize the subsequent loans/variations alleging that the signatures of Abdallah Kundechea and Rose Mutagonda were forged and hence questioning possibility of Mr Abdallah Kundechea mortgaging the property to secure the said loans. But since that was not pleaded and without much ado I fully agree with the submissions by Mr. Nyaisa that this issue was never disputed by the 2nd and 6th defendants therefore it should not waste much time of the court and I hereby answer it in affirmative that the late Abdallah Yusuph Kundechea now represented by 17 the personal legal representative, the 2nd defendant and the 6th defendant mortgaged the property registered under CT No 165183 plot No 256, Block "C" Mbezi area Kinondoni Municipality to the plaintiff. The third issue was couched thus whether the 6th defendant consented to mortgage property registered under CT 165183, Plot No 256 Block "C" Mbezi area Kinondoni Municipality to the plaintiff. This issue also will not detain this court much based on reasons I gave when dealing with the second issue in this suit. I associate myself with the conclusion made by the plaintiff's learned counsel that once certain facts are admitted in the pleadings they need not be proved. As such since the 6th defendant under paragraph 4 of written statement of defence and paragraph 6 of her witness statement, acknowledged the fact that she consented to mortgage the impugned house, then in terms of Section 60 of the Evidence Act [Cap 6 R.E. 2019], it is my considered view that this issue has to be answered in affirmative that the 6th defendant consented to mortgage property registered under CT 165183, Plot No 256 Block "C" Mbezi area Kinondoni Municipality to the plaintiff. The next issue was couched thus whether the late Abdallah Yusuph Kundechea now represented by the personal legal representative, the 2nd defendant and the 6th defendant consented to the deed of variation and amendments of the facility letter executed between the plaintiff and the 1st defendant. It was the learned counsel for plaintiff submission that, the 2nd defendant and the 6th defendant consented to the deed of variation and amendments of the facility letter executed between the plaintiff and the 1st defendant on two folds. One, there is no proof of forgery of signature to the required standard so as to substantiate that the 2nd and 6th 18 defendant did not give consent during the execution of the deed of variation. According to Mr. Nyaisa the absence of forensic report to prove that the signature appearing under exhibit P3 collectively do not belong to 2nd and 6th defendants

leave the 2nd and 6th defendant case floppy on their part. Two, the allegation of forgery or fraud in respect of the impugned deed of variation were neither specifically pleaded nor the particulars were stated in the 6th defendants' written statement of defence and counter claim. The reliance was placed on the case of City Coffee Ltd Vs Registered Trustee of Holo Coffee Ggroup Civil Appeal No 94 of 2018. In which the court had this to say, where parties rely on fraud that fraud must be specifically pleaded and that particulars of fraud alleged must be stated on the face of the pleadings. Further reliance was placed on the case of Omary Yusuph vs Rhahma Ahmed Abdallah [1987] T.L.R 169. In rebuttal the learned counsel for 2nd and 6th defendants strong submitted that, the 6th and 2nd defendants never consented to the first deed of variation because the purported signature in exhibit P3 collectively specifically on the first deed of variation dated 13th July, 2018 is different from one appearing in mortgage of certificate of right of occupancy dated 6th June, 2017 also the purported signature appearing in spousal consent dated 30th August, 2017 is different from one appearing in spousal consent (exhibit D2). He added that, the signature appearing on the form No 41 dated 2nd October, 2018 indicates that were not signed by the 6th defendant but rather was signed by Grace Irigo and John Gunga while the purported signature of Grace Irigo appear to be the signature of Abdallah Yusuph Kundecha. According to Mr. Mponda the discrepancies in signature amount to forgery as such the 2nd and 6th did not willingly consent to terms and 19 conditions of the deed variation and in the circumstance, they have been discharged from the liabilities. To cement his position the learned counsel referred this court to the case of Exim Bank (Tanzania) Limited V. Dascar Limited & Johan Harald Christer Abrahamsson [2016] T.L.R 251. While I appreciate the arguments by the learned advocate for the 2nd and 6th defendants and the relevant law as cited and case law but the circumstances of this case do not convince this court to hold otherwise because having carefully considered both the pleadings, the testimonies of the respective parties' witnesses and documentary evidence tendered in their totality, I noticed that the centre of dispute is forged signature. It is a common knowledge that, once forgery of signature is pleaded an expert witness is required to form opinion whether the disputed signature is genuine or not. As such the argument that signatures appearing on the first deed of variation dated 13th July, 2018 is different from one appearing in mortgage of certificate of right of occupancy dated 6th June, 2017 cannot hold water without calling the expert witness to produce independent evidence proving the real signature or availing the forensic report. In absence of forensic report the allegation of forgery and fraud remain as a speculation which the court cannot act upon it. It is the law that where a witness who is in better position to explain some missing links in the party's case, is not called without any sufficient reason being shown by the party, adverse inference may be drawn against that party that was held in the case of Hemed Said vs Mohamed Mbilu [1984] TLR No 113. Moreover, this being a civil suit, the parties are the masters of their case. It is not for the court to search for the evidence out there to satisfy one's claim. 20 Therefore, with that in mind and back to our case at hand, it is my considered opinion that since 2nd and 6th defendants in this case opted not to call expert witness to give opinion on the disputed signatures, the 2nd and 6th defendants leaves the case for forged signature hanging on

their part and the adverse inference has to be drawn against them that had they called expert witness he might have testified against the 2nd and 6th defendants' case. I am alive that in civil cases, law places a burden of proof upon a person who desire a court to give judgement on his favour. That means the 2nd and 6th defendants were required to establish forgery because matter of facts is said to be proved when its existence is established by preponderance of probability as stated in section 110 (1) and (2) of the Evidence Act. In addition to that, since the centre of dispute is forged signature which implies fraud the 2nd and 6th defendant ought to have specifically pleaded and state the particulars of fraud. The argument that the plaintiff was put to notice by way of pleading that, signature of the late Abdallah Yusuph Kundechea and the 6th defendant in deed of variation were forged, cannot be said that the 2nd and 6th defendant specifically have pleaded fraud. Fraud must be specifically pleaded and that particulars of fraud alleged must be stated on the face of pleading. See the case of City Coffee Ltd(supra) where the CAT had this to say: "We subscribe to the position taken by the supreme court of Uganda as depicting the correct position of the law in this jurisdiction as well. In the view of foregoing, it is dear that regarding allegations of fraud in civil cases and proven and the 21 standard of proof of fraud in civil cases the particulars of fraud, being a very serious allegation must be specifically pleaded and the burden of proof thereof, although not that which is required in criminal cases generally applied in civil cases, proving the case beyond reasonable doubt it is heavier than a mere balance of probabilities". Back to the case at hand, I have carefully read the written statement of defence and counter claim between the line. I have noticed that, the 2nd and 6th defendant did not plead fraud as required under the law as such these allegations in my considered view are an afterthought because the allegation of fraud must be shown how, when, where and in what way the fraud was committed. This was not done in this case and failure to plead the particulars of fraud was a fatal blow to the 2nd and 6th defendants' case because these were very material in establishing fraud. Furthermore, the allegation that the 2nd and 6th defendant did not consent to subsequent loan between plaintiff and the 1st defendant save only the first facility letter between plaintiff and Juma Bakari Said trading as Mafubilo General supplies, with due respect to the learned counsel for 2nd and 6th defendant this argument was raised out of ignorance. The contents of (Exhibit P6) are clear that, among other objective of the Mafubilo general supplies limited, was to acquire and take over the business now carried under the name and style of Mafubilo general supplies together with all its assets and liabilities. Not only that but also clause 3.3 of the first amendment to the banking offer letter (exhibit P1) are clear that the purpose of the loan among others was for conversion of overdraft facility issued with offer letter issued as per offer letter with reference NMB/AGRI/MGS/OD/2017/05/17 (the first 22 facility between the 4th defendant trading as t/a Mafubilo general supplies and plaintiff). Then flowing on the depicted words of the clauses, it seems the doctrine of novation was created between the 1st defendant and the plaintiff. The doctrine of novation is not novel in our law it is recognised under Section 62 of the Law Contract Act [Cap 345 R.E. 2019]. The Section provides as follows; "If parties to a contract agree to substitute a new contract for it or to rescind or alter it, the original contract need not be performed." The same legal

position was stated by the CAT in the case of M/S MUSILAGA ENGINEERING vs. P. F. NYAKUTONYA NYAMGESERA AND ANOTHER [1986] TLR NO. 115 in which it was held that:

- "By virtual of a tetter there was a creation of a new contract between the plaintiff and Musoma Foodstuffs Trading Co. The doctrine of novation recognizes that one party to contract can release the other and substitute a third person who then undertakes to perform the released person obligation under the old contract depending on the agreement of the parties in the new contract." With that in mind and back to this suit, and having gone through and considered both sides' pleadings, testimony of the PW1 and exhibits tendered, I am of considered view that, the allegation that the 2nd and 6th defendant did not consent to the loan between 1st defendant and plaintiff is devoid of any merit because terms on the first facility was novated in the deed of variation and the certificate of incorporation. 23 On the above reasons, the arguments by Mr. Mponda are far from convincing this court otherwise. That said and done, I associate myself to the conclusion by Mr. Nyaisa that the fourth issue is to be answered in the affirmative that the late Abdallah Yusuph Kundecha now represented by the personal legal representative, the 2nd defendant and the 6th defendant consented to the deed of variation and amendments of the facility letter executed between the plaintiff and the 1st defendant. Next issue was couched thus if answer to issue number one and three are in affirmative, whether the 2nd ,3rd and 6th defendants breached the mortgage deed and their variation. This issue should not take much time of the court. It is worth noting here that as matter of law in banking business, there are two kinds of agreements the first agreement is between a lender and a borrower (the loan agreement) say plaintiff and 1st defendant. The second type of agreement is a contract of guarantee, this is the agreement between the lender and the guarantor, it is an independent undertaking which arises only when at the first place there is covenant to make good when the principal debtor defaults to repay the loan as agreed. The provision of Section 78 of the Law of Contract Act [Cap 345 R.E. 2019] defines the contract of guarantee. For ease of reference, the section provides as follows: Section 78- " A contract of guarantee" is a contract to perform the promise, or discharge the liability of a third person in the case of his default and the person who gives the guarantee is called the "surety"; the 24 person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor", Guided by the above provision, the contract of guarantee puts a guarantor as a third person to undertake an obligation to honour the promise or to perform the obligation of the principal debtor to a creditor in case of default by the principal debtor. Therefore, since there is no dispute that 1st defendant failed to repay the loan, the 2nd 3rd and 6th defendants are liable to pay the plaintiff. See the case of Exim Bank (Tanzania) Limited (supra) where the CAT had held that Section 80 of the Law of Contract, Cap 345, stipulates that a surety's liability is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract. Co - extensive means the same limits or extent. That means the surety becomes liable to pay the entire amount. The liability is immediate, it does not defer until the creditor exhausts his remedies against the principal debtor, once a principal debtor defaults in the payments of the loan, the surety steps into or is placed into equal footing with that of the principal

debtor. Therefore, unless the principal debtor sooner discharges the liability, the guarantor is as liable as the principal debtor to the creditor and to the same extent under the terms of the loan facility. In the light of the above CAT decision and after scrutiny of exhibit P1 and P2 and exhibit p3 collectively and the wording of Section 80 of the Law of Contract Act, the 2nd, 3rd and 6th defendants breached the mortgage deed and their variation. The next issue was couched thus whether the 4th and 5th defendants breached the directors personal guarantee and indemnity deed. Since there is no dispute that the 1st defendant has failed to repay the loan as agreed and taking into account that the guarantors under discussion guaranteed the 1st defendant term loan and of an overdraft. As a matter of law the liability of guarantors co-exist with that of the borrower as per Section 80 of the Law of Contract Act. In the fine, I find the third issue is answered in affirmative that the 4th and 5th defendants breached the directors personal guarantee and indemnity deed breached. For the foregoing reasons I find the plaintiff's case to have merit. The 6th defendant's counterclaim is without substance. The last issue was couched thus what reliefs parties are entitled. Before concluding, I should say a few things about the counterclaim raised by the 6th defendant (Rose Mutagonda Kundecha) against the plaintiff in the main suit, now the 1st defendant in the counterclaim, the Mafubilo General Supplies Limited, 2nd defendant and Juma Bakari Said as 3rd defendant, this claim is misplaced against the 2nd and 3rd defendants in the counterclaim for a simple reason that the relief sought are not against them. And held earlier that a counterclaim cannot be raised against co-defendants. The claims are rather against the 1st defendant in the counterclaim (NMB PLC). The reliefs sought are:

- (a) The legal mortgage registered in respect of a certificate of Title No. 165183, Plot No. 256, Block "C" Mbezi Area, Kinondoni Municipality dated 6th June 2017 and duly registered on 5th September 2017 as security for credit facilities extended to Juma Bakari Saidi t/a Mafubilo General Supplies whose aggregate sum is not exceeding TZS 600,000,000.00 be discharged. 26 (b) The 1st Defendant be ordered to hand over to plaintiff certificate of Title No. 165183, Plot No. 256, Block "C" Mbezi Area, Kinondoni Municipality; and
- (c) The plaintiff be awarded costs of this suit. These claims have no basis as the plaintiff in the counterclaim duly consented to the credit facility and signed the deed of variation. Her claim of signatures being forged lacks any evidence to support it as expounded hereinabove. The alleged forgery came as an afterthought it has never been reported to the police to mount investigation because forgery is a crime. Moreover, no hand writing signature was brought to examine the signature and supply his report to the court and even appear before the court to give his expert testimony. The claims in the counterclaim thus lack evidence. They are baseless and without merit. The court proceeded to dismiss them with costs. But before making final orders, among the reliefs sought by the plaintiff in suit is general damages. It is the law under Section 73 (1) of the Law of Contract Act [Cap 345 R.E. 2019] that: "Where a contract has been broken, the party who suffers by such breach to receive, from the party who has broken the contract, compensation for any loss or damage caused to him..." Indeed, the plaintiff extended loans to the 1st defendant, and she and her guarantors have defaulted

to repay them. That entitles the plaintiff to the reliefs claimed as well as general damages. The court has taken into consideration the loan amount disbursed to the 1st defendant and the outstanding amount. It is undisputed that the plaintiff bank is in lending business, when significant amount of money is in hands of the borrow who does not want to repay the loan that adversely affects the 27 lending business. In the premises the defendant is granted TZS 50,000,000 as general damages. Regarding interest, and according to the plaint in the main suit, there are two sets of interests, the commercial interest rate and interest at court's rate. The court grants the commercial interest of 18% because that is found in the parties' agreement. As for the court's interest rate on the decretal sum, the court finds it fair to grant interest at court rate of 7%/ Since the plaintiff's claims in the main suit have been found to have merit, the court declares, and order as follows:

- i. It is declared that the 1st defendant is in breach of the facility letters and amendments. ii. It is declared that the 2nd and 3rd defendants are in breach of the mortgage and variation deeds. iii. It is also declared that the 4th and 5th defendants are in breach of the deed of guarantee. iv. The defendants are ordered to pay the plaintiff TZS. 1,346,750,179.91 say (Tanzania Shillings One Billion Three Hundred Forty -Six Million Seven Hundred Fifty Thousand One Hundred Seventy -Nine Shillings and Ninety-One cents and USD 558,514.11.
- v. The plaintiff is allowed to proceed with recovery against mortgage securities to wit, Plot No 256, Block C, Mbezi and Plot No 573 Block G Tegata, Kinondoni Municipality. vi. The defendants shall pay the plaintiff interest on the decretal sum at the commercial rate of 18% per annum above the normal interest rate on the outstanding amount from the date of filing this suit to the date of judgement. 28 vii. Interest on the decretal sum at the court rate of 7% from the date of judgement to the date of full satisfaction. viii. The defendants shall pay the costs of this suit. ix. The defendants shall pay the plaintiff general damages of TZS 50,000,000 for breach of contract. Order accordingly. DATED at DAR ES SALAAM this 29th Day of September 2023. Date: 29/09/2023 Coram: Hon. UJ. Agatho J. For Plaintiff: Robert Mosi, Advocate For 1st, 3rd, 4th and 5th Defendants: Amon Ndunguru, Advocate. For 2nd and 6th Defendants: Daniel Weiwei, Advocate. C/Clerk: Mustafa 29 Court: Judgment delivered today, this 29th September 2023 in the presence of Robert Mosi, counsel for the Plaintiff, and Amon Ndunguru, counsel for the 1st, 3rd, 4th and 5th defendants and Daniel Weiwei, counsel for the 2nd and 6th U. J. AGATHO JUDGE 29/09/2023 30

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://media.tanzlii.org/media/judgment/302885/source_file/nmb-bank-plc-vs-mafubilo-general-supplies-ltd-5-others-by-way-of-counter-claim-rose-mutagonga-kundecha-vs-nmb-bank-plc-2-others-2023-tzhccomd-319-29-september-2023.pdf

CASE PAGE <https://chat.esheria.ai/case-law/tanzania/nmb-bank-plc-loandefault-tzhccomd-2023>

Prepared on 14 October 2026 · Esheria