IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KOROSSO, J.A., RUMANYIKA, J.A. And MGONYA, J.A.)

CIVIL APPEAL NO. 330 OF 2022

MACKRIMAN TRUST FUND.....APPELLANT

VERSUS

NATIONAL BANK OF COMMERCE..... 1ST RESPONDENT

LESHEYA INVESTMENT CO. LTD.....2ND RESPONDENT

SADOCK DOTTO MAGAI ..... 3RD RESPONDNET

(Appeal from the Judgment and Decree of the High Court of Tanzania, Land Division, at Dar es Salaam)

(Maghimbi, J.)

dated the 27th day of April 2020

in

Land case No. 215 of 2016

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JUDGMENT OF THE COURT

19th September & 31st October, 2023

RUMANYIKA, J.A.:

Before the High Court of Tanzania, Land Division at Dar es Salaam (Magimbi, J.), Mackriman Trust Fund, the appellant, unsuccessfully sued the National Bank of Commerce, Lesheya Investment Co. Ltd and Sadock Dotto Magai ("the 1st, 2nd and 3rd respondents"), respectively, vide Land Case No. 215 of 2016. In that case, the appellant had challenged the intended auction and sale of its house on Plot No. 29/1 located at Kunduchi, Salasala area within Kinondoni Municipality, in Dar es Salaam,

valued at TZS 766,000,000.06 ("the disputed property"). It was alleged that, the 3rd respondent had advertised to sell it to realize TZS 400,000,000/=, being an outstanding balance of the overdraft facility extended to the 2nd respondent by the 1st respondent, although the former defaulted to repay. The appellant sought the intended auction and sale to be declared unlawful, because, it was not until on 25th November, 2000 when it knew about the mortgage deed which allegedly had extended the overdraft facility, as it was executed behind its back.

Consequently, the 1st respondent sued the 2nd respondent and the appellant successfully, vide Civil Case No. 442 of 2001. Then, the collateral was advertised for auction and sell to recover the defaulted sum. Aggrieved, by that advertisement, the appellant sued the respondents in the trial court vide Civil Case No. 215 of 2016, praying, inter alia, to recover the disputed property from the 3rd respondent, without a success.

In their evidence, the 1st and 3rd respondents (defendants then) asserted that, the appellant had breached the mortgage agreement, as a guarantor of the 2nd respondent, with respect to the extended 1st overdraft facility of TZS 400,000,000.00. The respondents averred that, due to the said breach, the intended auction and sale of the disputed property was justified. At the end of the trial, the High Court held the appellant liable for breaching the agreement and therefore, it found that, the 1st respondent

had rightly exercised its right to sell the mortgaged property. The appellant is not satisfied with the decision. It is before us with four points of grievance, as follows;

1. *That the trial judge erred in law for not holding that, the appellant was not privy to the 2nd overdraft facility agreement (Exhibit P2).*
2. *That the trial judge erred in law for holding that, the 2nd overdraft facility being secured by the suit property to cover the second mortgage deed (Exhibit D1) was not automatic.*
3. *That the 1st respondent wrongly sold the disputed property, for there was no proof of disbursing the alleged moneys by the 2nd respondent and that, the appellant had defaulted as guarantor.*
4. *That the trial judge imposed her personal sentiments thereby, considering extraneous evidence thereby arriving at the wrong decision.*

At the hearing of the appeal, the appellant was represented by Mr. Edward Peter Chuwa and Ms. Anna Lugendo, both learned counsel. Dr. Onesmo Kyauke and Ms. Hamisa Hamza Nkya also, learned counsel represented the 1st and 3rd respondents, whereas the 2nd respondent had the service of Mr. Rajabu Mrindoko, learned counsel.

At the outset, and as the practice demands, we had to determine a preliminary legal issue raised by Dr. Kyauke. He contended that, the appeal is time-barred and liable to be struck out. That, it was filed contrary to rule 90(5) of the Tanzania Court of Appeal Rules, 2009 ("the Rules"), since the

appellant did not vigilantly apply, follow up and collect the respective copy of the proceedings timely. Dr. Kyauke argued further that, the appellant applied for a copy of proceedings on 12th May, 2020 which is beyond fourteen days' limit, since, the ninety days given for the Registrar to supply the copy had long expired. That, the appellant wrote a reminder letter on 5th January, 2021, at pages 406-407 of the record of appeal ("the record") which was about 4 years and six months later. He added that, in terms of rule 90(5) of the Rules, the fourteen days ran from 27th April, 2020, when the impugned judgment was delivered to 10th August, 2020. Dr. Kyauke added that, the appellant acted about six months later, on 5th January, 2021, when the latter wrote a letter asking for the documents, at page 399 of the record. The learned counsel also contended that, there was no affidavit which was sworn by the Registrar to show that the remarkable efforts made by the appellant to get the documents timely.

Responding to Dr. Kyauke's submission, Mr. Chuwa stoutly urged us to overrule the objection for being unfounded for the following reasons: **One,** it has been raised without notice of three clear days before the hearing, contrary to rule 107(1) of the Rules, taking the appellant by surprise. **Two**, rule 90(5) of the Rules applies upon the appellant being notified and invited by the Registrar to collect the copy of proceedings or within fourteen days after expiry of ninety days of the Registrar's failure to

supply the copy. But, in this case, Mr. Chuwa contended, the appellant had followed up for the copy immediately after he (Mr. Chuwa) took over the case from Advocate Wasira who formerly acted for the appellant, as shown at page 411 of the record. The learned counsel therefore, implored the Court to invoke the principle of overriding objective and overrule the objection. Since, the appellant did not sit back, and the alleged appellant's omission to collect the documents did not prejudice the respondents.

Rejoining, Dr. Kyauke reiterated his submission in chief. He asserted that, the issue of time-bar is jurisdictional which can be raised at any time before judgment. Additionally, Dr. Kyauke contended that, the change of advocate is immaterial because, he whoever acted for the appellant before Mr. Chuwa took over the case should have followed up the copy of proceedings, equally vigilantly, in pursuit of the appeal. The learned counsel urged the Court to find that, the principle of overriding objective does not apply in the circumstances.

Upon hearing of the counsel's submissions for, and against the objection, the issue for our determination is whether, the appellant had violated rule 90(5) of the Rules for failing to request for the copy of proceedings timely, for appeal purposes. And, if the answer to that question is in the affirmative, whether the appellant is not entitled to the exclusion of the days from 12th May, 2020 up to 10th May, 2022, to render

the Certificate of Delay, at page 413 of the record inconsequential and the appeal being time barred. We wish to remind Mr. Chuwa that, a time -bar issue is jurisdictional. Therefore, it was raised by Dr. Kyauke properly in the circumstances.

We have noted that, the High Court handed down the impugned judgment on 27th April, 2020. Also, as it is shown at pages 399-400 of the record of appeal, on 12th May, 2020 the appellant wrote a letter to the Registrar requesting for a copy of the proceedings vainly. It also wrote a reminding letter on 5th January, 2021 which is appearing at pages 406-407 of the record. Finally, by a letter dated 10th May, 2022, at page 412 of the record, the Registrar invited the appellant to collect the copy. Then, as it was expected of him, the Registrar issued the respective Certificate of Delay on 10th May, 2022, at page 413 of the record, excluding the days up to 10th May, 2022. The instant appeal was filed on 11th July, 2022, just one day later. It was filed within time. With this background, we overrule the objection and embark on the merit part of the appeal.

On his part, Mr. Chuwa began by adopting the appellant's written submission filed on 9th September, 2022. He chose to argue the 1st and 3rd grounds of appeal together, contending that, the appellant had guaranteed repayment of the first overdraft facility of TZS 400,000,000.0 only, which was fully repaid, and the parties were done. He faulted the trial judge for

holding that there was another mortgage deed, allegedly extending an overdraft facility to the first respondent, guaranteed by the appellant, and that the latter had defaulted. Much as, he argued, the 1st respondent did not lead evidence to prove disbursement of the respective money to the first respondent, let alone, the 2nd respondent's acceptance of it and its utilization. Mr. Chuwa cited the Court's decision in the case of **Travertine Ltd and 2 Others v. NBC** (2006) T.L.R. 133 to facilitate his point.

Moreover, the learned counsel asserted that, the intended auction and sale of the disputed property was unlawful because, the 1st and 2nd respondents had executed the said mortgage deed and extended overdraft facility, without the appellant's knowledge or consent. Still stressing on the genuineness of the 1st respondent's claims against the appellant, Mr. Chuwa contended that, the alleged outstanding amount varies from TZS 9,791,122,897.73 stated in the WSD and TZS 6,087,737,662.58 referred in the respective Notice of Default of 31st December, 2013. He further argued that, Exhibit D5 is the calculations of the bank interest accrued on the 2nd respondent's account which should not be mistaken for a bank statement. Lastly, Mr. Chuwa asserted that, as long as, the liability of the principal 2nd respondent was not established, then, the purported guarantor who is the appellant cannot be liable as an agent.

About the 2nd ground of appeal, on the validity or otherwise of the alleged second mortgage agreement giving rise to an extended overdraft facility between the appellant and the 1st respondent, with the same collateral, Mr. Chuwa contended that, the mortgage was not registered to constitute a valid security. Since, he stressed, in terms of s.67 of the Evidence Act, Cap.16 R.E. 2019, it was incumbent upon the 1st respondent to prove the registration. However, the latter did not discharge that liability. The learned counsel added thus, in terms of section 113(4) of the Land Act, Cap.113 R.E. 2019 (the Land Act), the High Court should have held that, the alleged mortgage is *void ab'nitio.*

Moreover, referring to Clauses 3 and 4 of the Mortgage Deed (Exhibit D1), Mr. Chuwa contended that, the purported security is vague and unreliable for offending the provisions of s. 29 of the Law of Contract Act, Cap. 345 R.E. 2019 (the Act), since, he argued, the clauses referred to, had stipulated for securing loan of unspecified amount of money. To sum up, Mr. Chuwa urged the Court to find merits in the appeal and allow it entirely with costs.

In reply, Dr. Kyauke, took the same course as Mr. Chuwa. He responded to the 1st and 3rd grounds of appeal together. He contended that, the existence, or nonexistence of the extended overdraft facility by the first respondent to the 2nd respondent is a new fact. It was not raised

before. He urged the Court to give it no consideration for being an afterthought. However, Dr. Kyauke asserted that, the appellant's acceptance to the said mortgage agreement is reflected in paragraph 6 of the 2nd respondent's Written Statement of Defence (WSD), at page 2 of the record. He further argued that, the appellant had stamped and signed the respective Mortgage Deed to execute it, as shown at page 226 of the record. In that regard, Dr. Kyauke stressed on the cardinal law that, the parties, in this case the 2nd respondent, is bound by its own pleadings.

Regarding the alleged variances of the outstanding sums, stated in the respective WSD and those in the notice of default issued, Dr. Kyauke implored us to discount the complaint because, during the trial, the appellant did not dispute it to be TZS 9,791,122,867.73, as at 30th November, 2015, nor the contents of paragraph 13 of the 1st and 3rd defendants' WSD at page 37 of the record.

Stressing on the liability of the appellant and 2nd respondent to the 1st respondent, Dr. Kyauke referred us to the respective bank statements at pages 265-351 of the record to show the actual outstanding loan. Since the appellant did not object it sufficiently.

As regards the issue of the appellant's consent or non-consenting to the 2nd mortgage deed, Dr. Kyauke contended that, it is evident, by necessary implication at page 189 of the record, that Mr. Emil Woiso had

executed the mortgage agreement on behalf of the appellant, as a director. He thus, accepted the terms and conditions attached to that deed, as appearing at page 229-230 of the record. Further stressing on the appellant's liability, Dr. Kyauke referred us, yet to another undisputed fact that, the appellant and the 2nd respondent were sister companies sharing the said director. The learned counsel thus, beseeched us to distinguish the instant case with the case of **Christopher Paul Chale And 2 Others v. Commercial Bank of Africa (Tanzania) Ltd,** Civil Appeal No. 452 of 2020, cited by Mr. Chuwa. He contended that, in the present case, the appellant and 2nd respondent are said to be affiliated companies, and the former had guaranteed the 2nd respondent whereas appellants in the case of **Christopher** (supra) were an individual and strangers to the alleged lending arrangements.

Lastly, on the second ground of appeal about the alleged invalidity of the Mortgage Deed, for being unregistered, Dr. Kyauke asserted that, the said mortgage may have not been registered, but the appellant did not raise that fact before. Nonetheless, the learned counsel contended that, looking at paragraphs 7 and 8 of the plaint at page 2 of the record, the appellant (the plaintiff then), admitted to have guaranteed the facility by the 2nd respondent. Therefore, the learned counsel contended that, the

appellant's denial of the truth today is an afterthought which has to be discounted.

On the issue of the mortgage deed being vague, for the reason of having sought to secure an overdraft credit facility of unspecified sum of money, Dr. Kyauke contended that, that complaint is baseless because, the sum of moneys issuable under such kind of bank financing arrangements is never static. It depends on the deposits and withdrawals of the day. Since, initially, the appellant had denied ever being privy to the alleged extended overdraft facility, and not the sum of money involved.

Winding up, Dr. Kyauke appreciated the comments made by the trial judge in the impugned judgment for being justified. He contended that, those comments were, but a reminder to the general public that, the survival of the financial institutions depends on the honest borrowers who repay without delays or failures.

On his part, Mr. Mrindoko adopted the 2nd respondent's written submission. He also agreed with Mr. Chuwa's submission as being the correct position.

After the hearing of the submissions of the parties' learned counsel for, and against the appeal, and having considered the record, we propose to begin with the 1st and 3rd grounds of appeal about the issue of the

appellant's acceptance or non - acceptance to the alleged second mortgage deed, and the appellant's liability on the extended overdraft facility, Exhibit P2, at pages 237-250 of the record.

It is common knowledge that a duly incorporated company, as was the appellant, is a person, though not biological. It discharges its day- to-day activities through its directors. There is, in this case two main undisputed facts: **One**, that, the said Mr. Woiso had signed and stamped the said Mortgage Deed, giving rise to the extended overdraft facility advanced to the 2nd respondent by the 1st respondent. He did so for, and on behalf of the appellant, as director and **two**, that the appellant and the 2nd respondent were sister and affiliated companies, as testified by DW1 at page 201 of the record. It follows therefore, that, since it was not sufficiently disputed by the appellant that, the said two sister companies shared the said director, as shown at pages 202 and 189 of the record, neither the appellant nor the 2nd respondent can disassociate itself from Mr. Woiso's acts now. Much as, in his testimony, PW1 recognized him as his predecessor director, who signed the respective Mortgage Deed in the year 2004. Moreover, it is common knowledge that, company directors are the brains of a respective company. The appellant is bound by the acts of Mr. Woiso, who, within the scope of his employment signed to execute the mortgage deed, for the 2nd respondent, and the latter got the said

extended overdraft facility. It is very unfortunate that, the appellant did not call Mr. Woiso at the trial, as a material witness nor give reasons for that failure. We hereby draw adverse inference. Therefore, the appellant is vicariously liable to the extent explained above. Being confronted by a similar problem in a number of cases, the Court has taken such a stance. For instance, in **Salim O. Kabora v. TANESCO Ltd And 2 Others,** Civil Appeal No. 55 of 2014, we stated:

> *"Ordinarily, where it is established that, the acts of an employee in his faithful execution of his employer's functions have resulted into injury, the employer would be held responsible for the injury..."*

Moreover, the scope of vicarious liability is fairly wide with far reaching effects such that, the employer's authority on the acts done by the employee needs not necessarily be express. What counts most is that, the employee's act being complained of, has a necessary connection with the acts done in his ordinary course of business. Whether or not, the employee has done that act in a proper mode is immaterial. Holding so, we are fortified by and taking inspiration of what was held in the case of **Marsh v. Moores** [1949]2 KB 2008 at 215, that:

> ***"a master is liable even for acts which he has not authorized provided they are so connected with the acts which he has authorized*** *that they may*

rightly be regarded as modes, although improper mode of doing them". (Emphasis added).

It is not disputed, in the instant appeal that, Mr. Woiso is the one who had signed the first mortgage deed, authorized by the appellant. It is from the respective mortgage deed, where the parties had envisaged to use the respective continuous security, as stipulated in Item 4(a) thereof, and consequently, the 2nd respondent got the disputed extended overdraft facility. The rule in the **Marsh's case** (supra) therefore applies to the instant case.

Moreover, we agree with Dr. Kyauke that, in paragraphs 7 and 8 of the plaint, at page 2 of the record, the appellant admitted to have guaranteed the 2nd respondent to pay, though it defaulted. The appellant is now estopped from denying that truth. It has breached that agreement and has to accept the legal consequences.

The foregoing apart, more interesting is items 3 and 4(a) of Exhibit D1, the conditions of which, the appellant had covenanted to. In no uncertain terms therefore, the appellant and 2nd respondent, are liable for that breach. We agree with Mr. Chuwa that, the said two items had stipulated for the 1st respondent to extend unspecified sum of money to the 2nd respondent. However, the appellant's commitment counts on its liability. It had guaranteed the repayment using such continuous security,

as appearing at pages 240-241 of the record. It follows therefore, that, the case of **Christopher** (supra) is distinguishable with the instant case. In this case, Mr. Woiso signed the agreement, as a director for the appellant, whereas, in the former case, the 2nd and 3rd appellants were not company directors but individuals and their privy to the respective financing arrangements was not established and proved.

With respect, we cannot buy Mr. Chuwa's proposition that, Items 3 and 4(a) of the respective Mortgage Deed are vague and unenforceable in law. That deed is not void, as far as the parties are concerned. For clarity, we take liberty to reproduce s. 29 of the Act to define a void contract, as follows:

> *"An agreement, the meaning of which is not*
> *Certain, or capable of being made certain, is void".*

We also note that, pursuant to section 81 of the Act, the said continuing guarantee still legally binds its executor, the appellant. The provisions state that:

> *"A guarantee which extends to a series of*
> *transactions is called a "continuing guarantee".*

With respect, we find that, the learned trial judge was right for holding that the appellant had breached the agreement and it is liable. Upon full repayment of the first overdraft facility by the 2nd respondent, the

appellant should have sought to have the security, stipulated under Items 3 and 4(a) of the Mortgage Deed to be discharged. However, this was not done until a couple of years later, which we find to be quite unusual.

We have noted very clearly that, the appellant did not give sufficient evidence to disown Mr. Woiso as its director, who signed the Mortgage Deed. Also, the appellant did not complain about it at the trial court. Its complaint today is new and an afterthought which we have no jurisdiction to decide, as the Court held, times without number. See- **Elias Msaki v. Yesaya Ntateu Matee**, Civil Application No. 2 of 1982 and **Richard Mgaya @ Sikubali Mgaya v. R**, Criminal Appeal No. 335 of 2008 (both unreported). The 1st and 3rd grounds of appeal are unmerited and dismissed.

As regards the 2nd ground of appeal, on the alleged invalidity of the extended Mortgage Deed, contravening s.113 of the Land Act, for being unregistered, we agree with Dr. Kyauke that, the issue is now raised for the first time. It is an afterthought. We therefore, note that, not only that issue and complaint were not raised during the trial, but also, it is not a point of law worth our consideration at this stage.

Equally important, but without prejudice to the foregoing, we take note of yet another key factor, that the 2nd respondent did not dispute the existence of the said extended credit facility (Exhibit D1) seriously. Leave

alone the fact that, the latter's payment was guaranteed by the appellant, its sister company, though the borrower defaulted to repay, as earlier on discussed. The 2nd ground of appeal is also lucking and dismissed.

In conclusion, we find this appeal to be unmerited and hereby dismiss it entirely with costs. It is so ordered.

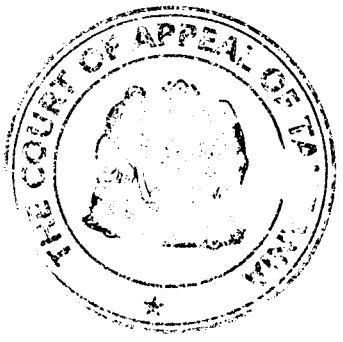
DATED at **DAR ES SALAAM** this 27th day of October, 2023.

W. B. KOROSSO
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

L. E. MGONYA
JUSTICE OF APPEAL

The Judgment delivered this 31st day of October, 2023 in the presence of Ms. Monalisa Mushobozi holding brief for Mr. Edward Chuwa, learned counsel for the Appellant and Ms. Hamisa Nkya appeared for the first, second and third Respondents, is hereby certified as a true copy of the original.



S. J. KAINDA
REGISTRAR
COURT OF APPEAL