

IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM

CIVIL CASE NO. 243 OF 2000.

HERMAN K. KIRIGINI APPLICANT

VERSUS

AGRICULTURE INPUTS TRUST FUND STOCK
BROKERAGE AGENCIES RESPONDENT

JUDGMENT

Mlay, J.

The Plaintiff entered into a loan agreement with, and executed a mortgage over, his landed property in favour of, the 1st Defendant. The 1st Defendant purporting to exercise the rights of the mortgagee engaged the 2nd Defendant to sell the mortgaged landed property, for alleged default by the Plaintiff, to repay the loan, according to the terms of the loan agreement. The Plaintiff with the assistance of his advocate Magesa and Co. Advocates, sued the 1st and 2nd Defendants jointly and severally seeking judgment and decree, as follows:

1. The 1st defendant be ordered to extend time to the plaintiff within which to pay the loan.
2. The plaintiff be granted an extension of two years from the date of filing this suit being time within which to repay the loan.
3. The 1st defendant be forced to reduce the said loan by shs.11,150,000/- which the plaintiff has already paid.
4. A permanent injunction to restrain the defendants or their servants or agents from selling the plaintiffs house at Musoma on Plot No. 32 Block "L" Kamnyonge area until the dispute over the amount of the loan the plaintiff is now required to pay is resolved and until the extended time prayed for above has expired.
5. Costs of this suit to be granted to the plaintiff
6. Any other relief deemed just be granted to the plaintiff.

Both defendants filed written statements of Defence disputing the plaintiffs claims. At the hearing of the suit the Plaintiff HERMAN K. KIRIGINI was the sole witness who testified as PW1, led by Mr. Magesa, learned advocate.

He told this court that he obtained a loan of Tsh.30,000,000 (thirty million) from the 1st Defendant but that the Defendant deducted his costs and the Plaintiff received Shs.27,473,007/.

He produced the letter granting the loan as Exh. P1. PW1 told this court that he used the money to buy animal drugs in the sum of Tshs.28,145,2000/-.

He produced 20 invoices to prove the fact which were collectively admitted as Exh. P2. PW1 went on to say that he started repaying the loan on 31/12/97 by cheque No.010190011 for shs.6,000,000/- (six million), which has not been disputed by the 1st Defendant.

He said he paid another instalment on 19/03/98 by cheque No.011084601 of shs.3,500,000/- and another installment of Tshs.2,100,000/- paid by cheque No.011084629 dated 25/11/98. He produced two cheque- counterfoils to prove the payment of the two installments as Exh. P3. PW1 went on to say that after the payment his business was confronted with problems from the end of 1998 up to this day (the day he was giving evidence, which was on 28/9/06).

He said one of the problems was draught which caused many herders to move to the regions and the movement destroyed the market for animal drugs as the result most of the drugs were damaged. PW1 said he wrote two letters to the 1st Defendant explaining the problems and asking for their help. He produced copies of two letters which were dated 2/6/98 and 31/12/97 as Exh. PP4 (a) and (b). PW1 told this

court that 1st Defendant did not reply to his letters. He said neither 1st Defendant or their agent contacted the Plaintiff. He said he wrote a letter to the 1st Defendant dated 9/12/99 by which he asked the 1st Defendant for extension of time for the repayment of the loan. He produced a copy of the said letter as Exh.P5. He said the 1st Defendant did not reply to Exh.P5 but instead sent a Demand Notice claiming from the Plaintiff, shs.31,212,000/-(thirty one million two hundred and twelve thousand). The Demand Notice is Exh.P6. PW1 claimed that by the time he received Exh.P6, he had paid over Tshs.11,150,000/- (eleven million one hundred fifty thousand) which was not reflected in Exh.P6. PW1 told the court that he read in the Nipashe Newspaper published on 11/5/2000 that the 2nd Defendant had advertised the sale of his house. He produced an extract of the newspaper as Exh. P7. He further stated that the property to be sold was valued at Tsh.52,000,000/- (fifty two million), and produced the Valuation Report as Exhibit P8. PW1 concluded by saying that he was selling drugs using his Company UNICHEM (T) Ltd and that, after finding that his house was being auctioned, he filed the present suit against the 1st and 2nd Defendants. He prayed to be granted the prayers which have been set out earlier on, in this judgment.

PW1 was cross-examined by Ms. Mutabuzi, advocate for the Defendants. He told the court that in Exh.P1, he had applied

for a loan of Tsh.100,000,000/- (one hundred million) but the approved loan was Tshs.30,000,000/-. He conceded to have signed a loan agreement for shs.30,000,000/- and that the collateral was the property on Plot No.32 block A Kamnyonge Area, Musoma and that the title deed was taken by the 1st Defendant. He said it was a condition of the loan that the 1st Defendant would take the title deed. PW1 said he did not remember signing a mortgage deed. He said he was told he would be given a schedule of payment and that he asked for an extension of time because he was indebted. He went on to say that he thought they (1st Defendant) would bring to him a copy of the loan agreement and a schedule of payment and that, he was paying in darkness and that is why he was paying in lumpsum. PW1 went on to say he had a University education. He said he made payments by cheque to the account of the 1st Defendant but said he didn't remember if he was given any document. He said Exh. P3 are cheque counterfoils which are record of the payment he made by cheque. He said further that he had his own bank records which are at home and that he had not made any payments since the last payment in November 1998 because there was a problem. He said the first problem was that there was no reconciliation of his accounts with those of the 1st Defendant and that is why he came to court. The second reason was that the business became bankrupt, and he gave a long account to the 1st Defendant. He told this court that he failed to pay the

loan for the two reasons. PW1 further conceded that in para 1 of the Plaint he prayed for extension of two years in order to repay the loan. He however said that, since filing the suit, he had not made any payment. He said he had not made any payment because his debtors had not paid him and it took a long time to move the drugs around from place to place in the course of which they were damaged. PW1 stated that he did not know the consequences of failure to repay the loan. He reiterated that he did not remember if he signed any document when he gave his title deed as a collateral for the loan. However, upon being shown the mortgage deed, PW 1 conceded that it bears his signature and the name of the mortgagor is his. He then admitted that he remembered he signed a mortgage. He denied that he had refused to pay the loan but conceded he was late to repay it. He admitted that the loan drew an interest of 20%.

Upon re- examination by Mr. Magesa, PW1 told this court that the Demand Notice, Exh. P6 reminded him to repay the loan that is why he came to court. He said the Notice stated that the last day of repaying the loan was 30/9/99. he stated further that he had bank statements at his home which concern the account which he was operating on the business. He stated further that the loan agreement shows that the maximum period for the repayment of the loan was 12 years. He said the twelve years have not expired. He said since he

took the loan the maximum period for repayment of there loan will end in 2009.

That was the end of the evidence offered by the Plaintiff after which Mr. Magesa closed the Plaintiffs case.

The Defence also called one witness, CHARLES MALYATO, the Company Secretary of the 1st Defendant, who gave evidence as DW1. DW1 told this court that the 1st Defendant is a government institution which deals with giving loans for agricultural inputes and such loans are given to private individuals and to institutions.

DW1 stated that in their records, the Plaintiff is one of the individuals to whom the 1st Defendant has advanced a loan. He said according to their procedure, an applicant makes an application by filling in a form for the loan, stating what the loan is required for and also specifying what property the applicant pledges as a security for the loan. The 1st Defendant then sends out a valuer to value the property pledged and after comparing the value of the security to the loan intended to be applied for, the Applicant is given a loan agreement which the applicant reads and then signs. DW1 stated that the Loan Agreement contains a schedule of payment of the loan. He said the Plaintiff was given a loan in 1977 of Tshs.30,000,000/- and pledged a house situated at

Kamnyonge Area in Musoma and that the Plaintiff followed all the procedures explained. He stated further that the property pledged as a security is House No. 91 Plot 32 Block 1 Kamnyonge, Musoma Township and according to the certificate of title, it is owned by HERMAN KIRIGINI, the plaintiff. DW1 further stated the loan attracted an interest of 20% and the repayment schedule required the Plaintiff to pay back every three months, the last instalment being required to be paid by April 1998 while the first instalment was payable on 1/7/1997, the Plaintiff having got the loan in April, 1997. DW1 stated that since taking the loan the Plaintiff had paid back only shs.6,000,000/- (six million). He stated further that the plaintiff wrote a letter in 1999 after the expiry of the repayment period, asking for extension of time for the repayment of the loan. He identified the letter as Exh. P5. DW1 said the Plaintiff did not ask for any specific period of the extension. DW pointed out that in paragraph 16 of the plaint the Plaintiff has asked for 2 years extension from the date he filed the suit, which suit was filed in 2000. He said at the time the Plaintiff filed the suit the outstanding debt together with interest, amounted to Tshs.28,000,000/-. He further stated that since filing the suit, the Plaintiff has not paid any part of the outstanding loan. He said according to their records, the Plaintiff has not paid any other amount to the 1st Defendant. DW1 told this court that the Plaintiff does not deserve any extension of time to repay the loan as, since he asked for

extension in 1999 and also in 2000 when he filed the suit, he has not paid any part of the loan. DW1 further stated that the Plaintiff has not written any other letter to the Defendant seeking extension of time.

DW1 tendered the Loan Agreement and the mortgage deed as exhibits "D1" and "D2", respectively.

Upon being cross examined by Mr. Magesa, DW1 told this court that the Plaintiff does not deserve to be granted extension of time because there is no such provision in the Loan Agreement. He denied that the Loan Agreement provides that the period of the loan is 12 years.

He denied also that the 1st Defendant had breached the loan Agreement or that the repayment of the loan ended in 2009. he said the 1st Defendant advertised the sale of the Plaintiffs house in the year 2000 and the repayment schedule ended in 1998.

Upon re – examination by Ms. Mutabuzi DW1 told this court that there is only one repayment schedule which is for four equal installments. He stated further the since 1999, the Plaintiff had not brought to the 1st Defendant, any evidence of payment of additional shs.5 million. He said if the Plaintiff had

made such payment, the 1st Defendant would not have rejected it.

Counsels for the parties were allowed to file final written submissions on the suit. However, before going into what each counsel submitted, it is necessary to set out the issues which were agreed upon and framed, particularly because the written submissions have been made on the issues, as framed. The framed issues are as follows:

1. Whether the Plaintiff has paid to the 1st Defendant the sum of Tshs11,150,000/- as part payment of the loan of Tsh.30,000,000/- which the 1st Defendant advanced to the Plaintiff.
2. Whether the Plaintiff is entitled to obtain from the defendant an extension period in which to repay the loan advanced to the Plaintiff by the 1st Defendant.
3. What reliefs the parties are entitled to.

Having summarized the evidence adduced by both sides, the Plaintiff counsel Mr. Magesa went on to address the framed issues starting with the 1st issue. Mr. Magesa submitted that, that the plaintiff has paid shs.6,000,000/- towards liquidation of the loan, is not in dispute. He contended that, what is in dispute, is the payment of shs.5,150,000/-. He submitted that the Plaintiff gave evidence

to the effect that he paid the money and he exhibited before this court counterfoils of his cheques to show that he issued cheques for the said payment. He contended that the Plaintiff could not offer better evidence as the bank branch to which he made payment had changed ownership and it was not easy to trace past records. He referred to the evidence of DW1 to the effect that the 1st Defendant was depending on the record of the borrower to confirm the repayment. He submitted that in the circumstances, the plaintiff has shown on the balance of probability, that he paid the sum of shs.5,150,000/- and for this reason, this court should hold that the plaintiff has paid the sum of shs.11,150,000/- towards the liquidation of the loan, and answer that first issue in the affirmative.

On the other hand the Counsel for the 1st Defendant strongly apposed Mr. Magesa's submissions on the 1st issue.

He submitted that, in terms of section 110 of the Evidence Act, the Plaintiff is required to prove that he infact paid to the defendant the sum of Tshs.5,150,000/-.

Referring to the Plaintiffs claim to have paid the sum and the evidence he produced Exh. P3, Ms Mutabuzi called to the attention of the court two letters produced by the Plaintiff, as Exh. P4.

She argued that, whereas by the first letter dated 2/6/98 the Plaintiff was forwarding to the Defendant a Cheque (No.010190011) in the sum of Tshs. 6 million being the first installment, in the second letter dated 31/7/1997 in which the Plaintiff referred to the first letter, he informed the defendant about the difficulties he was facing in his business. She argued that if the Plaintiff had effected the purported second payment (of shs.5,150,000/-) on 19th March, 1998, as alleged, the Plaintiff would have at least communicated the fact to the 1st Defendant vide the letter dated 2nd June 1998. She submitted that on this, the Plaintiffs claim that he paid a total of shs.11,150,000/- is not true and further that had he done so, he would have produced records from the bank.

I propose to dispose of the first issue before proceeding with the submissions on the next issue.

Both parties are in agreement that the plaintiff obtained a loan of Tshs.30,000,000/- from the 1st Defendant.

The Loan Agreement Exh. D1, was signed by the Plaintiff on 8/4/97. Paragraph 3 (1) of the Loan Agreement provides as follows:

“3 REPAYMENT OF THE LOAN.

- i) The Borrower hereby covenants and agrees to repay to the Fund the Principal amount of the loan in FOUR (4) successive QUARTERS equal instalment of shillings SEVEN MILLION FIVE HUNDRED THOUSAND ONLY.....
(SHS.7,500,000/-) the first of which shall be due and payable THREE (3) months after the signing of Agreement and the last instalment shall be due on the 30th day of APRIL 1998”.*

The repayment schedule has been made a SCHEDULE to the MORTGAGE Deed, which is Exh. D2. The Repayment Schedule sets out the schedule for repayment of the whole loan and interest at the rate of Shs.7,500,000 as loan repayment and shs.1,500,000/- interest, amounting to shs.9,000,000/-, to be paid in each of the four instalments. According to the schedule of repayment, the instalments were payable in July 1997, October 1997, January 1998 and the last instalment in April 1998. The name and signature of the Plaintiff is appended in the attestation clause appearing after the Schedule of Repayment. In paragraph 2 of a letter dated 31/12/97, the Plaintiff informed the 1st Defendant that he was

forwarding to the 1st Defendant a cheque No. 010190011 dated 31/12/97 for shs.6 million being the first instalment of the loan. The Plaintiff wrote in Kiswahili.

2. Kwa furaha kubwa nakuletea hundi yangu iliyofunganishwa na barua hii yenye nambari 010190011 ya tarehe 31/12/97 kwa ajili ya malipo ya shilling 6.0 milioni ikiwa ni sehemu ya kwanza ya marejesho ya mkopo uliotajwa hapo juu.

The 1st Defendant, through DW1 does not dispute receipt of the payment by the Plaintiff of the sum of shs.6. million. The Plaintiff has however claimed that he paid an additional sum of shs.5,150,000/- to make the total sum which the Plaintiff has made towards the liquidation of the loan, shs.11,150,000/-. The evidence of additional payment, are two counterfoils of cheques purported to have been issued by the Plaintiff. The two counterfoils were produced as Exh. P3. The first counterfoils whose serial Number ends with the figures11084601 is dated 19/3/98 and in the column showing "amount of this cheque", a figure of "3,050,000/=" has been entered. At the top, there appear the words "A. INPUTS TRUST FUND" written in ink. The second counterfoil has the serial

Number. 1084629 and is dated 25/11/98 and also bears at the top the legend, "A. INPUTS TRUST FUND".

However, in the column for "*A mount of this cheque*", the column is blank. A sum of shs."2,100,000"/= appears in the column for "*Balance Available*". On the face of the second counterfoil dated 25/11/98, even if it is assumed that the counterfoil is evidence of the cheque issued, there was no money shown to have been paid on this counterfoil, as the relevant column relating to the "*Amount of this cheque*", is blank. Such a counterfoil, cannot be taken to be proof of money paid by the cheque relating to the counterfoil, as the amount on the cheque is unknown.

Secondly, cheque counterfoils are records kept by the owner of the cheque book for his own personal interest. They are not part of the cheque or evidence of the cheque itself. Even where a cheque has been issued or made, there must be evidence that the cheque was received by the payee. Counterfoils are not proof that the cheque was issued and received by the payee. If the cheques were actually made, proof would still be required that they were either received by the payee or deposited in the payees account. No such evidence has been offered by the Plaintiff.

I do not therefore agree with the plaintiffs advocate, that by production of the two cheque – counterfoils Exh. P3, the plaintiff has proved on the balance of probabilities that he paid an additional sum of shs.5,150,000/= to the 1st Defendant. On the evidence which is not in dispute, the plaintiff has paid only shs.6,000,000/= as part payment of the loan of shs.30,000,000/= advanced by the 1st Defendant. Accordingly, the 1st issue is answered in the negative.

On the second issue which was framed, which is whether the plaintiff is entitled to an extension of time in which to repay the loan, the Plaintiffs Counsel has submitted that, the Loan Agreement Exh. D.1, has clearly shown that the maximum period of paying the loan was 12 years. He contended that this is provided in Paragraph 3 (11) of the said Agreement.

He argued that since the plaintiff had asked for extension of the period of repayment and the said maximum period had not been exceeded, there was no reason why the plaintiff should not be granted this extension. He contended that calculation from the time the plaintiff took the loan in 1997 the repayment period ends in 2009. He further contended that, apart from the fact that the period of repaying the loan had not ended, the Plaintiff wrote a letter to the 1st Defendant explaining difficulties which were confronting the Plaintiff in

his business like drought and movement of his customers to seek pastures in other areas. He submitted that those are **strong factors** to support the plaintiffs application for extension of the period of repaying the loan. The letter is Exh. P5. He argued that since the plaintiff encountered problems in his business, as shown in Exh. P5, and since the repayment period had not ended, the plaintiff was entitled to the extension of the period. He therefore prayed that the 2nd issue be answered in the affirmative.

Ms Mutabuzi Counsel for the Defendant made three arguments to counter Mr. Magesa's submissions on the second issue. First, she submitted that according to Clause 3 (i) of the Loan Agreement, the plaintiff was required to have repayed the last instalment on 30th April 1998 and under Clause 3 (iii), the plaintiff was required to repay the loan with interest, according to the repayment schedule appearing at page 8 of the Mortgage deed. The second argument made is that under Clause 10 of the Loan Agreement it is made clear that loan rescheduling would not be entertained by the Defendant. The final point made by Ms Mutabuzi is that when the plaintiff filed the suit on 3rd July 2000, he had prayed for an extension of two years from the date of filing this suit. She contended that from that date, the plaintiff has failed and neglected to pay the outstanding liability. She wondered how such a defaulter can come to court at this stage, to pray for

extension of time after having had seven (7) years to service the loan.

Ms Mutabuzi argued that even if the Loan Agreement had provided for extension of time, which is disputed, such extension would have by now have expired. She further contended that the plaintiff knew that there was no such entitlement to extension, that is why in his plaint, he prayed for two years extension. For these reasons, she prayed that the suit be dismissed.

In his rejoinder Mr Magesa reiterated his earlier submissions that the plaintiff is entitled to extension on grounds that the period of repaying the loan had not ended, until 2009.

According to Paragraph 3 (1) of the Loan Agreement, it is clearly stipulated that the plaintiff **“covenant and agrees to repay to the Fund the principal amount of the loan in “FOUR (4) successive quarters equal instalments of shillings SEVEN MILLION FIVE HUNDRED THOUSAND ONLY”** and that, **“the first instalment shall be due and payable THREE months after signing of the Agreement and the last instalment shall be due on the 30th day of April, 1998.”** It is further not in dispute that Paragraph 3 (iii) of the Loan Agreement Stipulates that, **“The Borrower hereby**

covenants to repay the Loan together with interest thereon in the manner appearing in the Repayment Schedule . . .” As demonstrated earlier on in this judgment and as submitted by Ms Mulokozi, the repayment schedule which is attached to the Mortgage Deed, sets out a repayment schedule for the payment of the principal sum and interest in equal instalments of shs.9,000,000/= and the instalments are stipulated to be paid one each in July 1997, October 1997, January 1998 and the last instalment in April 1998.

It has been established by evidence that the plaintiff has paid only the sum of shs. 6,000,000/= which was paid by Cheque No. 010190011 dated 31/12/97 and the cheque was sent to the 1st Defendant vide a letter from the plaintiff, dated 31/12/97. The letter was admitted as Exh. P4 (a). On this evidence, it is clear that the sum of Tsh.6,000,000/= which the plaintiff paid on 31/12/97, is far short of the instalment of Tshs.7,500,000/= payable under the loan Agreement as an instalment on the principal sum. It is further clear that, the said sum did not include payment of interest amounting to shs. 1,500,000/=, as stipulated in the repayment schedule. The plaintiff was therefore in breach of the Sale Agreement Exh. D 1 by failing to pay the whole first instalment of shs.7,500,000/= on the principal sum and also, the interest of shs.1,500,000/=. Secondly, the amount was paid on 31/12/97, some eight (8) months after the signing of the Loan

Agreement, while the Loan Agreement stipulated repayment within three (3) months of the signing of this Agreement and the Schedule of Repayment, stipulates that the first instalment was payable in July 1997. It follows that, the first instalment paid by the Plaintiff was not only short of the amount of shs.9,000,000/= payable, but was also paid late, without the plaintiff having sought or obtained extension of time from the 1st Defendant. In his letter Exh. P4 (a), the Plaintiff explained the difficulties he was facing in his business, but he did not ask for any extension of time in which to repay the remaining part of the loan and interest. The same applies to his second letter dated 2/6/98, Exh. P4 (b). There was no application for extension of time. In addition, by the date the plaintiff wrote the second letter Exh. P4 (b) which was on 2/6/1998, the period of repaying the last instalment and interest, had already lapsed by April 1998, as stipulated in the schedule of repayment. It was not until 29/12/99, that the plaintiff wrote a letter to the 1st Defendant Exh. P5. The said letter was written after the 1st Defendant letter was had sent to the plaintiff, a **“DEMAND NOTICE FOR LOAN REPAYMENT AMOUNT DUE”** dated 23/11/99, which is Exh. P6.

In Exh. P5, the plaintiff asked for unspecified extension of time in which to repay the Loan. He stated in the last sentence of the letter, in Kiswahili:

“Kwa msingi huo nitashukuru sana uongozi wa Mfuko wa Pembejeo za Kilimo kwa kunipa muda zaidi ili kuniwezesha kutekeleza azma yangu”

By the time the plaintiff wrote the letter asking for extension of time in which to repay the loan, Exh. P5, he was already in breach of the Loan Agreement and the attendant repayment schedule. Infact, the period of repaying the principal sum and interest on the loan in the terms of paragraph 3 (i) of the Loan Agreement and the timetable of repayment as set out in the repayment schedule, had lapsed.

The Plaintiff has contended that he is entitled to extension by reason of the difficulties he was a facing in his business and by reason of Paragraph 3 (ii) of the Loan Agreement which he claims stipulates the repayment period of 12 years.

As for the hardships the plaintiff was facing in his business, the Plaintiff and his counsel have not pointed out any provision of the Loan Agreement which provides for extension of time by reason of the borrower facing problems with his business or otherwise, in the repayment of the loan. In the absence of any such provision in the Loan Agreement, I

find no legal basis to find that the difficulties faced by the plaintiff in his business are a strong reason for the Defendant or for this court to grant an extension of time in which to repay the loan.

Coming back to the provisions of Paragraph 3 (ii) of the Loan Agreement Exh. D1 by which the plaintiff has claimed the repayment period is twelve years, the paragraph states:

“(ii) The maximum term of this loan shall be TWELVE (12) years inclusive of the moratorium period which shall not exceed years from the date of Offer (i.e Funds written decision to grant the loan)”

If I understand Mr Magesas submission on this issue correctly, his contention is that the Loan Agreement could, under paragraph 3 (11) be extended up to twelve years and as the result, since twelve years had not lapsed, since the plaintiff was advanced the loan, he was entitled to an extension of time.

Reading Paragraph 3 of the Loan Agreement as a whole, there is no doubt in my mind that the Plaintiff and the 1st Defendant, agreed that the loan and interest was repayable in

the instalments stipulated in the Repayment schedule and within the period stipulated in the repayment schedule. The plaintiff understood the Loan Agreement in these terms, and that is why in his first letter to the 1st Defendant, Exh. P4 (a), by which he forwarded a cheque for the payment of the first instalment, he stated in paragraph 3:-

“3. Naomba kutumia fursa hii
kukuomba wewe pamoja na
mfuko wako radhi kwa
kuchelewa kuanza kurejesha
fedha za mkopo kulingana na
masharti yaliyowekwa pamoja
na barua ambayo nilikwisha
kukuandikia huko nyuma bado
nalazimika kuwa mkweli na wazi
kwa kusema kwamba
nimeshindwa kwenda
sambamba na utekelezaji wa
masharti ya mkopo kwa
sababu zifuatazo:-“

In a summary, put in English, the plaintiff asked the 1st Defendant to forgive him for **failing to repay the loan according to the terms and condition of the Loan**

Agreement. By such admission, the Plaintiff cannot be heard to say that the repayment period of the loan was twelve years and had not therefore lapsed. If that was the case, there would not have been any need for the apology for delay in repaying the loan as the plaintiff offered in Exh. P4 (a), as early as 31/12/97, eight months after the Loan Agreement was signed. Even in his plaint which was drawn and filed by Mr Magesa his advocate in the case, the plaintiff did not plead that he was entitled to an extension of time by reason of paragraph 3 (ii) of the Loan Agreement. In the Plaint the claim for extension of time is wholly based on the difficulties the plaintiff faced in his business making it difficult for him to repay the loan.

Ms Mutabuzi did not offer any help on the interpretation of paragraph 3 (ii) of the Loan Agreement but instead, she contended that, under paragraph 10 of the Agreement, which deals with “LOAN RESCHEDULING, it is stipulated that rescheduling were not be entertained. The said paragraph states:

“10 LOAN RESCHEDULING

In principle, loan rescheduling will not be entertained by the Fund but **each case will be considered on its own merits** (emphasis mine).

My understanding of paragraph is that as a general rule debt rescheduling will not be considered but in certain cases, depending on the merits of the matter, rescheduling can be considered. Reading Paragraph 30 together with paragraph 3 (11) of the Loan Agreement, I think a loan under an agreement such as Exh. D1, which appears to be a standard form contract, the loan can in certain circumstances be considered for rescheduling and in terms of paragraph 3 (ii) the maximum period for which the rescheduling can be done, unless there is some other plausible explanation, which was wholly looking from the 1st Defendant, is 12 years. The question is whether the plaintiff is automatically or by law, entitled to an extension of time by reason of paragraphs 3 (11) and 10 of the Loan Agreement. I do not think so. First, in order to obtain an extension of time or rescheduling of the loan, the party seeking the extension has to request the other party to make the extension. I am also of the settled mind that such a request has to be made before the repayment period of the loan has lapsed.

After a party has been in breach of the loan agreement and the other party being entitled to enforce the agreement, the party in breach cannot be entitled to an extension or rescheduling of the loan in the terms of the Agreement of which he is already in breach.

As stated earlier on, according to the terms of the Loan Agreement and the repayment schedule of the loan, the last instalment of the principal and interest was payable in April 1998. The Plaintiff did not apply for extension of time in which to repay the loan until 31/12/99, when he wrote the letter Exh. P5. By this time the period of repaying the loan had long lapsed and the Plaintiff was in breach of the agreement. The rescheduling which was asked for after the Plaintiff had been in breach and the Defendant had started enforcing the agreement by sending a demand notice, cannot be a rescheduling to which the Plaintiff is entitled under the agreement.

For this reason the second issue is also answered the negative.

The last issue is what reliefs the parties are entitled to. In the Complaint the Plaintiff has prayed for the following reliefs:

- 1) The 1st defendant be ordered to extend time to the Plaintiff within which to pay the loan.
- 2) The Plaintiff be granted an extension of two years filing this suit, being the time within which to repay the loan.

- 3) The 1st defendant be forced to reduce the said loan by sh.11,150,000/- which the plaintiff has already paid.
- 4) A permanent injunction be issued restraining the defendants or their servants or agents from selling the plaintiffs house at Musoma on Plot No. 32 Block C Kamayonge area until the dispute over the amount of the loan the plaintiff is now required to pay is resolved and until the extended time prayed for above has expired.
- 5) Costs of the suit be granted to the plaintiff.
- 6) Other relief.

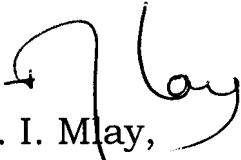
As found by this Court, the Plaintiff having been in breach of the Loan Agreement and having sought an extension of time or rescheduling of the loan, after the period of repayment under the agreement had lapsed, the Plaintiff is not entitled to extension of time under the terms of the Loan Agreement, Exh. D1.

On the prayer for extension of time for two years from the date of filing the suit, since the suit was filed on 3/7/2000, and it is now the year 2008, the prayer has been overtaken by events, for over seven years having lapsed. At any rate, as the first prayer cannot be granted, it would follow that the

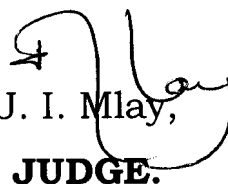
extension for two years, cannot be granted. On the third prayer, this court has found that the Plaintiff failed to prove that he paid the alleged additional payments of shs.5,150,000/- purportedly evidenced by Exh. P3, which are courtfoils of cheques. In the circumstances, the loan advanced to the Plaintiff can only be reduced by shs.6,000,000/- (six million) which it has been proved was paid by the plaintiff. The third prayer that the loan be reduced by shs.11,150,000/- cannot therefore be granted.

As the plaintiff failed to prove the main claims in the suit, there is no basis for restraining the Defendants from enforcing the Loan Agreement, in accordance with the terms of the Loan Agreement and of the mortgage deed.

In the final analysis the suit is dismissed, with costs to the Defendants.


J. I. Mlay,
JUDGE.

Delivered in the presence of the Plaintiff in person and in the absence of the Defendants, this 25th day of April, 2008. The Plaintiff has right of appeal to the Court of Appeal after giving the statutory notice within 14 days.


J. I. Mlay,
JUDGE.

25/04/2008.