IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., LEVIRA, J.A., And MAIGE, J.A.)

CIVIL APPEAL NO. 1 OF 2018

1. **KILANYA GENERAL SUPPLIES LTD**
2. **EXAUD AUGUSTINO KWAYU** ..... **APPELLANTS**

VERSUS

1. **CRDB BANK LIMITED**
2. **COMRADE AUCTION MART LIMITED** ..... **RESPONDENTS**
3. **ABDULRAHMAN MUHIDIN KHAMIS**

[Appeal from the Judgment of the High Court of Tanzania (Commercial Division) at Dar es Salaam]

(Songoro, J.)

dated the 2nd day of June, 2017
in
Commercial Case No. 23 of 2014

.....

JUDGMENT OF THE COURT

13th September & 20th December, 2021

MWAMBEGELE, J.A.:

This appeal arises from the judgment of the Commercial Division of the High Court of Tanzania (Songoro, J.) dated 02.06.2017 in Commercial Case No. 23 of 2014. The appellants unsuccessfully sued the respondents in the trial court claiming for a number of reliefs; that is, a declaration that the appellants had no obligations to repay the term loan and overdraft

facilities granted to Integrated Cotton Fields Ltd, a declaration that the sale and transfer of title of the property on Plot No. 15 Block "W" Ilala Municipality, Dar es salaam City with Certificate of Title No. 58892 was illegal, an order for specific performance by the first respondent to unconditionally release the mortgaged securities of landed property with Certificate of Title No. 59387 LO No. 25336 of Plot No. 398 Block C Kimara, Dar es salaam City and the property on Plot No. 15 Block "W" Ilala Municipality Dar es salaam with Certificate of Title No. 58892, permanent injunction restraining the first and second respondents and their agents to demand anything from the appellants in relation to the term loan and overdraft facilities granted to Integrated Cotton Fields Ltd, general damages and any other reliefs the court would deem fit to grant. Aggrieved by that decision, the appellants filed the present appeal.

The factual background to this appeal is not complicated; it can be briefly stated as follows: the appellants were guarantors of a term loan and an overdraft facility to the tune of Tshs. 1,536,635,000/= granted by the first respondent bank to one Integrated Cotton Fields Ltd (the borrower), together with an additional overdraft facility of USD 1,000,000.00. apparently, the second appellant, so the record of appeal has it, was the

Managing Director of both the first appellant and the borrower. The loan and the overdraft facilities were to be repaid within 126 months from the date of disbursement to 31.12.2019; the date of expiry. The appellants guaranteed the facilities and in that regard, they mortgaged their landed properties, namely; property on Plot No. 15 Block W, Ilala Dar es Salaam, registered in the name of the first appellant, Kilanya General Supplies Limited, as well as that on Plot No. 398 Block "C" Kimara, Dar es Salaam registered in the name of the second appellant, Exaud Augustino Kwayu.

It happened that the borrower defaulted to repay the term loan and overdraft facilities. Thus, the first respondent, decided to enforce the mortgage by way of sale of the mortgaged properties. In that process, the property on Plot No. 15 Block W, Ilala Dar es Salaam was sold by the second respondent, Comrade Auction Mart, to the third respondent, Abdulrahman Muhidin Khamis. Thinking that the respondent had no right to do what she did, the appellants instituted the suit in the High Court seeking the reliefs referred above.

It was the appellants' claim before the High Court that it was wrong for the first respondent to appoint a financial controller as well as to proceed to sell the mortgaged properties, because no default notice had

been given to them. They also claimed that the appointment of the financial controller was done without the appellants' consent. The appellants also alleged that the sale of the property to the third respondent was illegal.

The first respondent's answer to the claim by the appellants was simply that as the borrower had defaulted to repay the term loan and overdraft facilities which the appellants guaranteed, she was right to resort to the disposition of the mortgaged security as she did. She also responded that the appointment of the collateral manager and financial controller was made in accordance with the underlying contract. With regard to the notice, she responded that the same was properly issued to the appellants.

The High Court framed the following issues for determination; **one**, whether the appointment of the stock collateral manager/financial controller was in accordance with the contract; **two**, whether the appellants had any legal obligation to repay the outstanding loan and overdraft facilities granted to the borrower; **three**, whether the sale of the first appellant's property was lawful; **four**, whether the appellants were served with a notice of default to repay the loan and overdraft facilities and; **five**, to what reliefs were the parties entitled.

As already alluded to above, the appellants lost the suit. The High Court dismissed the appellants' suit having found that the terms in the Overdraft Letter (Exh. D7), under item 5.3, allowed the first respondent to appoint a collateral manager, while item 5.9 of the same exhibit allowed the first respondent to appoint the financial controller. It also dismissed the appellant's complaint that the first respondent defaulted the terms of the agreement.

As to the issue whether the appellants, as guarantors, were liable to repay the loan and overdraft facilities, the trial court, relying on item 3.2 of Exh. D7 as well as section 78 of the Law of Contract Act, Cap 345 of the laws of Tanzania, which compel guarantors to honour their promises, it stated that, since the borrower defaulted, then the guarantors were duty bound to repay the outstanding balance.

On whether the appellants were served with the default notice, the trial court, relying on the demand notice (Exh. D4), held that, by virtue of the demand notice being sent to the appellants via their postal address, it could be concluded that the default notice was duly communicated.

On whether the sale of the mortgaged property was lawful, the trial court noted that the appellants' basis for denial of repaying the loan was

that they were not served with default notice and that they were not contractually bound to repay. The trial court considered the appellant's arguments and held that under the mortgage deed, the first respondent had rights of sale of the mortgaged properties, including landed property on Plot No. 15, Block W of Ilala Dar es salaam and, since a public auction was conducted, then the sale was legally done.

Dissatisfied with the decision of the High Court, the appellants have appealed to this Court on seven (7) grounds, namely:

1. That the honourable trial Judge erred in both law and facts in holding that the borrower, Integrated Cotton Fields Limited, who was not a party to the suit had defaulted to repay the loan as per the bank statements and repayment schedule which was neither pleaded nor admitted in evidence;

2. That the Honourable trial Judge erred both in law and facts in holding that the appellants had mortgaged their lands as security for the loan granted to Integrated Cotton Fields Limited for USD 1,000,000.00 on 18th June 2010 and variation letter of offer for Tshs. 1,536,635,000 dated 18th June 2010;

3. That the honourable trial Judge erred in law and fact in holding that the second plaintiff and the Directors of the first plaintiff had guaranteed repayment of the loan granted to the Integrated Cotton Fields Limited, for USD 1,000,000.00 and Tshs. 1,536,635,000/- on 18th June 2010;

4. That the honourable trial judge erred both in law and facts in holding that the first respondent had power to appoint a financial controller for the borrower, one Integrated Cotton Fields Limited, and that the said financial controller was properly appointed to form part of the Integrated Cotton Fields Limited, a Limited liability company;

5. That the honourable trial Judge erred both in law and facts in holding that there was a legal notice of default to the appellants;

6. That the honourable trial Judge erred in law in holding that it was proper for the second respondent to auction the first appellant's property and that the property was legally sold to the third respondent; and

7. That the honourable trial judge erred in law in holding the conduct of proceedings, tendering and admission of documents as exhibits to the

extent that both the proceedings and the judgment and decree are problematic.

When the appeal was called on for hearing before us, Mr. Edward Peter Chuwa, learned counsel, appeared for the appellants. Mr. Deogratias Lyimo Kiritta, also learned counsel, appeared for the respondents. Mr. Chuwa had earlier on filed written submissions in support of the appeal which he sought to, and did clarify, at the oral hearing. Mr. Kiritta who did not file any reply written submissions presented oral arguments resisting the appeal.

We shall determine the appeal in the order the grounds appear.

Starting with the first ground of appeal, it was the appellants' contention that the first and second issues before the High Court could not be determined without the borrower being a party to the suit as the borrower had to be afforded the right to be heard. On the other hand, the Mr. Kiritta for the respondents contended that the fact that the loan was not repaid, was not disputed. He added that the appellants were the plaintiffs in the suit subject of this appeal and therefore, they cannot benefit from their failure to implead the borrower.

We have considered this ground of complaint and are of the opinion that the same lacks merit. We hold that view because the participation of the borrower as a party to the suit was neither an omission by the respondents nor by the High Court. The appellants were the ones who instituted the case in the first place and ought to have joined or decided not to join any party they deemed necessary. There is no dispute that the appellants were guarantors of the term loan and overdraft facilities advanced to the borrower. This means that the appellants were fully aware of the terms of the facilities, hence, as guarantors, they cannot deny liability in case of the default by the borrower to repay the loan and this liability does not change when the borrower is not a party to the suit. After all, under Order I rule 13 off the Civil Procedure Code, Cap. 33 of the Revised Edition, 2019, the non-joinder of the borrower could not affect the judgment of the court. Much as we agree that the borrower was a proper party, we are of the view that she was not a necessary party as the determination of the issues of controversy between the parties, could be finally and conclusively determined without her presence.

We respectfully think that, since the appellants were the ones who instituted the suit, they were under obligation to adduce evidence that

would exonerate them from liability and not the other way round. We find solace in this stance in the elementary principle of evidence under section 110 of the Evidence Act, Cap. 6 of the Revised Edition, 2019, that he who alleges the existence of a fact must prove that that fact exists as discussed in a plethora of cases including **Paulina Samson Ndawavya v. Theresia Thomasi Madaha**, Civil Appeal No. 45 of 2017 (unreported). In the matter before us, the appellants generally denied the entire liability without sufficiently showing whether the liability stated by the respondents was valid or not. In the premises, upon failure to discharge their burden of proof to sustain the claims in the suit, the trial court rightly held them liable even in the absence of the borrower who they did not implead. As put by Mr. Kiritta, and to our mind rightly so, the appellants cannot benefit from the wrongs, if any, which they committed. We find no merit in the first ground of appeal and dismiss it.

The appellants' complaint in the second ground of appeal is that the trial Judge erred in law and fact in holding that the appellant mortgaged their lands as security for the loan granted to Integrated Cotton Fields Limited for USD 1,000,000.00 on 18.06.2010 and Variation Letter of Offer for Tshs. 1,536,635,000/= dated 18.06.2010. In view of the evidence

adduced at the trial of the matter, especially through exhibits D1, D2 and D9, we really find difficulties in faulting the trial Judge in his finding and verdict on this complaint. It was not disputed that Integrated Cotton Field Limited, borrowed the said amount of money from the first respondent. It is clear from Exhibits D1, D2 and D9 particularly at pp. 520, 528 and 557 of the record, that the appellants mortgaged their land as security for the loan granted to the borrower. This fact is admitted by the appellants in paragraph 10 of the plaint. The appellants argued that the appointment of Mr. Amani Nyabuzuki as financial controller of the borrower amounted to a variation of the terms and conditions of Exh. P1 and Exh. D7 thereby discharging the appellants from liability. We, respectfully, do not agree. As will become more apparent when considering the fourth ground of appeal, the appointment of Mr. Amani Nyabuzuki from M/s ACE Audit Control and Expertise (Tanzania) Ltd, was quite in order in that it was backed by the agreement by the first respondent and the borrower executed on 18.06.2010 (Exh. D7). We find no merit in this ground and dismiss it.

We now turn to consider the third ground of appeal; a complaint that the trial Judge erred in law and fact in holding that the second plaintiff and the director of the first plaintiff had guaranteed repayment of the loan

granted to Integrated Cotton Fields Limited. This ground should not detain us as the record speaks volumes that the appellants guaranteed the repayment of the loan granted to Integrated Cotton Fields Limited. Exh. D1 clause 8.1 and 8.2 and Exh. D7 clause 3.1, 3.2 and 3.3 categorically state that the appellants were the guarantors of the said loan and they signed Guarantor's Guarantee and Indemnity. Based on those exhibits, the appellants cannot dissociate themselves from the liability as guarantors of the loan and overdraft facilities granted to the borrower. This ground is devoid of merit as well. We dismiss it.

Next for consideration is the fourth ground of appeal, in which the appellants challenge the appointment of the financial controller. In determining this complaint, the High Court took the view that the first respondent had power under Exh. D7 to appoint the financial controller of the borrower who was properly appointed to be part of the management. We agree with the finding and verdict of the High Court on this complaint. We shall demonstrate why we are in such an agreement with the trial court.

We start with reproducing Item 5.9 of the Exh D7 provides:

> ***"5.9 MANAGEMENT OF BUSINESS DURING THE SEASON***

The Bank shall appoint an independent person to be part of the company's management team who shall take control of all financial matters. The cost related to the hiring of this person shall be borne by the borrower."

It is clear from item 5.9 of Exh. D7 that the bank had power to appoint an independent person to be part of the borrower's management who would take control of its financial matters. Taking into account that the appellants signed the Deed of Guarantee and Indemnity as per item 3.1, 3.2 and 3.3 of Exh D7, and the same facility under item 5.9 allowed the first respondent to appoint a financial controller, who was to control the finances of the beneficiary for that season, the appointment, we strongly are of the view, was legally done. The appellants' complaint that the overdraft facility was varied when the first respondent appointed Amani Nyabuzuki to manage the finances of the borrower was without their consent, is, in our view, without any substance. So is their complaint that the letter of appointment (Exh. D3) was sent to the borrower without their consent. As seen above, the appointment of an independent person to be part of the borrower's management team who would take control of all financial matters was a term of Exh. D7 referenced to above. There is no

term in the exhibit which required the first respondent to seek consent from the appellants before appointment. Neither did it provide that the communication to the borrower was to be with the consent of the appellants. In the premises, we find and hold that the first respondent correctly exercised her right to appoint the financial controller complained of.

We need to underline that, in terms of section 10 of the Law of Contract Act, parties are bound by the terms of contract they freely entered – see also: **Unilever Tanzania Ltd v. Benedict Mkasa t/a BEMA Enterprises**, Civil Appeal No. 41 of 2009, **Philipo Joseph Lukonde v. Faraji Ally Saidi**, Civil Appeal No. 74 of 2019 and **Simon Kichele Chacha v. Aveline M. Kilawe**, Civil Appeal No. 160 of 2018, all unreported decisions of the Court.

On the basis of the foregoing discussion, we are in agreement with the trial Judge that the financial controller was properly appointed in terms of Exh. D7 and the consent was implied under the contract. This ground of appeal is dismissed for want of merit.

The fifth ground of appeal is on the issue whether the default notice was communicated to the appellants. While the appellant deny any service

of the borrower defaulting to pay the loan, the first respondent countered that they were served through Exh. D4. Scanning through the record of appeal, it can be noted that, the trial court gave due regard to the demand notice dated 10.11.2011 as notice of default. The trial court further stated that by virtue of the demand notice being sent to the appellants via their postal address, it meant that the default notice was duly communicated. We agree. Exh. D4 is a demand notice appearing at p. 267 of the record of appeal addressed to the first appellant and copied to the second appellant, among others. The letter is titled "Demand Notice for Payment of Bank Facilities". It bears Ref. No. 3390/540914/4433 dated 10.11.2011. The body of the notice had the following information:

> *"Notice is hereby given that Integrated Cotton Fields Ltd has defaulted to pay the overdraft facilities as well as the restructured term loan installments contrary to provisions of the Loan Facility Letters which requires that principal loan installments and interest thereon to be serviced every month as per agreed repayment schedules. The total loan position as at 09/11/2011 is as hereunder ...."*

And the letter went on:

"As per borrower's guarantor, you are hereby given sixty (60) days to settle the sum of Tshs 2,887,831,561.82 (say Two billion eight hundred eighty seven million eight hundred thirty one thousand five hundred sixty one cents eighty two only) being principal plus interest arrears overdue for payment, furthermore, you are given the same period to settle the sum of USD 253,164.16 (say united states dollars two hundred fifty three thousand one hundred sixty four cents sixteen only) being overdraft outstanding balance as at above prescribed date.

Please be further informed that should you fail to settle the said sum within the given period of sixty days from the date of this letter, the Bank or its authorized agents shall proceed to take recovery measures which include but not limited to sale of assets pledged as security.

Description of the security that shall be attached is:-

1. *First charge Legal Mortgage over landed property, located at Plot No. 15, Block "W" Ilala in Dar es Salaam City, CT No. 58892 LO 206848 in the name of Kilanya General Supplies Limited of P. O. Box 50139 Dar es Salaam ...."*

Exavery Makwi (DW1) testified at pp. 402 and 403 of the record of appeal, that the notice of default (Exh. D4) was served on the appellants on 14.11.2017 and a dispatch book was tendered for identification purposes to verify service. Both Exh. D4 and the dispatch book were tendered without any objection from the appellants. The appellants did not even cross-examine the witness on that aspect. It is a principle of evidence established upon prudence in this jurisdiction that failure to cross examine a witness on important matter means acceptance of the truth of the witness evidence – see: **Damian Ruhele v. Republic**, Criminal Appeal No. 501 of 2007 (unreported), **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010 and **George Maili Kemboge v. Republic**, Criminal Appeal No. 327 of 2013.

In the case the subject of this appeal, the appellants did not object to the tendering for identification the dispatch book that showed that Exh. D4 was served on the appellants on 14.11.2017 and they did not cross-examine on that important aspect. The only inference deducible from that state of affairs is that the appellants accepted that the witness stated nothing but the truth. They cannot now be assumed to be correct when

they say Exh. D4 was not served on them. This ground of complaint lacks merit as well. It is dismissed.

On the sixth ground of appeal, the appellants complain that the trial Judge erred in law in holding that the second respondent legally auctioned the first appellant's property. We think this course of action was properly resorted to by the first respondent. Section 126 of the Land Act, Cap 113 of the Revised Edition, 2019 (the Land Act) provides:

> *"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;*
>
> *(b) lease the mortgaged land or where the mortgaged land is of a lease, sub-lease 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".*
>
> [Emphasize supplied]

Plot No. 15 Block "W" Ilala Municipality Dar es Salaam was among the securities offered by the appellants (guarantors) against the facilities extended by the first respondent to the borrower. After the default of payment, the first respondent instructed the second respondent to sell the said property through public auction. The second respondent sold the property to the third respondent by public auction. According to Issa Bendera (DW2), before the auction, publication was made through newspaper fourteen days prior to it. The auction was conducted in the presence of a number of people and the third respondent was the highest bidder. We agree with the trial court that the second respondent legally auctioned the first appellant's property. As rightly submitted by Mr. Kiritta, the third respondent is a bonafide purchaser for value. In view of the fact that no fraud, misrepresentation or other dishonest conduct on the part of the mortgagee of which the third respondent had actual or constructive notice, he is protected in terms of section 135 (3) of the Land Act. This ground of appeal has no merit and is dismissed.

We now turn to consider the last ground of appeal in which the appellants complain that the trial Judge erred in law in handling the conduct of proceedings, tendering and admission of documents as exhibits to the

extent that both the proceedings and the judgment are problematic. Unfortunately, the appellants' counsel had very little to clarify on this ground. He simply told us that some exhibits were irregularly admitted in evidence without appearing in the proceedings. On the other hand, Mr. Kiritta submitted that all the exhibits were properly admitted. We have scanned through the entire record of the proceedings in the High Court as they appear in the amended record of appeal. Having so done, we find difficulties in agreeing with the appellants. If anything, the record is loud and clear that the trial Judge conducted the proceedings in accordance with the procedure prescribed by the High Court (Commercial Division) Procedure Rules, 2012 - GN. No. 250 of 2012 applicable in that division of the High Court. Evidence-in-chief by witnesses was given through witness statements, exhibits were tendered and admitted according to the rules of evidence and the witnesses were cross-examined and re-examined. We find no irregularity in the proceedings of the High Court as to render the consequent judgment problematic as Mr. Chuwa would have us believe. The last ground of appeal has no merit as well. We dismiss it.

In view of the reasons we have endeavoured to assign in this judgment, we find no iota of merit in this appeal. It stands dismissed with costs.

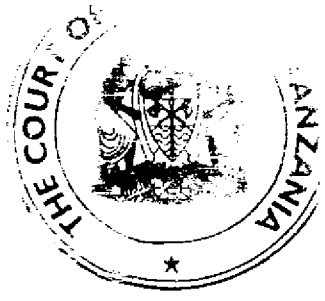
DATED at **DAR ES SALAAM** this 14th day of December, 2021.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The judgment delivered this 20th day of December, 2021 in the presence of Mr. Levis Lyimo who is holding brief for Mr. Chuwa, learned counsel for the Appellant, and Mr. Levis Lyimo, learned counsel for the Respondent is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL