

IN THE COURT OF APPEAL OF TANZANIA
DAR ES SALAAM

(CORAM: NDIKA, J.A; SEHEL, J.A; And, KAIRO, J.A.)

CIVIL APPEAL NO. 46 OF 2022

HAROLD SEKIETE LEVIRA 1ST APPELLANT
FLORENCE KOKUJAMA MKYANUZI.....2ND APPELLANT

VERSUS

AFRICAN BANKING CORPORATION TANZANIA
LIMITED (BANK ABC)1ST RESPONDENT
NKYA COMPANY LIMITED.....2ND RESPONDENT

**(Appeal from the Judgment and Decree of the High Court of Tanzania,
Dar es salaam District registry at Dar es salaam)**

(Rumanyika, J.)

dated the 24th day of June, 2021

in

Civil Case No. 239 of 2016

JUDGMENT OF THE COURT

8th & 30th November, 2022

KAIRO, J.A.:

This is a first appeal. The appellants seek to challenge the judgment and decree of the High Court of Tanzania, District Registry at Dar es salaam dated 24th day of June, 2021 in Civil Case No. 239 of 2016.

The factual background to this appeal is as follows; the 1st respondent advanced a mortgage finance loan facility of TZS. 180,000,000.00 to the appellants in February, 2013. It was agreed that the facility would be repaid in monthly installments of TZS. 2,974,000.00

repayable in 17 years. As security, the appellants' pledged their property located on Plot No. 1230 Block "G" Tegeta area in Kinondoni Municipality within Dar es Salaam City.

In between the appellants defaulted to service the loan contrary to the agreement. The default prompted the 1st respondent to contemplate selling the mortgaged property so as to recover the outstanding balance of TZS. 212,943,718.53 as at January, 2017. The action aggrieved the appellants and they decided to institute the suit to challenge the respondents' move and prayed among others, the court's order that the respondents ascertain the amount due and further order that the sum be payable in lesser instalments.

In their reply, the respondents filed a counter claim and insisted that the appellants had defaulted to repay the loan as per agreed repayment schedule and thus it was proper to sell the pledged security so as to recover the loan.

The issue for determination at the trial court was whether upon admission of default by the appellants, the court has powers to restructure the loan repayment schedule. After hearing the parties the trial court found that the court had no powers to interfere with a valid contract which the appellants and the 1st respondent entered into and thus dismissed the suit with costs.

The appellants were not amused and decided to lodge this appeal armed with two grounds of appeal which can conveniently fused into one ground as follows:-

That, the trial court erred in law and in fact for failure to consider and order the restructuring of the loan repayment schedule as requested by the appellants.

When the appeal was called for hearing, the appellants fended for themselves while Mr. Raphael Rwezahula, learned counsel represented the respondents.

In his oral submission, the first appellant faulted the trial court for failing to consider that he was no longer employed following the labour dispute that ensued between him and his employer. Since the instalments to repay the loan were coming from his salary, the unemployment caused financial hardship on their part. As a result, they could not repay the loan as per the agreed manner. He stated this to be the reason why they prayed for the order of the court to restructure the loan repayment schedule.

The second appellant joined hands with the first appellant and added that, they still have the intention to repay the loan and the only thing they prayed from the trial court was to order the respondents to

accept the instalment of a lesser sum. In conclusion the appellants prayed the Court to find this appeal with merit and allow it.

In his reply Mr. Rwezahula contended that, the appellants did not advance cogent arguments as to warrant the reversal of the High Court's decision by this Court. He submitted that all of the three issues framed by the trial court were answered in favor of the respondents. In elaboration he stated that the appellants did not deny that they have borrowed from the first respondent and defaulted to repay as per repayment schedule agreed upon, instead their complaint is against the trial court's decision to deny them an order to restructure the repayment schedule they initially agreed upon. Mr. Rwezahula argued that, there was nothing to fault the trial court for the finding made to the effect that where the parties have entered into contract out of their own free will, no third party including the court can legally interfere, or temper with the agreed terms and conditions of the parties to the contract. To fortify his arguments, Mr. Rwezahula sought reliance on a string of cases as follows:- **Joseph Kahungwa vs. Agricultural Inputs Trust Fund and 2 Others**, Civil Appeal No. 373 of 2019, **Unilever Tanzania Ltd vs. Benedict Mkasa Trading as Bema Enterprises**, Civil Appeal No. 41 of 2009 and **Philipo Joseph Lukonde vs. Faraji Ally Saidi**, Civil Appeal No. 74 of 2019 (all unreported) and **National Bank of**

Commerce vs. Dar es Salaam Education Office Stationery [1995] TLR 272 and **Juma Jaffer Juma vs. Manager of the Peoples' Bank of Zanzibar Ltd and 2 Others** [2004] T.L.R. 332. He thus prayed the Court to dismiss the appeal with costs for want of merit.

In rejoinder, the appellants reiterated what they submitted earlier insisting on their good intention to repay the loan upon restructuring the repayment schedule and further attributing their default to unemployment and economic hardship on their part.

From the pleadings and evidence on record coupled with the rival arguments by the parties, we have noted that there is no dispute that the appellants had entered into a contract to borrow from the first appellant. It is further not in dispute that the appellants failed to abide by the repayment schedule agreed in the said contract. According to them, the instituted suit had the intention of obtaining a court order to have the repayment schedule, agreed in the contract, rescheduled and that they be allowed to repay instalments of lesser amount. The issue for determination therefore is whether or not the High Court erred to find that it had no mandate to interfere with the agreed terms and conditions of the contract freely entered by the parties.

Among the cherished cardinal principles of the law of contract is the sanctity of a contract. Once parties competent to contract for a

lawful consideration with a lawful object entered into an agreement freely, the contract entered becomes sacrosanct. That is, the parties to the contract become bound by the terms and conditions stipulated and each has to fulfill his/her part of bargain. Neither a third party nor courts should interpolate or tamper with the terms and condition therein. The position was lucidly brought out in **Philipo Joseph Lukonde** (supra), one of the cases cited by the appellant wherein the Court quoted a Kenyan case of **Michira vs. Gesima Power Mills Ltd** [2004] eKLR when determining a similar issue as to whether or not can the court interpolate anything in a freely concluded agreement. The Court while insisting on its duty to give effect to the intention of the parties to the contract and not interfering with the terms and conditions therein stated among others:-

"That fact does not give room to this Court to tamper with the agreement... If the words of the agreement are clearly expressed and the intention of the parties can be discovered from the whole agreement then the court must give effect to the intention of the parties"

We have given a similar stance in many of our decisions including **Miriam E. Maro vs. Bank of Tanzania**, Civil appeal No. 22 of 2017, **Simon Kichele Chacha vs. Aveline M. Kilawe**, Civil Appeal No. 160

of 2018 (both unreported), **Unilever Tanzania Ltd** and **Philipo Joseph Lukonde vs. Faraji Ally Saidi** (supra). In **Miriam Maro** (supra) while quoting the findings in **Unilever Tanzania Ltd**, the Court stated:

*"Strictly speaking, under our laws, once parties have freely agreed on their contractual clauses, it would **not be open for the courts to change those clauses which parties have agreed between themselves...** [emphasis added]."*

In this appeal, the appellants are faulting the trial court for failing to consider and order the restructuring of the loan repayment schedule agreed by the parties. Interpreting the prayer, it is plain that they are praying the Court to interpolate new terms and conditions regarding the repayment of the loan which amounts to tempering with the agreement the parties had entered into. However, as above shown, the courts have no powers to interfere with the sanctity of the contract but to give effect to what the parties have agreed upon.

Giving the reasons for failing to abide by the repayment schedule, the appellants attributed it to economic hardship due to unemployment after termination, but the said facts were to be discussed with the first respondent (lender) and not the courts. The Court cannot condone the breach of the terms and conditions freely entered into by the parties. In

the eyes of the Court, these amount to a lame excuse by the appellants for non-performing a contractual obligation which, with much respect we cannot entertain. In **Unilever Tanzania** (supra) the Court insisted on the parties' renegotiation in the circumstances they wish to change the terms and conditions of their agreement. It stated: -

"It was up to the parties concerned to renegotiate and to freely rectify clauses which parties find to be onerous. It is not the role of the courts to re-draft clauses in agreements but to enforce those clauses where parties are in dispute." [Emphasis added]

With the same spirit of guarding in favour of the sanctity of contract, we find nothing to fault the trial court in its finding. We further state that we have gone through the cases cited by the appellant as above listed, the import of which is to show the sanctity of contract and we wholly agree with the decisions therein in this aspect. The courts have been consistently loath to interfere with the said principle where there is no sign of fraud or misrepresentation as we stated in **Abualy Alibhai Azizi vs. Bhatia Brothers Ltd** [2000] T.L.R 288 at page 289:

"The principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud (actual or

constructive) or misrepresentation, and no principle of public policy prohibiting enforcement"

In the light of what we have endeavored to discuss, we find and hold that the decision of the High Court was in all respects sound in law, as such we cannot fault it. Consequently, we dismiss this appeal in its entirety, with costs.

DATED at MWAANZA this 28th day of November, 2022.

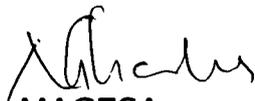
G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Judgment delivered this 30th day of November, 2022 in the presence of Mr. Mohamed Muya, learned counsel for the Respondents via Video Link and in absence of the 1st and 2nd Appellants who were fully notified, is hereby certified as a true copy of the original.




C.M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL