IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MKUYE, J.A., MWANDAMBO, J.A., And MAKUNGU, J.A.)

CIVIL APPEAL NO. 395 OF 2020

MRS. MARY PETER OTARU (Administratrix of the Estate of the late Peter Casmir Otaru) ..... 1ST APPELLANT

OTARU MANUFACTURING & TRADING CO. LTD ..... 2ND APPELLANT

VERSUS

AFRICAN BANKING CORPORATION (TANZANIA) LTD .....1ST RESPONDENT

AHADI COMPANY LTD ..... 2ND RESPONDENT

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

(Sambo, J.)

Dated the 31st day of October, 2014

In

Land Case No. 343 of 2009

.....

JUDGMENT OF THE COURT

11th July, 2023 & 2nd July, 2024

MAKUNGU, J.A.:

The appellants instituted a suit in the High Court of Tanzania (Land Division) (henceforth the trial court) against the respondents, praying for:-

1. *A declaration that the defendants have trespassed into their Farm No. 3676 at Kimara King'ong'o Area.*

2. *A declaration that the amended notice of default issued by the 2nd defendant under the Land Act No. 4 of 1999 is illegal and null and void.*
3. *A declaration that the sale of Farm No. 3676, Kimara King'ong'o Area conducted by the 2nd defendant on 20th December, 2009 is null and void.*
4. *A declaration that the 1st defendant is in breach of agreement dated 11th January, 2007.*
5. *The defendants pay to the plaintiffs TZS 900,000,00.00 being general damage for trespass to land and for breach of contract.*
6. *The defendants pay interest on 5 above at court's rate from the date of judgment till payment in full.*
7. *Costs of the suit be paid by the defendants.*
8. *IN ALTERNATIVE, permanent injunction restraining the defendants from selling or trespassing to the 1st plaintiff's Farm No. 3676, Kimara King'ong'o Area.*
9. *Any other relief this Honourable Court may deem fit to grant be so granted.*

The respondents totally refuted the appellants' claims and raised a counterclaim in their joint written statement of defence in which they prayed for the following:

(a) *A sum of TZS 566,673,070. 00 (Tanzania Shillings five hundred sixty six million, six hundred seventy three thousand and seventy only);*

(b) *Interest on (a) at the commercial rate of 21% from the date of filing the counterclaim to the date of judgment;*

(c) *Interest on the decretal sum from the date of judgment to the date of satisfaction of the decree;*

(d) *Costs of the case; and*

(e) *Any other orders or reliefs as the Honourable Court may deem fit.*

In what seemed to be a highly contested trial, both sides summoned witnesses. The appellants' case was founded on Mary Peter Otaru (PW1) while the respondents relied on the evidence of Mwalimu Ally Zuberi (DW1) and Dua Mbapila Rwehumbiza (DW2).

The material facts as may be gleaned from the record of appeal is as follows: On 11th January, 2007 the 1st respondent entered into an agreement with the 2nd appellant whereupon it was agreed that the 1st respondent to advance a loan of TZS 391,000,000.00 to the 2nd appellant for the purpose of financing purchase of farm equipment and water irrigation equipment. They agreed that the loan would be repaid within 36 months from the date of their agreement. It appears that, the 1st appellant mortgaged her farm (mortgaged property) to secure the loan issued to the 2nd appellant. This necessitated the 1st respondent to grant that loan.

The record reveals that, the supplier of the farming equipment (TSFC) was paid by the 1st respondent so as the equipment could be delivered to the 2nd appellant. Despite of all those arrangements, it appears that the 2nd appellant failed to repay the loan, an act which prompted the respondents to the issuance of the default notice which signified the intention of the respondents to sell the mortgaged property.

That action prompted the appellants to lodge Land Case No. 434 of 2009 before the High Court in which they contended that the respondents had no justification of taking their mortgaged property because the respondents breached the agreement between them.

In view of the dispute between the parties, the High Court, (Sambo, J), heard evidence and arguments that were laid before that court and in the end, he dismissed for want of proof. On the other hand, the Counterclaim was allowed as there was sufficient evidence proving that the appellants breached the loan agreement.

This appeal therefore, arises from the dissatisfaction of the appellants with the decision of the trial court dated 31st October, 2014. The appellants have approached this Court with nine grounds of complaints which can be summarized as follows:

1. *That the High Court erred in holding that the 2nd appellant had received the loan amount as per the agreement without any evidence on record.*
2. *That the High Court erred in holding that the 2nd appellant had a contract with the alleged supplier (TFSC) and that she was bound by the contract between the 1st respondent and TFSC without pleading or evidence on record.*
3. *That the High Court erred by failing to analyse exhibit D1 and thus arriving at a wrong decision.*
4. *That the High Court erred in holding that interest in loan was part of the principal amount agreed in the loan contract and that they were disbursed to the 2nd appellant without any evidence.*
5. *That the High Court erred in holding that there was a registered legal mortgage without any evidence.*
6. *That the 2nd respondent had the power to auction the 1st appellant's property without any legal instrument for such power of appointment and sale.*
7. *That the High Court erred in construing section 112(5) of the Land Act (sic) and holding that the amended notice of default was proper.*
8. *That the High Court erred in holding that the 1st respondent had proved the counter-claim.*
9. *That the judgment and decree of the High Court is tainted with illegality to the Hon. Judge was not impartial having communicated secretly with the counsel for the respondents and extended time to file final submission by telephone conversation without the knowledge of the appellants nor their counsel.*

At the hearing of the appeal on 11th July, 2023, the appellants were represented by two learned advocates; Mr. Edward Peter Chuwa and Ms. Anna Lugendo while the respondents were represented by learned advocate Mr. Sostenes Mbedule.

In his oral submission, Mr. Chuwa who had filed written submissions for the appellants pursuant to rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) prayed to adopt the written submissions in relation to the 1st to 8th grounds of appeal without anything to add except on. 9th ground, on which he emphasized on the principle laid down in the cases of **R.v. Sessex Justices, Ex parte Mc Carthy** (1924) 1 KB 256 and **Metropolitan Properties Co. (F.G.C.) Ltd v. Lannon and Others** [1968] 3 All E.R 304. Mr. Chuwa argued ground nine first and the rest in the alternative. He submitted that the counsel for the respondents had the privileged opportunity of communicating with the trial judge secretly in matters connected with the trial, even after the closure of the case. He said that this was evident in the written submissions filed by the counsel for the respondents on the 15th September, 2014. It came to his knowledge that the trial judge extended time for the 1st respondent to file the final submission through telephone conversation without the knowledge of the appellants or their counsel. This is contrary to the

principle of natural justice, he added. On this ground only he prayed the Court to quash the whole proceedings of the trial court because this irregularity is fatal which cannot be cured by rule 106 (13) of the Rules. He therefore prayed the appeal be allowed with costs.

On his part, Mr. Mbedule did not lodge written submissions as required by rule 106 (7) of the Rules. Mindful of the dictates of rule 106 (10) (b)(18) of the Rules, we allowed him to address the Court orally before Mr. Chuwa took the floor in rejoinder. He made brief elaborations on them and prayed the appeal to be dismissed with costs.

It is worthy to note that, in the course of arguing the grounds of appeal, Mr. Chuwa in his written submissions argued grounds one and two together, grounds three and four together, grounds five and six together and remaining grounds 7, 8 and 9 separately. We shall endeavour to discuss them in the same order.

The basis of the 2nd appellant's claim against the 1st respondent was a loan agreement which was admitted in court as exhibit P2 and in which it was agreed that the 1st respondent would advance TZS. 391,000,000.00 as a term loan to the 2nd appellant for the purpose of financing purchase of farm machinery and equipment. The loan was supposed to be repaid within a period of 36 months. The loan agreement was between the 2nd

appellant and the 1st respondent. The thrust of the argument of the appellants in grounds one and two is that there was no evidence on record that the 2nd appellant had received the loan amount as per agreement and there was no contractual relationship between the 2nd appellant and TFSC which was not party to the loan agreement.

We have considered the submissions by the learned advocates and the record of appeal on both grounds and we are firm that both grounds are bound to fail as we shall endeavour to discuss shortly. Having examined the record of appeal, as correctly reasoned in the impugned judgment, the evidence of DW1 and DW2 supported by exhibits P4, D1, D2, and D3 established not only the fact that there was a contractual arrangement between the 2nd appellant and 1st respondent but also there was a clear indication from the 1st appellant that she was aware of the role of TFSC on the implementation of the arrangement between the 2nd appellant and 1st respondent.

Through the contents of the letter (exhibit P4) at page 228, of the record of appeal it is plain that the 2nd appellant already knew that the 1st respondent had disbursed the loan amount thus she was requesting TFSC to arrange for the delivery of the equipment as per the profoma invoice. In the same letter (exhibit P4), the 2nd appellant requested a

summary indicating which equipment were paid for and the outstanding balance against the funds already paid to TFSC.

There are also exhibits D2 and D3 at pages 251 and 253 of the record of appeal in which the 2nd appellant was aware of her liability and explained to the 1st respondent that the re-service of the loan was met with challenges. She therefore expressed her commitment to repay the outstanding amount and proposed a new schedule to repay the loan.

Furthermore, the evidence in exhibit P5 demonstrates two things; **firstly,** TFSC submitted Tax invoices of the machinery which was already delivered to the appellants' farm (Lerongo Farm). **Secondly,** through such evidence, TFSC was informed the 2nd appellant on the machines that were expected to be delivered at Lerongo Farm. In that regard, the complaint of the appellants that they were given an amount that they did not agree with cannot have any basis at this stage because the relevant loan was issued in accordance with the procedures they agreed.

In grounds three and four, the appellants' complaint is that the trial Judge erred in law and fact in failing to properly analyse **exhibit D1** and thus arriving at a wrong decision. Mr. Chuwa's submission was that had the trial court analysed that exhibit properly, it would not have come to the conclusion it did. In elaboration, he submitted that **exhibit D1** is a

statement of account which was produced by the 1st respondent in an attempt to prove that the loan amount of TZS 391,000,000.00 was disbursed to the 2nd appellant. He argued that **exhibit D1** was manufactured to reflect the figure in the counter-claim and the trial Judge wrongly held that the 1st respondent had proved the counter-claim without analyzing the defects or the weight of this piece of evidence. The learned advocate submitted further that had the trial court considered the evidence in its totality, in particular the evidence of PW1, it would not have held that the counterclaim was proved. The learned advocate for the respondents did not support that argument and urged us to disregard the appellants' complaint and hold that the trial Judge properly analysed that exhibit which was properly admitted before the trial court and complied with section 78 (1) of the Evidence Act. He drew our attention that the 2nd appellant in paragraph 8 of her plaint admitted to receive the sum of one Hundred Million Shillings (100,000,000.00).

Upon scanning the record and judgment of the trial court, there is no dispute that **exhibit D1** is the bank statement showing on how the loan was disbursed to the appellants. Our thorough scrutiny of that exhibit and explanation given by DW1, we are settled in our mind that the learned trial Judge properly analysed the said exhibit.

Like the trial court, we are satisfied that the evidence on record proved the counter-claim on the balance of probabilities. In the circumstances, we hold that the criticism against the trial court in these two grounds is misplaced and in consequence, we dismiss them.

The foregoing discussion, takes us to grounds five and six which claim that there was no evidence tendered to prove that the legal mortgage over Farm No. 3676 Kimara King'ong'o Dar es salaam was ever created and registered and therefore the 1st respondent lacked powers to appoint the 2nd respondent to auction the property. The learned advocate for the respondent defended the finding of the trial Judge that the appellant had the duty to prove that the Farm was registered.

With respect, we are inclined to agree with Mr. Chuwa in his submissions. We say so because the issue of registration was neither pleaded nor featured as one of the issues framed prior to the hearing of the case. More so, it was not argued by the parties during the hearing except that the appellants raised it in their final written submissions. The argument is simply an afterthought and as rightly found by the trial court (page 365 of the record) the appellants should be aware that both court and parties are bound by pleadings.

Furthermore, the contention that the 2nd respondent had no mandate of selling the mortgaged property appears to be correct. However, there is evidence adduced by the appellants demonstrating that such property was sold. Section 110 (2) of the Evidence Act, provides that when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. In the present appeal, the onus to prove that the mortgaged property was sold lied on the appellants as they had knowledge on the existence of such fact. However, the evidence of DW2 was clear that the mortgaged property is still in the possession of the 1st appellant (pages 193 and 199). Consequently, we find merit in ground six and allow it.

With regard to ground seven, the argument of the appellants is that the amended notice of default was not proper and the trial court erred in holding that it was proper. In reply, the learned advocate for the respondents argued that the ground could be valid if the respondents could have sold the mortgaged property but the sale was not done. He urged us therefore to hold that this ground lacks merit and dismiss it accordingly.

On our part, upon reading section 127 (1) and (2) of the Land Act, it appears that the insuance of the amended notice of default did not

contravene the law. Under the existing facts, the duty of the mortgagee (1st respondent) under the above section was to serve on the mortgagor (2nd appellant) a notice in writing informing her on the default. After that, she could exercise the right to sell the mortgaged property after the expiry of sixty days. It is beyond doubt that the 1st respondent complied with the law because there is no evidence suggesting that the 1st respondent took recovery measures against the appellants before expiry of sixty days of the date when the notice of default was served. Therefore the complaint is baseless. Even if the amended notice of default is not contemplated by the law that does not change the fact that the appellants were served with notice. In that regard the complaint is short of merit and we accordingly dismiss it.

We now move to consider the submissions on ground eight of the appeal. We agree with Mr. Mbedule's submission and the finding of the learned trial Judge on the matter. The reason being as we have demonstrated in grounds three and four of the appeal above that exhibit D1 proved how the loan was disbursed to the appellants and that the 2nd appellant in paragraph 8 of her Plaint admitted to receive the sum of TZS 100,000,00.00 Consequently, this ground of appeal is also dismissed.

Lastly, Mr. Chuwa lamented in ground nine that the trial Judge was biased and thus the judgment is tainted with illegalities. He argued that the trial Judge privately communicated with the respondents' counsel in respect to the matters connected with the trial after the closure of the case. He premised the complaint from the wording presented in the respondents' final written submissions (page 304 of the record). The respondents remarked that the submission was filed in compliance with a directive issued by the trial Judge through telephone.

From the weight of the wording themselves, they may be construed as indication of impartiality or biasedness of the trial Judge. However, the complaint lacks basis of reliability because the quote is deduced from the respondents' written submissions and not from the court record. With respect, there is nothing on record showing or supporting that argument and, in our considered view, it was an assertion from the bar not supported by any proof.

With respect to Mr. Chuwa, the cases cited above were decided on the ground of a chairman of assessment committee who sat in the judicial capacity. That position to a large extent differs from our situation in this appeal. Therefore, those cases are not of much assistance to the instant situation.

In the final analysis, except for ground six, we find no merit in the remaining grounds and dismiss the appeal with costs.

We so order.

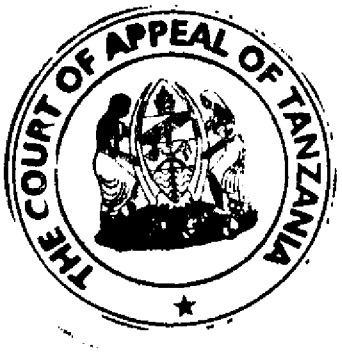
DATED at **DAR ES SALAAM** this 26th day of June, 2024.

R. K. MKUYE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 2nd day of July, 2024 in the presence of Ms. Monalisa Mushobozi, learned counsel appeared for the Appellants and in the absence of the Respondents is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL