IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KWARIKO, J.A., GALEBA, J.A. And FIKIRINI, J.A.)

CIVIL APPEAL NO. 162 OF 2019

NATIONAL BANK OF COMMERCE LIMITED.....APPELLANT

VERSUS

STEPHEN KYANDO T/A ASKY INTERTRADE.....RESPONDENT

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

(Phillip, J.)

dated the 24th day of April, 2019
in
Commercial Case No. 153 of 2017

.....

JUDGMENT OF THE COURT

23rd March, & 2nd May, 2022

GALEBA, J.A.:

Stephen Kyando trading as Asky Intertrade, the respondent, by an overdraft facility agreement dated 20th July 2009, was availed an overdraft facility to the limit of TZS. 90,000,000.00 by the National Bank of Commerce Limited, the appellant. The purpose for the borrowing was to supplement working capital and to finance procurement of agricultural products as stock to replenish the respondent's business and to meet other operational requirements of his commercial enterprise. According to the overdraft facility letter (exhibit P1), the financing was secured by six securities, but relevant

for this judgment, as it will be noted as we proceed, are two legal mortgages registered over Plot No. 765 Block 'BB' Kiwanja cha Ndege Area, Morogoro Municipality, Certificate of Title No. 80538 (the Morogoro property) and Plot No. 555 Block 'A' Kinyerezi Area, Ilala Municipality in Dar es Salaam registered and assigned Certificate of Title No. 82778 (the Dar es Salaam property). Both properties were registered in the name of the respondent. The lending carried a normal interest rate of 24% per annum with an additional 5% per annum, penal rate in case a default occurred. According to the facilities agreement, a default situation included where the respondent would utilise the funds over the approved limit of TZS. 90,000,000.00 or if he utilized the facilities, without renewal, after expiry of the overdraft period for which the funds were availed, which was agreed to be 31st August, 2010.

The respondent accessed and utilised the funds but, because he allegedly fell sick and entrusted running of his business operations to his relatives, there ensued failures in the business such that he could not achieve the necessary turnover sufficient to enable him to service the bank overdraft. Following failure to service his overdraft normally, the appellant issued a statutory notice of default under section 127 of the Land Act [Cap 113 R.E. 2002, now R.E. 2019] demanding, in sixty days, full clearance of TZS.

96,400,064.40, an amount that was due and owing on the respondent's overdraft account as at 28th February, 2011.

The respondent failed to liquidate the debt within the sixty days provided in the notice of default, whereupon by a letter dated 19th August, 2011 (exhibit P5), he requested the appellant to restructure his credit accommodation by converting it from an overdraft facility to a loan facility, so that he could settle his liability in instalments. In his letter requesting for restructuring of the debt, he proposed to settle the outstanding balance in monthly instalments of TZS. 5,000,000.00 each.

The appellant agreed to the respondent's proposal, and the debt was accordingly restructured by drawing a deed of undertaking, which was duly executed by the respondent on 15th September, 2011. According to that instrument, repayment of the due balance, which was at that time, TZS. 89,609,763.40 was spread over eighteen (18) instalments corresponding to eighteen (18) months running from 30th September, 2011 to 28th February, 2013 payable on the last day of each month. Each instalment was indicated to be TZS. 5,000,000.00 except the last, which would be TZS. 4,000,000.00. In terms of that deed, in case any instalment fell due and payable but remained uncleared for seven days, the appellant would be entitled to initiate recovery

measures. It appears, the respondent for some time, complied with the deed of undertaking and settled several instalments, but failed to observe strict compliance to the schedule of repayment for all eighteen (18) instalments.

It is common ground that, upon failure to observe the schedule of repayment, parties met and agreed that the Morogoro property be sold in order to regularize the respondent's poorly serviced account. Consequently, the property was sold at TZS. 45,000,000.00 and the whole amount was deposited with the appellant to reduce the balance due at the time. After depositing that amount in the respondent's loan account on 8th January, 2013, according to the bank statement (exhibit D1) at page 345 of the record of appeal, an amount of TZS. 30,554,992.00 still remained due and owing on the respondent's account. Further, following the sale, the certificate of occupancy for the sold property, was delivered to its buyer. However, that was not the case with the Dar es Salaam property.

In respect of the latter property, the mortgage was not discharged, that is, the appellant did not release the certificate of occupancy to the respondent. Consequently, on 15th January, 2013 the respondent wrote a letter (exhibit P9) to the appellant stating that as he had cleared the whole outstanding debt with the appellant, the latter was duty bound to discharge the mortgage even over

the Dar es Salaam property and hand back to him the certificate of occupancy. The appellant responded to the above letter on 21st January, 2013, (exhibit P8) confirming that the bank would be able to discharge the mortgage in respect of the Dar es Salaam property, only and only after clearance of the full liability outstanding on the respondent's loan account.

The respondent instructed Access Attorneys Advocates to issue a demand notice pressing for discharge of the mortgage in respect of the Dar es salaam property. The lawyers wrote a letter dated 2nd April, 2013, (exhibit P10) to the appellant but, before the appellant could do anything with the letter, the next day on 3rd April, 2013, the respondent on his own, wrote another letter, (exhibit P9) to the appellant pleading with her to carefully scrutinise her records once again and confirm if indeed, her allegations that there was an outstanding debt was at all authentic, particularly because he had earlier on requested the appellant to suspend application of interest on his loan account, and according to his records, he had discharged his full liability. There is no record that the two letters were replied to by the appellant, but what followed shows that she neither discharged the mortgage in respect of the Dar es Salaam property, nor did she deliver its title deed to the respondent. Apparently, that remained the status, until 16th December, 2014, as per the bank statement, when the appellant marked in its books of account

that the respondent's debt was written off thereby reflecting the running balance, as zero.

The two acts, that is withholding the Dar es Salaam property title deed and writing off the appellant's debt in the appellant's books of account were the central axis around which, all issues in the Commercial case which, would be filed three years later in 2017, oscillated.

As indicated above, on 28th September, 2017 the respondent instituted Commercial Case No. 153 of 2017 in the Commercial Division of the High Court seeking to enforce the following reliefs against the appellant; **first,** TZS. 170,000,000.00 as specific damages for losses arising from failure to honour his commitments, legal consultations and other expenses. **Second,** he claimed TZS. 30,000,000.00 as compensation for denied use of the collateral over the Dar es Salaam property. **Third,** he prayed for general damages of TZS. 15,000,000.00 and **fourth** were interests and costs. In brief, the respondent's case at the High Court was that he had discharged fully his financial liability with the appellant at the time the Morogoro property was sold and realized TZS. 45,000,000.00 which amount was deposited with the appellant. Further and alternatively, according to the respondent, the fact that his debt was written off by the appellant, he was discharged of any contractual liability to

pay the debt, even if the proceeds of the Morogoro property would not have fully liquidated his indebtedness.

In her written statement of defence, the appellant pleaded that the sale of the Morogoro property did not fully liquidate the respondent's debt with the appellant and writing off the debt did not discharge the respondent from his contractual responsibility to repay it. She prayed that the suit be dismissed with costs.

After taking into consideration the pleadings, the evidence tendered and closing submissions of parties, the High Court dismissed all reliefs prayed by the respondent. The court however, ordered discharge of the Dar es Salaam property and release of the certificate of occupancy to the respondent, on grounds that his debt had been written off by the appellant on 16th December, 2014. This decision aggrieved both parties to this appeal. In a quest to challenge that decision, whereas the appellant lodged the appeal on one hand, the respondent lodged a notice of cross-appeal, on the other.

The appellant lodged the memorandum of appeal containing the following four grounds:

> *"1. That, the learned trial Judge erred both in law and fact by holding that, "Exhibit D1", showed that, there*

was zero balance or there was no outstanding amount after write-off of the respondent's outstanding loan amount to avoid affecting Bank's Financial Books.

2. That, the learned trial Judge erred both in law and fact by misdirecting herself that, when a loan is termed written-off it means that the Bank accepts it to be a loss and does not continue with any recovery processes and or the Bank is legally barred to take any recovery measures.

3. That, the learned trial Judge erred both in law and fact by ordering the appellant to release the respondent's Certificate of Title in respect of Plot No. 555 Block "A", Kinyerezi Area with CT No. 82778, while in answering issue No. 3 as framed by the court, she confirmed that retention of respondent's certificate of title was lawful.

4. That, the learned trial Judge erred both in law and fact by issuing or ordering a relief which was not prayed by the respondent (plaintiff by then) in his pleadings after dismissing all the respondent's claims contained in his pleadings."

As indicated above, the respondent also lodged a notice of cross-appeal, which contained the following four grounds of appeal:

"1. That, the honourable trial Judge erred in law and fact by failure to hold that the appellant was in breach of the Loan Agreement despite the admission by the appellant's sole witness that the respondent made payment of the principal amount and interest as per the deed of undertaking prepared by the appellant's Legal Department.

2. That, the trial Judge erred in law and fact by holding that the respondent paid only the principal amount and that interest was not paid contrary to the evidence on record.

3. That, the trial Judge erred in law and fact by holding that the appellant's retention of the respondent's title deed No. 82778 for Plot No. 555 Block 'A' Kinyerezi Dar es Salaam was lawful consequently dismissed the respondent's claim for compensation pegged on the wrongful retention of the title deed while the respondent fully compiied with the deed of undertaking (exhibit P6) and made full payment of the principal loan amount and interest as agreed by both parties in the deed of undertaking.

4. That, the honourable trial Judge erred in iaw and fact by dismissing the respondent's claims for compensation, specific and general damages despite ample evidence that the appellant was in breach of the

agreement and unlawfully held the respondent's title deed No. 82778 for Plot No. 555 Block 'A' Kinyerezi."

At the hearing of this appeal, the appellant was represented by Mr. Sabato Ngogo, learned advocate, whereas the respondent appeared in person without legal representation. After moving us to adopt the appellant's written submissions which had been lodged under Rule 106 (1) of Tanzania Court of Appeal Rules 2009, (the Rules), to support the appeal, Mr. Ngogo informed us that he would argue the first and second grounds together and argue the remaining third and fourth grounds each independent of the other. On the respondent's part, being unrepresented, he prayed that we consider his written submissions he had filed in terms of rule 106(7) of the Rules, in opposing the appeal and in support of his grounds of appeal in the notice of cross-appeal. He prayed that this Court be pleased to set aside the judgment of the High Court and grant him the reliefs he had prayed for in the plaint.

In support of the appeal, Mr. Ngogo started off with the first two grounds of appeal. In that respect, he submitted that the learned High Court Judge erred when she held that, by the appellant taking a regulatory step of writing off the debt thereby reflecting zero as the running balance, it meant that the respondent was discharged of the obligation to repay his debt. He contended that writing off a debt in the appellant's books of account means

nothing more than suspending accumulation of interests on a borrower's debt account with the lending bank. To bolster his point, he cited to us a decision of the High Court in the case of **National Bank of Commerce Limited v. Universal Electronics and Hardware Ltd and Two Others** [2005] T.L.R. 257. Finally, Mr. Ngogo beseeched us to fault the Judge of the High Court and allow the two grounds of appeal.

In reply to the first and second grounds of appeal, the respondent as per his written submissions, contended that as the writing off of his debt was effected after the appellant had realized that he had no ability to repay the bank loan, then the act discharged him from his contractual responsibility to repay the debt. He contended that even after filing the suit at the High Court, the fact that the appellant lodged no counter claim to enforce the outstanding liability, is evidence that indeed, she had no claim against him. In any event, he added, he had cleared all liabilities by payment of the full debt in compliance with the deed of undertaking by applying the proceeds of sale of the Morogoro property.

We have meticulously reviewed the record of appeal and are in agreement with both parties that according to exhibit D1, which is a bank statement of the respondent's account contained at page 346 of the record of

appeal, it is evident that on 16th December 2014, the appellant marked TZS. 54,828,516.50 as written off. Consequently, the last column reflecting the actual debt or liability of the account holder displays zero balance. The dispute however, is not whether the debt was written off or not, bubbling beneath the surface in this case, is the issue whether writing off or charging off a debt amounts to discharging the debtor from the liability of the debt's settlement such that the lender does no longer have a contractual or legal right to enforce the debt against the defaulting borrower. That is the focal point upon which, for a while, we will concentrate our full attention to expound the concept and discuss the legal effect of writing off a debt in the context of banking.

According to **Black's Law Dictionary**, Bryan A. Garner, 11th Edition at page 1929, the term write off is defined thus:

> *"**Write off**, vb (1891) Accounting. To transfer part of the balance (of an asset account) to an expense or loss account to reflect the asset's diminished value."*

In our view, the above definition of writing off, is based on the fact that debts due to banks are one of the categories of their assets. It entails also that there are circumstances where, in case of banks operating in Tanzania, the Bank of Tanzania (the BOT) in execution of its mandate to supervise and to regulate the financial sector, imposes regulations providing for specified

periods of time beyond which, a bank is not permitted to retain a debt as an asset particularly if the debt is non-performing. In such circumstances, a bank is required to move the amount of the debt from its asset's portfolio to its expense's in its books of account in order to diminish or rather to match the realistic value of its assets in its books.

Further under our laws, writing off, also called charging off a debt is not an option for the lender to do it or not, when it has to write off a debt. It is a requirement of the Banking and Financial Institutions (Management of Risk Assets) Regulations, 2014, G.N. No. 287 of 22nd August, 2014 (the 2014 Regulations). Regulations 8(1), 9, and 11(1) and (2) of those Regulations provide as follows:

> *"8.-(1) A bank or financial institution* ***shall review and classify its outstanding loans*** *and other risk assets including contingent accounts or off balance sheet items at least once in every quarter.*
>
> *9. A bank or financial institution shall, at every quarterly review, charge off all credit accommodations and other risk assets* ***that have remained in the loss category for four consecutive quarters.***
>
> *11.-(1) Credit accommodations shall be classified into the following categories-*
>
> *(a) current;*

(b) especially mentioned;

(c) substandard;

(d) doubtful; and

(e) loss.

(2) Non-performing credit accommodations shall include substandard, doubtful, ***and loss categories*** *and be classified by a bank or financial institution according to the criteria prescribed in these Regulations."*

[Emphasis added]

We will get back to the above quoted regulations, but before we do it, we think, it is appropriate that we make a point or two because the phrase "write off" is not used in regulation 9 above, instead the phrase applied is "charge off". We wish to state that the two phrases in the two previous regulations namely the Banking and Financial Institutions (Management of Risk Assets) Regulations, 2001, G.N. No. 38 of 2001 and the Banking and Financial Institutions (Management of Risk Assets) Regulations, 2008, G.N. No. 374 of 2008 used the terms interchangeably in both regulations before the former regulations revoked the latter and before the latter were to be revoked by the 2014 Regulations. For instance, regulation 7 of the 2001 Regulations, with the same import as regulation 9 of the 2014 Regulations provided that:

> *"7. Every bank and financial institution shall* ***charge off or write off*** *ail loans classified as loss at the end of every quarterly review. Recoveries out of the charged off accounts shall be recognized as per requirement of the National Board of Accountants and Auditors (NBAA) accounting standards."*
> [Emphasis added]

The point we want to underscore, is that the term charge off referred to in the 2014 Regulations is the equivalent of write off as used in this matter.

We hinted above that writing off a bad debt in the lender's books, is not at the option of a given bank or financial institution, it is a regulatory requirement of the financial sector regulator in a quest to maintain the stability, safety and soundness of the financial system in order to reduce the risk of loss to depositors. Section 5 of the Banking and Financial Institutions Act No. 5 of 2006 (the BFIA), provides for supervision and regulation of banks and financial institutions as the underlying objective of that BFIA as follows:

> *"5. The primary objectives of supervision and regulation of banks and financial institutions by the Bank are to maintain the stability, safety and soundness of the financial system and to reduce the risk of loss to depositors."*

Regulation 8 of the 2014 Regulations which were made under section 71 of the BFIA, requires a banking institution to review and classify its lending portfolio and other risk assets, at least once in every quarter. Regulation 11(1) thereof requires a lender to classify the non-performing loans into five categories, the fifth being the loss category. Regulation 9 of the regulations provides that if a non-performing loan remains in the loss category for four consecutive quarters the same has to be charged off or as we indicated above, it must be written off. See also this Court's decision in the **National Bank of Commerce v. the Commissioner General Tanzania Revenue Authority,** Civil Appeal No. 52 of 2018 (unreported), where we stated that:

> *"According to the BOT Regulations, once a loan is classified as a loss, it has to be taken out in the period in which it appears as uncollectible. In other words, that loss has either to be charged off or written off from the financial statements of the bank..."*

The issue raised in grounds one and two, tasks us to determine the legal effect of writing off a debt, as indicated above. Whereas the respondent was of the view that the act discharged him from liability, the appellant was of a firm position that the act did not discharge the respondent from his financial commitment towards her to repay the debt.

In our endevour to expound the effect of writing off a debt, we stumbled on three decisions of this Court discussing some aspects of writing off debts. The cases are **National Bank of Commerce** (supra), **Access Bank Tanzania Limited, v. Commissioner General (TRA)**, Civil Appeal No. 314 of 2017 and **National Bank of Commerce v. Commissioner General, Tanzania Revenue Authority,** Civil Appeal No. 251 of 2018, (both unreported). However, the decisions do not discuss the effect of writing off a debt in the context of lending by banks. They discuss the subject in the theme of taxation and tax allowable reliefs. We have not laid our hands therefore on any appropriate decision or decisions of this Court discussing in details the effects of writing off a debt on the liability of the borrower and on the securities held by a bank. Nonetheless, we have traced a decision of the Milimani Commercial Division of the High Court of Kenya, in **Karmali and Another v. CFC Bank Limited and Another,** [2006] 2 EA 106 at page 115 where that foreign court observed thus:

> *"In my understanding a 'bad debt write off' does not connote the absence of a legitimate claim against the debtor whose debt is being written off. A creditor would write off a debt as a process of updating his records, once he came to the conclusion that the prospects of recovering the debt were literally non-existent.*

Therefore, I am unable to accept the plaintiff's contention, to the effect that simply because the first defendant decided to write off the debts in the account of Hyundai Motors as a bad debt, the said company had not been indebted to them."

Mr. Ngogo however, had referred us to a local decision of the High Court, that is, the case of **National Bank of Commerce Limited v. Universal Electronics** (supra) on the very point. In this case, the court observed that:

"The writing off of the debt was just an internal mechanism intended to clear the bank's books but not to discharge the debtors from liability; it was an exercise allowed by the Banks Guidelines, vide GN 39 of 2001, providing debt or loss write offs, but they do not discharge customer's liability as such."

The above decision was adopted by the High Court, Commercial Division in yet another case of **Stanbic Bank (T) Limited v. Radi Services,** Commercial Case No. 72 of 2014 (unreported).

We are pretty aware and mindful of the fact that this Court is not bound by decisions of foreign courts or of any lower courts in the court system including the High Court, however, we are persuaded by the holding in the

decision of the High Court of Kenya and that of the courts at home. In addition, as we have indicated above, writing off or charging off a bad debt or a non-performing asset, follows a requirement of the BOT as a regulator of the banking sector *vide* regulation 8(1) of the 2014 Regulations, that every bank and financial institution shall carry out quarterly reviews of their outstanding loans and other risk assets and classify them as appropriate. We indicated also that the 2014 Regulations require that once an asset is classified as loss under regulation 11(1), and remains in that category for four consecutive quarters, the same must be written off under regulation 9. In other words, although writing off debts by banks or financial institutions is an internal matter within the banking or financial institution itself as observed in the Kenyan and the two High Court decisions, the requirement is also statutory and mandatory as required by the BOT being a regulator of the national financial sector.

Further, we have painstakingly studied the entire 2014 Regulations and the BFIA, but have not been able to trace a regulation or provision providing that a defaulting borrower, whose debt has been classified as loss, like the respondent in this appeal, should benefit from the regulatory aspect of writing off his own non-performing asset. Thus, we agree with Mr. Ngogo, that the act of the appellant writing off the respondent's debt did not relieve or discharge the respondent from the obligation of liquidating his debt and the appellant

retained a legal right to enforce recovery of the written off debt from the defaulting respondent. Holding otherwise, which we cannot do, would be tantamount to condoning financial indiscipline by unscrupulous and dishonest borrowers who could deliberately, default in settlement of their financial liabilities with their lenders waiting for their debts to be classified into categories qualifying for writing them off, so that they can go scot-free without repaying the borrowed monies.

In this matter, we are satisfied that, writing off the respondent's debt, **one**, did not mean that the respondent's liability to the appellant to repay the loan was discharged; **two,** it also did not mean that the security held was now free for collection by the respondent or that the mortgage had to be discharged. The appellant had a right to continue holding it until full payment of the entire outstanding debt by respondent; and **three**, after writing off the debt, the appellant still had a right to enforce its repayment, for it was still due and owing an account of the respondent. Based on the foregoing discussion, the first and second grounds of appeal have merit and we allow them.

In relation to the third and fourth grounds of appeal, Mr. Ngogo argued that the trial court erred in law, when it ordered the appellant to discharge the respondent's Dar es Salaam mortgaged property, while holding that the

respondent did not pay the whole debt. He submitted also that discharging the mortgage over that property was not an aspect pleaded in the pleadings and the same was not even a prayer of the respondent in his plaint.

In reply, the respondent submitted that, the complaint on refusal by the appellant to discharge the Dar es Salaam property was pleaded at paragraph 3 (b) and 13 of plaint. On whether the point was not prayed, the respondent submitted that the relief sought at paragraph 13(i) is compensation as a result of failure by the appellant to discharge the property.

These two grounds, will be considered together. As for the issue that the discharge of the Dar es Salaam property was not pleaded, we do not agree with Mr. Ngogo because the complaint of withholding the title deed and refusal to hand it back to the respondent, was pleaded at paragraphs 12 and 13 of the plaint. Those paragraphs are to the effect that:

> *"12. That, despite the strict follow up and sending out demand notices and reminders, the defendant has kept deaf ears on the plaintiff's cry for discharge of his collateral with Title No. CT No. 82778 in Kinyerezi. The defendant has further continued to charge interest amounting to TZS. 33,842,333.40 as per bank statement of 21st May, 2013. Copies of the demand notice dated 2nd April, 2013, 3rd April, 2013 and a bank*

statement dated 21st May, 2013 are herewith attached being marked collectively as annexture SK 8 for which the plaintiff craves leave of the court to be read as part of the Plaint.

13. That due to failure of the Defendant to discharge the collateral with Tittle No. 82778 in Kinyerezi the Plaintiff has suffered the following specific damages ....."

We however agree with Mr. Ngogo that, no prayer was made in respect thereof, because the prayers at page 11 of the record of appeal are as follows:

"(a) Payment of Tsh. 170,000,000/= as specific damages itemized in clause 13 of the Plaint.

(b) Payment of Tsh. 30,000,000/= as compensation for denied use of the collateral for other facilities.

(c) Payment of general damages of Tsh. 15,000,000/=.

(d) Interest at the court rate of 12% from the date of filing till judgment and thereafter at the rate of 7% up to payment in full.

(e) Costs of the suit."

In law generally, a relief not prayed cannot be granted for that omission offends Order VII Rule 1(g) of the Civil Procedure Code [Cap 33 R.E. 2019] (the CPC) which provides that:

"1. The plaint shall contain the following particulars-

(a) to (f) NA

(g) the relief which the plaintiff claims;

(h) and (i) NA"

However, it is different if such a relief is reflected in the pleadings and an issue relating to it, duly framed. For instance, in this case, in addition to the above quoted paragraphs 12 and 13 of the plaint, one of the issues framed at page 170 of the record of appeal was:

> *"Whether retention of the plaintiff's title deed No. 82778 for Plot No. 555 Block 'A' Kinyerezi by the defendant is lawful."*

It is the settled position of the law that the court must decide on a matter that comes before it for decision making. That is so even where a specific prayer is not made on the prayer list at the foot of the plaint and even where no issue is framed. See the case of **Stella Temu v. Tanzania Revenue Authority** [2005] T.L.R. 178, where it was held that:

> *"As the Issue of defamation was contained in the pleadings and the appellant gave evidence on it, the trial court was right to make a finding on it even though it was not among the framed issues."*

In this case, there was even more justification for the High Court to have considered the relief because facts supporting it were pleaded as indicated and an issue for its resolution framed. In the case of **International Commercial Bank Limited v. Jadecam Real Estate Limited,** Civil Appeal No. 466 of 2020 (unreported), this Court observed that:

> *"It is trite that findings in suits must be based on issues arising from pleadings. However, there is an exception to that rule. The trial court is not precluded from deciding an issue which, though not framed, parties left it for its determination."*

See also **Agro Industries Ltd v. Attorney General** [1994] T.L.R. 43 and **George J. Minja v. Attorney General,** Civil Appeal No 75 of 2013 (unreported) on the same subject. Thus, it was not unlawful for the High Court to have determined the issue of retention of the title deed in respect of the Dar es Salaam property as complained by the appellant in terms of the fourth ground of appeal. It is however, different on how the court ultimately determined the issue.

The single major point for determination in grounds three and four in the memorandum of appeal is therefore, whether ordering the appellant to discharge the mortgage over the Dar es Salaam property which was held as

security for the subsisting debt, was lawful. Notably, the point raised that the trial Judge erred when she ordered discharge of the Dar es Salaam property, must be resolved, in our view, in the context which is consistent with the manner in which we have determined the first and the second grounds of appeal. In resolving those grounds, we firmly stated that writing off the respondent's debt did not in any way free him from his contractual responsibility to repay the debt, and that discharging the mortgage of that property and releasing the certificate of occupancy to the respondent was, in the circumstances, unlawful.

We will start with what the Judge found at page 397 of the record of appeal in order to appreciate her reasoning as she was making the order to discharge the Dar es Salaam property. It was reasoned thus:

> *"...the pertinent question now is what will happen to the plaintiff's right of occupancy in respect of his house at Kinyerezi, after the defendant's decision to write off the outstanding amount and the bank statement (exhibit D1) now shows zero balance. The defendant has retained the right of occupancy for Kinyerezi house for more than four years now after writing off the outstanding amount. To my understanding, when a debt is written off, it means that the bank accepts it to be a loss and does not continue with any recovery*

process, that is why, no wonder the defendant has not done any process, to auction the plaintiff's property at Kinyerezi for all those years. Having said the above, I am of a settled view that the defendant cannot continue retaining the plaintiff's right of occupancy in respect of the house at Kinyerezi, it is obliged to release it, since it is now legally barred to take any recovery measures as the plaintiff's account under which the overdraft was obtained does not show any outstanding amount."

By the above pronouncement, in the context of the manner we resolved the first and second grounds of appeal, with respect to the learned trial Judge, the trial court stepped into an error of law. The above quoted part of the decision of the High Court has three inherent errors wrapped and packaged into one. The errors are, **first,** the decision that once a debt is written off by a lender, then the debtor or the borrower is discharged of the liability to repay the debt; **second,** that once a debt is written off by a lender, then any collateral securing the debt's repayment must be discharged; and **third,** that once a debt is written off by the lender, then the latter legally has no right to recover the balance from the debtor. It is based on the second error that the trial court ordered release and discharge of the Dar es Salaam property. Thus,

the High Court was wrong to order an unconditional release of the Dar es Salaam property.

We have abundantly demonstrated, while disposing of the first and the second grounds of appeal that, writing off or charging off a debt by a bank or a financial institution under the 2014 Regulations, does not mean that the debtor is discharged of the repayment obligation, or that the collateral held as security for the debt must be discharged. Accordingly, in respect of ground three, we are of the firm position that the trial Judge erred in law when she ordered immediate release of the title deed in respect of the Dar es Salaam property in favour of the respondent, while the respondent had not repaid the whole debt because there was still an outstanding debt on the respondent's loan account as per the court's own findings in the same judgment.

As for the fourth ground of appeal, although the trial court was right to determine the issue of release of the title deed because it was pleaded and the issue in that respect framed, however, the learned trial Judge, with respect, erred when she ordered an unconditional release of the certificate of occupancy in respect of that property, while the respondent was still indebted to the appellant. In the circumstances, the third ground of appeal is allowed

but the fourth is partly dismissed and partly allowed to the extent discussed above.

As indicated at the beginning of this judgment, when the record of appeal was served on the respondent, he raised a notice of cross-appeal under the provisions of rule 94 of the Rules.

However, before getting to the real issues between the parties in the cross-appeal, we wish to make a general remark or clarification as regards reference to parties in the following part of this judgment. For purposes of maintaining consistence and to avoid confusion as to the identity of the parties, we will continue to refer to the appellant in the main appeal as the appellant in the cross-appeal although in fact she is, in the cross-appeal, the respondent. Similarly, we will still refer to the respondent in the main appeal as the respondent in the cross-appeal, just for the same sake, that is, to avoid confusion.

Although the appellant lodged his submissions in support of his grounds of appeal, there were no submissions on her behalf in respect of the cross-appeal. However, in terms of rule 106 (1) (b) of the Rules, Mr. Ngogo submitted orally in reply to the written submissions that had earlier been lodged by the respondent.

The complaint in the first ground is that, the trial Judge erred for failing to hold that the appellant breached the loan agreement because the sole witness from the appellant testified that the respondent fully paid both principal and interest in compliance with the deed of undertaking. According to the respondent's submission in support of this ground of appeal, the appellant informed the respondent to pay interest of TZS. 15,000,000.00, so that she could draw a deed of undertaking, which he did. Subsequently, according to him, a deed was drawn, he signed it and paid according to the deed such that the last instalment was paid on 28th February, 2014. He also added that, later on his Morogoro property was sold for TZS. 45,000,000.00 which amount was paid to the appellant. To him, he fully liquidated the debt. He moved the Court, in view of that, to fault the trial court in its judgment for holding that he did not pay both principal and interest.

In reply to this ground, Mr. Ngogo referred us to page 286 of the record of appeal where one Harold Ngogolo (DW1) was giving his evidence disputing the respondent's compliance with the deed of undertaking. In other words, the learned advocate submitted that the appellant's witness never told the trial court that the respondent settled his full liability with the bank as complained in the ground under consideration.

Determination of this ground is not going to take a lot of our time. We will only see what DW1 testified on the payment in compliance with the deed of undertaking by going direct to page 189 of the record of appeal where, during cross-examination DW1, stated:

> *"Mr. Kyando defaulted to pay as per deed of undertaking, eg. 30/9/2011 he paid Tshs. 2.8 only instead of Tshs. 5,000,000."*

At page 191 the witness concluded:

> *"Up to date the plaintiff is indebted to the bank to a tune of Tshs. 54 million plus. The plaintiff has not paid the said debt."*

The above evidence is consistent with the trial Judge's findings at page 395 of the record where she observed:

> *"Exhibit D1 shows the sum of Tshs. 45,000,000/= was deposited on 8th January 2013 and on that date the outstanding amount was Tshs. 75,554,992.90, thus a sum of Tshs. 30,554,992.90 remained unpaid. Also exhibit D1 shows that by 30th November 2014 there was a balance of Tshs. 54,828,516.30 which was written off on 16th December 2014...."*

From the above quoted parts of the record of appeal, we do not agree with the respondent as regards the first ground in the cross-appeal that DW1 stated that the principal amount and interest were fully paid in compliance with the deed of undertaking. Conversely, he testified that the respondent defaulted in complying with the schedule of repayment in the said deed of undertaking. Further, except for the conclusion that the Judge made on the issue of writing off the debt, we find no error with her findings on the debt due because the same was based on exhibit D1, which is the evidence on record. Further, there were popping up allegations now and then that the respondent requested for waiver of interest and that the waiver was granted. With respect, we did not trace any material on record to suggest that, the respondent applied for waiver of interest and the appellant granted it. Thus, there is no way the Judge would have held that the appellant breached the loan agreement. In the circumstances, the first ground of appeal in the notice of cross-appeal has no merit and we dismiss it.

The complaint in the second ground in the notice of cross-appeal was that the trial Judge erred by holding that the respondent repaid only the principal amount and defaulted on repayment of interest whereas evidence on record demonstrated that, the principal amount and interest, were both settled.

The submissions of the respondent in support of this ground were the same arguments as those supporting the first ground because, he argued the two grounds together. In reply to that ground Mr. Ngogo submitted that, the Judge did not say anything close to the respondent's allegations at the second ground in his cross-appeal. He contended that what the trial Judge found in her judgement was that both principal and interest were not fully paid by the respondent to the appellant in liquidating the former's debt. Mr. Ngogo therefore, beseeched the Court to dismiss the respondent's second ground of appeal as lacking both basis and merit.

On this point, other than the evidence of the respondent that he paid TZS. 15,000,000.00 as interest, there is no other evidence on record showing separation of principal amount and interest. Not even exhibit D1, the only authentic document showing exact entries in the respondent's account. Indeed, what is shown as unpaid in exhibit D1, is an outstanding balance, without any categorization of which amount is principal and which of its proportion is interest. Our reading of the judgment of the trial court, has not revealed any part of it where the trial Judge stated that the respondent paid the principal and the balance or the debt was only in respect of interest. We have scrutinized the written submissions of the respondent, but he does not refer to any specific part of the judgment where the Judge decided as per his

allegation in this ground. Thus, the second ground of appeal of the cross-appeal has no merit and we dismiss it.

The issue for determination in respect of grounds three and four in the notice of cross-appeal is whether dismissal of the respondent's claims for specific and general damages by the High Court was lawful, whereas the respondent had allegedly repaid his debt in full when he sold his Morogoro property in January 2013, thereby fully complying with the loan agreement, which, according to him was breached by the appellant.

In respect of these grounds, the respondent submitted that parties agreed to restructure the credit accommodation from the overdraft facility to the term loan and the appellant forced him to sell the Dar es Salaam property to a third party called Tito Ngajiro. Nonetheless, the respondent is blowing both hot and cold at the same time thereby creating a confusion. At page 12 of his submission, he contends that:

> *"It is not in dispute that the respondent defaulted payment of some of the instalments and consequently agreed with the appellant to sell one of the collaterals to pay the outstanding balance of the loan."*

By such submission we understood the respondent to mean that he defaulted to repay the debt he owed the appellant in accordance with the

schedule provided in the deed of undertaking. However, immediately at page 13 of his submissions, the same respondent submits to the contrary, that he adhered to the deed of undertaking and liquidated his indebtedness without default.

In reply, Mr. Ngogo submitted that, the respondent did neither prove specific damages of TZS. 170,000,000.00 he claimed, nor did he prove any other sums that he was claiming as reliefs in the plaint. He added that awarding general damages is within the discretion of the court.

We have considered the submissions of parties in seeking to resolve the issues raised in these grounds of appeal and we will start with what the learned trial Judge observed at page 396 of the record of appeal. According to the record, the trial Judge held, and correctly so, in our view, that it was not the appellant who breached the credit facility agreement, adding that it was actually the respondent who violated it, leading into all that followed including rescheduling of the credit facility from an overdraft accommodation to the term loan. On this aspect, that the respondent failed to pay the due debt in order to comply with the facilities agreement, we agree with the trial Judge because, according to his own evidence, after the respondent entrusted management of his business to his relatives, it failed to generate sufficient revenues to

regularly service his overdraft account. He defaulted and wrote a letter requesting for rescheduling of the debt which was converted into a term loan. Even after rescheduling his liability into a loan, still the deed of undertaking was breached by the respondent whereupon he had to sell his Morogoro property. According to law, where one instalment in a series of instalments is breached in terms of repayment, the entire contract is breached. In this respect, regulation 10 (1) of the 2014 Regulations provides as follows:

> *"10-(1) A credit accommodation with* ***specific repayment dates shall be considered as past due in its entirety*** *if any of its contractual obligation for payment has become due and unpaid."*

That is what had been the position of law even before the 2014 Regulations. In the case of **Abdallah Yussuf Omar v. The People's Bank of Zanzibar and Another** [2004] T.L.R. 399 at page 400, this Court stated:

> *"By failing to repay* ***any of the instaiments due*** *until May 2002, when he was served with a demand notice,* ***the appeliant was in breach of the loan repayment terms and the bank was entitied to exercise its power of sale of the mortgaged property.*** *"*[Emphasis added].

After the default, the Morogoro property was sold and TZS. 45,000,000.00 being the proceeds of the sale was credited into his account but

there still remained TZS. 30,554,992.90 unpaid as per exhibit D1 at page 345 of the record of appeal.

Pursuant to the above logical sequence of events, the trial Judge dismissed the argument that the bank breached the agreement and held that it was the respondent who infringed it. She subsequently dismissed all reliefs in the suit. By that sound finding of the trial court, we cannot fault the Judge for legally dismissing the respondent's misconceived suit at the High Court.

Briefly, in respect of the third and fourth grounds we hold that, retention of the title deed by the appellant for the Dar es Salaam property was lawful because the respondent did not fully liquidate his debt in terms of the deed of undertaking and dismissal of his claim for compensation in the suit at the High Court was a lawful order to make. We observe further that, it was the respondent who breached the credit facilities agreement, the act which led to his request to sell the Morogoro property, in order to normalize service of the loan. In the circumstances, grounds three and four in the notice of cross-appeal are hereby dismissed for want of merit.

In the event, the appellant's appeal is allowed with costs and the cross-appeal is hereby dismissed in its entirety. However, in the circumstances of

the case, we make no order as to costs in respect of the dismissed cross-appeal.

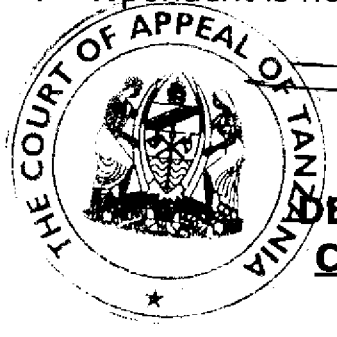
DATED at **DAR ES SALAAM** this 22nd day of April, 2022

M. A. KWARIKO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered this 2nd day of May, 2022 in the presence of Mr. Hakme Pemba holding brief Mr. Sabato Ngogo, counsel for the appellant, and in absence of respondent is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL