**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

AT DAR ES SALAAM

**LAND CASE NO. 66 OF 2007**

**ULF NILSON.....PLANTIFF**

**VERSUS**

**DR. TITO MZIRAY ANDREW.....DEFENDANT**

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23/04/2014 & 25/07/2014

## JUDGMENT

**A.F. NGWALA, J.**

This is a protracted matter. It has its genesis on 7th October 1997, when the Plaintiff, Ulf Nilsson and the Defendant, Dr. Tito Mziray Andrew signed a Loan Agreement. The Plaintiff issued a loan of Tz.Shs.20,000,000/= (Twenty Million Shillings) to the Defendant. On 16th October 1997 the Plaintiff and the Defendant signed another Loan Agreement, The Defendant borrowed Tz.Shs.10,000,000 (Ten Million Shillings). Again on 10th November 1997 another Loan Agreement was signed between the parties. This time the borrower, Dr. Tito M. Andrew took a loan of Tz.Shs.10,000,000 (Ten Million Shillings).

These three Loan Agreements were for a three month period and were disbursed on the signing date. The loans had the interest of 5% (five per cent) per month compounded monthly.

As security to the three loans, the Defendant pledged his landed property situated on Plot No. 5 ADA Estate, Dar es Salaam, with Certificate of Title No. 10499, herein after to be referred to as the suit premises.

The Defendant also, executed a Special Power of Attorney with regard to the agreed terms on the said three Loan Agreements. This Special Power of Attorney gave the Plaintiff the power to dispose the suit premises. This Special Power of Attorney was to remain force until the loans were discharged.

On each of these transactions, the Plaintiff and the Defendant signed the respective Loan Agreements. For avoidance of doubt one of the Agreement is quoted in full as follows:

**"LOAN AGREEMENT"**

*"MADE ON THIS 7TH DAY OF OCTOBER 1997*

*Between*

*ULF NILSON of Box 4596, Dar es Salaam (herein called lender)*

*and*

*TITO MZIRAY ANDREW OF Box 4959, Dar es Salaam (hereinafter called the borrower)*

*WHEREBY IT IS MUTUALLY AGREED BETWEEN THE PARTIES AS FOLLOWS:*

1. *The lender agreed to lend to the borrower a total amount of Tshs.20,000,000/=*
2. *The loan shall be three months only and be disbursed on 7th October, 1997.*
3. *An interest of 5 percent per month compounded monthly. Loan shall be repaid on 31st December 1997.*
4. *The total amount repayable on 31st December 1997 is Tshs.26,000,000/- (twenty six million). This amount includes commission and commitment fee and legal expenses for loan agreement, special power of attorney, notice of deposit of certificate of titles, application for filing power of attorney, official search at the Ministry of Lands including all filing fee and incidentals.*
5. *As the security for the repayment of the loan, the borrower shall immediately after the execution of this agreement by the parties hereto deposit with the lender so as to create a lieu there over certificate of tittles of the property whose particulars are given below:*
   *Property comprised in title number 10499 known as Plot Number 5, Kinondoni (Ada Estate), Dar es Salaam City.*
6. *The borrower hereby represents the name TITO MZIRAY ANDREW which is the name of the owner of the property comprised in the title No. 10499 is the name of the same person as the name of TITO MZIRAY ANDREW which is the name of the borrower.*
7. *The borrower shall execute special power of attorney in favour of the lender entitling the lender to dispose the property comprised in the certificate of title referred to above in order to recover what is owed by the borrower to the lender in the event of default by the borrower in repaying the loan or part there of or the interest thereon with the agreed time.*
8. *To borrower shall also execute jointly with the lender an application of the said power of attorney at the land registry.*
9. *The special power of attorney to be executed by the borrower in favour of the lender shall be expressed to be irrevocable until full repayment of the*

*loan and interest.*

*IN WITNESS WHEREOF the parties here to have executed by these presents in the manner and on the date of the year herein below appearing.*

*SIGNED and DELIVERED at Dar es Salaam*

*By the said Ulf NILSSON who is known to* *Sgd: Ulf Nilsson*

*Me personally in my presence this 7th day of*

*October 1997.*

*Witness name: Desideri Sebastian Ngalo*

*Signature: Sgd. Desideri Sebastian Ngalo* *(Stamp)*

*Address: 72349 Dar es Salaam*

*Qualification: Advocate*

*SIGNED and DELIVERED at Dar es Salaam*

*By the said TITO MZIRAY ANDREW who*

*Known to me personally/identified to me by Sgd. Tito Mziray*

*Andrew is.....who is known to me*

*Personally at Dar es Salaam in my presence this 7th day of*

*October 1997.*

*Witness name: Desideri Sebastian Ngalo*

*Signature: Sgd. Desideri Sebastian Ngalo* *(Stamp)*

*Address: 72349 Dar es Salaam*

*Qualification: Advocate"*

As above stated, their subsequent Loan Agreements had the same wording; save for the amount borrowed and witnesses. Two subsequent loans were witnessed by Mr. Emmanuel Dismas Kisusi, Advocate.

By 18th day of October 2003; the loans were yet to be fully repaid. It would appear, the defendant had paid one loan worth ten million (Tshs.10,000,000). The Parties made another agreement which show that the remaining unpaid loans was that of 7th and 16th October 2003. The loan taken on 10th November 2003 had already been paid.

On careful perusal of the Agreement signed on 18th day of October 2003, the parties changed their relationship from that of a **"borrower and lender"** to that of **"landlord and tenant".** Again, convenience imposes me to quote it in full:-

> *"AGREEMENT MADE THIS 18TH DAY OF OCTOBER 2003*
>
> *Between*
>
> *Dr. Tito Mziray Andrew of Box 4959, Dar es Salaam, his heirs, executor of his will, administrator of his estate and / or his legal personal representative on the one part.*
>
> *And*
>
> *Mr. Ulf Nilsson of Box 4595, Dar es Salaam, his heirs, executor of his will, administrator of his estate and / or his legal personal representative of the other part.*
>
> *WHEREAS Dr. Andrew is the owner of the property registered under title number 10499 known as Plot Number 5, Kinondoni District (ADA Estate). The property has been used as collateral for loan taken by Dr. Andrew from Mr. Nilsson as per loan agreement signed on 7th and 15th October 1997. The title deed number 10499 has been deposited with Mr. Nilsson.*

*Mr. Nilsson has registered a notice of deposit with the Ministry of Lands 21st May 1998 and the Notice of Deposit has been duly registered. Dr. Andrew has also applied for and registered a Special Power of Attorney in favour of Mr. Nilsson on 21st May 1998. The loan balance due as at 18th October 2003 is USD 175,000/=.*

*NOW THEREFORE IT IS HEREBY MUTUALLY AGREED BETWEEN THE PARTIES HERETO AS FOLLOWS:*

1. *Mr. Nilsson will rent the property known as Plot 5 Kinondoni and take possession of it with immediate effect.*
2. *The interest of the loan will cease by the end of November 2013.*
3. *The commercial rent for the whole property in the present condition is valued at USD 36,000/- per year.*
4. *Considering Mr. Nilsson paid up interest in the property through the loan and accumulated interest, Mr. Nilsson will pay 50% of the commercial rented value, or USD 1800 each year.*
5. *The rent will not be subject to any adjustment for a period of 5 years.*
6. *Mr. Nilsson will sublet the property at his own benefit.*
7. *Mr. Nilsson will renovate the property at costs to a good standard.*
8. *Mr. Nilsson will advance the costs for renovation.*
9. *The renovation will not affect the rent.*
10. *The rental period will start 1st December 2003.*
11. *Mr. Nilsson has advanced a rent of USD 5000/-*
12. *Mr. Nilsson will pay USD 5000 on 20th10. 2003*
13. *The rent balance, USD 8,000/- will be paid 1st December 2003.*
14. *Dr. Andrew will be entitled to sell the property at any time.*

*Mr. Nilsson will be allowed a reasonable period to move his tenant / subtenants.*

15. *Mr. Nilsson will be reimbursed for his renovation costs and unutilized prepaid rent at the time of the sale of the property*

16. *The balance of the gross sales shall thereafter be divided between the parties in two equal parts.*

17. *Upon receipt of his share from sale of the property into his account, Mr. Nilsson will immediately surrender the title deed to Dr. Andrew. Mr. Nilsson will not be responsible for transfer procedures or transfer costs.*

18. *Upon receipt of payments, the loans as mentioned above will be written off.*

IN WITNESSS WHEREOF the parties hereto have executed this in the manner and on the date of the year herein below appearing.

*SIGNED and DELIVERED at Dar es Salaam*

*BY THE SAID Dr. Tito Mziray Andrew who is known to me personally / identified to me by Dr. Tito Mziray Andrew*

*Mr. Ulf Nilsson the latter being known to me*

*Personally in my presence this 18th day of October 2003*

*Sginature: Sgd Desideri Sebastian Ngalo*

*Desideri Sebastian Ngalo*

*Qualification: Advocate (Stamp)*

*Box 72349, Dart es Salaam.*

*SIGNED and DELIVERED at Dar es Salaam*

*By the said Mr. Ulf Nilsson who is known to*

*Me personally in my presence this 18th day of October 2003.*

*Signature: Sgd. Desideri Sebastian Ngalo*

*Desideri Sebastian Ngalo*

*Qualification: Advocate (Stamp)*

*Box 72349, Dar es Salaam*

*I, the lawful wife of Dr. Tito Mziray Andrew,*

*Approved this agreement in its totality between*

*My husband and Mr. Ulf Nilsson Sgd. Chantal Andrew*

*As witness to last signatory*

*Sgd. Desideri Sebastian Ngalo*

*Desideri Sebastian Ngalo*

*Qualification: Advocate (stamp)*

*Box 72349, Dar es Salaam."*

It is not disputed that the agreement signed on 18th October 2003 was smoothly implemented until 02nd day of February 2007 when the Defendant issued the Plaintiff with a notice to vacate the suit premises for failure to pay rent. The notice sparked a dispute between the two. The Plaintiff thereafter filed this suit claiming that the Defendant had unlawfully recovered the Certificate of Title to the suit premises, and withdrew the Notice to deposit the Certificate of Title to the Registrar of Titles. The Plaintiff also claimed that the Defendant has defaulted and

breached the three loan Agreements and 1st October 2013 Agreement. The Plaintiff therefore prays for the Judgment and Decree against the Defendant as follows:-

1. An amount of Tshs.1,005,006,712/- being the value of the loan inclusive of the accrued interest as at 18th October 2003 is deemed to be a valid loan agreement with all its clauses.

a. An amount of USD 255,000/= being the value of the loan agreement of 18TH October 2003 and an immediate payment of the same.

b. An amount yet to be established in accordance with paragraph 16 of the loan agreement of 18th October 2003 in the event that the Defendant sells the property to settle the amount prayed under (a) above.

2. Financial damage due to eviction of the tenant at Dr. Andrew's property as a result of the undue retention of documents by the Defendants.
3. Costs of the suit.
4. Any other relief that the honourable court may deem fit and just to grant.

In the Written Statement of Defense the Defendant denied the allegations and maintained that he paid the loans and that the Plaintiff is due to pay rent as he had stopped to pay since December 2006. The Defendant claimed vacant possession of the property from the Plaintiff. He raised a Counter Claim praying for dismissal

of the Plaintiff's Suit and Judgment and Decree to be entered against the Plaintiff as follows:-

(a) A declaration that the interest rate of 5% per month on 60% per annum chargeable on the loan is extortionate, unreasonable and excessive and consequently should be reduced to accord with the prevailing commercial rates of interest.

(b) USD 51,000 being the commercial rent for the property for a period on 18 months from 1st August 2006 to date at the rate of USD 3,000 per month.

(c) Rent at the rate of USD 3,000 per month from the date of filing the counter claim until Judgment and at the same rate until payment in full.

(d) Interest on the sum of USD 51,000 at the rate of 10% per annum from the date of filing this claim until Judgment.

(e) Interest on the decretal amount of the court rate till payment in full.

(f) Costs of this suit.

(g) Any other or further reliefs this court may deem fit and just.

Mr. Rutabingwa, the learned Senior Advocate represented the Plaintiff while, Mr. Marando, learned Senior Advocate represented the Defendant. Before commencement of the trial each part framed issues. Nine (9) issues were exchanged and agreed upon. These are:

1. Which of the two Agreements dated 18th October 2003 annexed to the Plaint and Written Statement of Defence is valid.
2. Whether the parties properly performed the terms of the Agreement dated 18th October 2003.
3. What was the outstanding amount of principle and interest that had accrued as at 18th October 2003.
4. Whether the Defendant had voluntarily submitted his property under C.T. NO. 10499 as a collateral to the loans advanced to him by Plaintiff and whether the Notice of Withdrawal of Notice of Deposit over that title dated 21st May 1998 was properly signed by Plaintiff or forged by or at the instance of the Defendant and whether the Certificate of Title was erroneously and/or dubiously returned to the Defendant.
5. Whether the Plaintiff carried out renovation on Plot No. 5 ADA Estate Kinondoni under Certificate of Title No. 10499 as agreed and at what cost and on whose account.
6. Whether there was monthly rent fixed and or agreed by the parties and if so, whether the Defendant is entitled to the sum of USD 51,000 claimed as accrued rent and if so whether that amount can be deducted from the amount accrued under the loan.
7. Whether the Defendant had carried out a Sale of the Suit premises namely Plot No. 5 ADA Estate under C.T. No.

10499 on 5th February 2007 to Taher Muccadam and if so whether he can still demand rent from the Plaintiff.

8. Whether Defendant is entitled to vacant possession and mesne profit on the suit premises as claimed, and
9. To what reliefs are the parties entitled to.

During trial, seven (7) witnesses testified for the Plaintiffs case. They were Mr. Ulf Nilson (PW1), Chacha Gebani Wanani (PW2), Mr. Desiderious Sebastian Ngalo (PW3, Saidi Abdallah Msangi (PW4), Zakaria Mashaka Maftah (PW5) and Adelard Alfred (PW6) and Sebastian Michael Ubisimbale.

The evidence of the Plaintiff is that the Defendant borrowed money from him. He signed three loan agreements, with the Defendant on separate dates. The first one on is 7th October 1997, the second dated 16th October 1997 and the third dated 10th November 1997. PW1 told the court that the amount of the loans were Tshs.20,000,000/=; Tshs.10,000,000/= and Tshs.10,000,000/= respectively. These agreements were tendered in court and admitted as exhibits 'A' 'B' and 'C' respectively.

PW1 stated that the Defendant gave him a Special Power of Attorney that would enable him to sell the suit property. After he had received the original title deed he lodged a Notice of Deposit with the Registrar of Titles. PW1 tendered the Special Power of Attorney and its Application and the Notice of Deposition of the

Certificate of Title Deed. The documents were admitted as exhibit 'D' and 'E' respectively.

PW1 testified further that they had agreed with the Defendant to use the market rate of short term loans, to be 5% per month, interest compounded monthly. PW1 told the court that he came to realize that the Defendant could not repay the loans. Thus he suggested a new agreement to take effect. He drafted agreement and sent it to the Defendant who agreed to it and signed thereon. This Agreement was tendered and admitted as exhibit 'H'.

In 2006 the Defendant asked the Plaintiff if he could have his wife as a co-owner of the property. The Plaintiff, agreed. The Defendant provided the Plaintiff with the Instrument of Severance. The instrument was signed by the Defendant and one Chantal Francis. This instrument was tendered and admitted as exhibit 'F'.

On September 2006 the Plaintiff gave the original Title Deed to Mr. Taher Hussein Muccadam so that he could send it to the Ministry of Lands for change of ownership, but he did not return. In 2007 the Defendant learned that the Notice of Deposit had been cancelled though the Defendant did not sign the Notice of withdrawal and Application for cancellation. Mr. Muccadam and the Defendant were charged in Criminal Case No. 406/2007 for forgery. Later on, the Director of Public Prosecution entered a Nolle prosequi in respect of

the Defendant. It is not clear as to how the case ended for Mr. Muccadam.

The Plaintiff claims that in April 2007, he noted that the Agreement signed on 18th October 2003 had been tempered with. When the Defendant filed his Written Statement of Defence, the Plaintiff noted that the 1st page of the Agreement is forged. According to the Plaintiff, the original document had the figure of USD 175,000 but the forged one had the figure of USD 47,850 Mr. Ngalo who testified as PW3 attested the Agreement. His testimony was that the true and original copy is the one with the figure of USD 175,000.

It is also the Plaintiff's case that he carried out renovations. He was to be reimbursed his costs after the property had been sold. According to the Plaintiff, the amount of renovation is USD 80,000/-. He also claims to have spent about USD. 26,000/- which was not included in the maintenance which is done regularly. PW1 tendered in court Payment Vouchers and copy of cheques which he used to pay the Defendant as house rent (Exhibits). He also tendered receipts showing the costs of renovation to the suit premises (exhibit "K"). The Plaintiff paid rent as agreed on the 18th October 2003, from 18th October 2003 to 18th March 2007. According to the submitted exhibits it shows the Plaintiff paid USD 60,910 to the Plaintiff. According to the Plaintiff, the amount due to the Defendant by the end of 2011 was USD 84,000. In his testimony, The Plaintiff admits that he is still in occupation of the

suit premises. He has sublet the suit premises. He admits to have realized USD 269,000 till the end of 2012, though he states that the Defendant had never paid the loan. He avowed it is common in Tanzania that a person is allowed to sublet a property for a certain time provided he renovates it to a good standard.

The Plaintiff further stated that the renovation costs were supposed to be reimbursed to him after the suit premises had been sold. He submitted a calculation report a letter from Ernest & Young showing the balance of the loan as at 18th October 2003 to be Tz.Shs.1,054,546,522.98. This was admitted as exhibit "L".

The Plaintiff claims that he stopped paying the rent to the Defendant on February 2007 because Mr. Muccadam informed him that he had bought the premises. Another reasons was because the Defendant gave him notice to vacate.

The Plaintiff further stated that the Defendant failed to honour the agreement signed on 18th October 2003 and hence the agreements have been breached for the following grounds:

a. The Defendant obtained the Original title deed without any payment.
b. Plaintiff Notice of Deposit was illegally withdrawn
c. The agreement of 2003 has been forged by the Defendant

d. The agreement of 2003 state on clause 18 that the loans will be written off only if all provisions of 2003 had been fulfilled.

The Plaintiff therefore asked the court for the repayment of the three loans and that the exact amount on 13th October 2003 was one billion five hundred shillings.

The Plaintiff is also claiming ordinary bank interest from 18th October 2003 until the date of the judgment. He is also claiming interest of the decretal amount from the date of judgment until the date of payment at the court rates and renovations costs.

PW2 was Chacha G. Winand an Accountant by profession who works with Ernest & Young joined the firm on 4th January 2010. He testified to have gone through the files and made calculations on the debts of Dr. Tito Mziray Andrew due to the Plaintiff in 2008.

Mr. Desderious Sebastian Ngalo (PW3) stated to have witnessed and certified the Loan Agreement. He said the original and the true document had the balance of USD 175,000, he referred to exhibit 'H'.

PW4, Said Abdallah Msangi is an Engineer. He testified that he worked with African Construction Company from the year 1995 to 2008. He carried some works in ADA Estate in Dar es Salaam but failed to remember the house. He also carried renovation works.

d. The agreement of 2003 state on clause 18 that the loans will be written off only if all provisions of 2003 had been fulfilled.

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PW4, Said Abdallah Msangi is an Engineer. He testified that he worked with African Construction Company from the year 1995 to 2008. He carried some works in ADA Estate in Dar es Salaam but failed to remember the house. He also carried renovation works.

He said he did not know the owner of the house but Mr. Ulf Nilsson was carrying the renovations. PW4 told the court his labour charges were paid by the Plaintiff.

PW5; Zakaria M. Maftah a retired advocate, told the court that one day in his office came a person sent by Mr. Tahir Muccadam requesting for attestation of a withdrawal of Notice of Deposit of Title. He said that the document had a signature of Mr. Ulf Nilson, who was unknown to him. He attested the document.

PW6 was Adelard Alfred, an advocate of the High Court of Tanzania. His testimony was to the effect that in 2007 he attested more than two documents brought to him by Mr. Tahir Muccadam on Sale of Land. He said that one of the document concerned Plot No. 5 ADA Estate, Kinondoni in Dar es Salaam. He did not identify the seller but the purchaser was Mr. Tahir Hussein Muccadam. The documents were Sale Agreement, Deed of Transfer and an affidavit of consent of a spouse were tendered and collectively admitted as exhibit "N' (N1, N2, and N3). Dr. Tito Mziray Andrew did not sign any document before him. It was only Mr. Tahir Muccadam who signed before him.

The Plaintiff's case was closed by the testimony of PW7, Maximinus Michael Msimbali who is a retired Police Officer. He told the court of his involvement in Criminal investigation on the forgery case of Mr. Ulf Nilsson's documents. That was the Plaintiff's case.

On defense, Dr. Tito Mziray Andrew, the (Defendant) took to the dock. He admitted knowing the Plaintiff and borrowed some money from him. The Defendant referred to the Loan Agreements which were tendered as exhibits 'A', 'B' and 'C'. He admitted that the Agreements bear his signature. He said that a total of Tshs.15,000,000/- out of the principal sum of Tshs.40,000,000/- had already been paid.

The Defendant testified that annexure TM1 to the Written Statement of Defence indicated a balance of USD 47,850. He said that this document and exhibit 'H' are dated 18th October 2003. He said that he does not know the basis of the balance of USD 175,000 as indicated in exhibit 'H'.

The Defendant stated that the first three Loan of Agreements had no interest. He managed to pay Tshs.15,000,000 and the balance was Tshs.25,000,000/- equivalent to USD 47,850 according to the exchange rate at that time. He claimed to have repaid the balance by July 2006 after the Plaintiff has taken USD 18,000 to cover the loan.

The Defendant denied to have received the Bill of Quantities and the Plaintiff did not show any sort of documents concerning the Bill of Quantities of renovations which he had carried on the suit premises. DW1 the Defendant referred the court to paragraph 15 of the 18th October 2003 agreement (exhibit "H") which states that

Mr. Nilsson will be reimbursed for his renovation costs and unutilized prepaid rent at the time of sale of property. As he had not sold the property, the Plaintiff is not entitled to such reimbursement.

Upon cross examination by Mr. Rutabingwa, the Defendant said that even if the three loans were payable on compound interest, it was agreed that he will pay the interest on three months, and if he could not pay in three months it was another issue. The Defendant insisted to the court that he did not get the title deed from Mr. Nilsson, but he was given the same by the Police.

The Defendant admitted to have seen the Notice of Withdrawal but he denied knowing the person who drafted it. He denied the document to belong to him. On further cross examination, the Defendant stated that the Plaintiff took possession of the property since 2007. He is currently unaware of the condition of his property.

Finally, defendant told the court that he made an oral request to Mr. Nilsson to have the Bill of Quantities issued to him before the renovations, but the Plaintiff never heeded his requests.

After closing the defense case, parties submitted their written final submissions. I must at this state express my profound appreciation for the research made by learned counsels. Without doubt, they did their homework.

The first issue as raised and agreed by both parties is which agreement dated 18th October 2003 annexed to the Plaint and Written statement of defense is valid.

On his submission, Mr. Rutabingwa argued that the agreement annexed to the Plaint, which was also tendered as exhibit "H" is the valid agreement. He argued that the agreement annexed t o the Written Statement of defense was not tendered. Mr. Marando opted to adopt the agreement attached to the plaint, which reflect a balance of USD 175,000/-. The Plaintiff and Mr. Ngalo (PW3) testified that annexure TMS.1 was forged as the front page had material alterations. Be it as it may be, the Agreement annexed to the Written Statement of defense was never tendered as exhibit by the defense side and for that reason; I hold that exhibit "H" is valid.

Convenience imposes that I deal with the third issue before the second issue as raised. The third issue what was the outstanding amount of principal and interest that had accrued at 18th October 2003. The contents of exhibit "H" are being challenged. The Defendant is challenging the basis of the balance. How was the figure arrived at? The question has tasked my mind. It is on what basis, the loan of 7th and 16th October 1997, which amounted to Tshs.30,000,000/- multiplied USD 175,000? What was the formula applied? Why the parties switched from Tshs, to USD?

The Plaintiff is saying it was due to interest which compounded at the rate of 5% per month. There is no dispute that in 1997, Defendant borrowed a total of Tshs.40,000,000/- from the Plaintiff. It is in the laws of the Land and God that, the Plaintiff has all the rights to get his money back. The 18th October 2003 Agreement state that it was for the Loan Agreements signed on 7th and 16th October 1997, which amounted to Tshs.30,000,000/=. Happily, both parties don't dispute this. The charged interests are hotly disputed.

Mr. Marando submitted that the charged interests are an arbitrary figure. The basis of which has never been established. In his submission, he raised very valid questions. What is the law that applies to a person like the Plaintiff who lends money to people, take their properties as security, charge interests and sell their houses to recover the loan in case they default in payment?

I agree with Mr. Marando that The Bank of Tanzania Act and the Banking and Financial Institutions Act do not apply to the Plaintiff. He does not receive funds from the general public by accepting deposits and thereafter using such deposits to issue loans. It is prohibited by the law for an individual to engage in Banking Business unless such person has first obtained a license from the Bank of Tanzania in accordance with the Banking and Financial Institutions Act, 2006. The Plaintiff can only seek refuge under the Law of Contract.

The Law of Contract does not prohibit an individual from giving loan to another individual and going to court to reinforce in case of default. Again, Mr. Marando raised a very valid question, what is the nature of the contracts and whether they are enforceable?

Under the Law of Contract Act CAP 345 RE 2002 a Contract is defined under section 10. It states:

> "10: All agreements are contracts if they are made by the free consent of parties competent to contract, for lawful consideration and with a lawful object, and are not hereby expressly declared to be void".

In the case at hand; there was consent of parties. **BUT,** parties in this case were **NOT** competent. A Competent party to lend money and charge interest is a licensed financial institution or a Bank. Agreed, there is NO law in Tanzania which deals specifically with Money Lending. Citing the case of Arusha Kalwa and 5 others versus Wilbroad Peter Slaa and another (1997) TLR 250 at page 253, Mr. Marando urge the court to apply section 2 (3) of the Judicature and Application of Laws Act, Cap 358 R.E. 2002. He referred to English Money Lenders Act, 1900 which prohibit and nullify money lending business which charge excessive amount of interest and harsh and unconscionable transactions.

Vigorously, he argued that the interest in the three loans was payable in three months only, Mr. Marando referred the court to the

book CHITTY ON CONTRACTS, 25TH edition, Vol. at page 9772 Para 972 where it is stated:

> "Until 1981, it was generally accepted that a House of Lords Division in 1983, Chatham and Dover Railway versus South Eastern Railway (1893) AC 429 had settled that at common law interest could not be awarded as damages for late payment of money due, unless the contract itself made provision for it ... The common law rule has continued to be of importance in situations not covered by statute."

Mr. Marando further quoted CHITTY (SUPRA), at Paragraph 3171 where it is stated:

> "At common law, the general rule is that interest is not payable on a debt in the absence of express agreement or same course of dealing or custom to that effect. Thus in the absence of express stipulation, it has been held that interest is not payable on the price of goods sold, although the price was payable on the certain day, nor for money lent to, or paid for, the Defendant ..."

At Paragraph 3172 of the same book:

> "A contract to pay interest up to the date of repayment does not necessarily imply an agreement to pay interest beyond that date in the event of default in repayment".

Mr. Marando maintained that the outstanding amount claimed by the Plaintiff is illegal and not enforceable. He referred the court to the case Bafour versus Yeboah and Ameyaw (1971) African Law Reports 423.

In his rebuttal, Mr. Rutabingwa cited the book CHITTY on CONTRACTS, 20TH Edition and referred the court to Paragraphs that allow repayment of interest as damages if it happens the borrower has failed to pay the principle sum in time. Mr. Rutabingwa also referred the court to relevant paragraphs that allow compound interest, which is payable either by agreement or custom.

With regard the Money Lenders Act Application in Tanzania Mr. Rutabingwa disputed the same, stating that it is not a statute of general application as it is specified to apply in Scotland.

After having held that it is neither the Bank of Tanzania Act nor the Banking and Financial Institutions Act which apply in this case. The remaining question is, whether the **Money Lenders Act 1900** applies in Tanzania as argued by Mr. Marando.

As Mr. Rutabingwa had submitted, caution should be taken in applying foreign laws under the umbrella of the reception clause. In the case of **Nyali versus the Attorney General (1955) 1 ALL E.R. 646** Denning LJ held that:-

"...The task of making qualification to English law to suit the circumstance of overseas territories called for wisdom on the part of their Judges. This was a 'wise provision'. As to the application of the common Law in Foreign Jurisdiction, the court recognizes the wisdom of applying the common law in qualified as necessary to suit local circumstances ..."

I had the opportunity of perusing the **Money Lenders Act 1900**. It was not a bad law. It applied in England and Scotland. It has long been replaced by **The Consumer Credit Act 1974**. See Section 70 and the fourth (4) Schedule of the said Act. So Money Lenders Act 1900 is a dead law and inapplicable.

Besides, under the Judicature and Application of Laws Ordinance, CAP 453 two rudiments are necessary for the English statute to apply in Tanzania. First, the statute concerned must be a Statute of general application. Secondly, there should be no specific legislation enacted in Tanzania dealing with the matter in question. The case of **Arusha Kalwa and 5 others versus Wilbroad Peter Slaa and another (1997) TLR 250** is also relevant in this aspect. In Tanzania, we have legislations in this regard, one is **The Bank of Tanzania Act** and the second is the **Banking and Financial Institutions Act.**

I now turn to resolve the issue of interest. In the circumstance of this matter, from the first three loan agreements and the 18th October agreement, the law applicable is the law of contract. The

agreements were founded on contractual relationship and thus their courses of dealing are regulated by the law of contract. Let us examine the agreements to see if they are valid contracts, and if contract can be charged.

In the case of **Mufindi Paper Mills Limited versus Tanzania Electrical Supply Company Limited, Commercial Case No. 104/2005 (unreported)** Hon. Makaramba J, held that:

> "... I must state at the outset that there is no law the mode by which the interest should be calculated, be it simple or compound ..."

In the instant case, there is no ground, no starting point to show how the Plaintiff arrived at the figure of USD 175,000. This was pleaded, but on the balance of probability, it was not proved and the court will award such amount whole sale.

The agreements of 7th and 16th Octo ber 1997 and that of 10th November 1997 were very categorical. The agreed formula to calculate interest was compound interest formula and it was to accumulate for three months. The agreements did not specify whether or not interest will continue to pile up in case of failure to repay the loans. I agree with Mr. Marando that interest is not payable on a debt in the absence of express agreement or same course of dealing or custom to that effect.

Thus in the absence of express stipulation, it cannot be said that interest kept on piling up automatically. A contract to pay interest up to the date of repayment does not necessarily imply an agreement to pay interest beyond that date in the event of default in repayment. Most important is that the lender must be registered and licensed. In our case, the plaintiff was not registered nor licensed. So charging of interest is tainted with illegality.

So even if there were express provision in agreement between the Plaintiff and the Defendant, the money lender must be licensed. I hold that the interest compounded for three months and interest calculated after the expiration of agreed three months has **no** legal support. It is highly unsafe for the court to award such interest.

The Plaintiff admitted having lent money to other people on cross examination. He could remember eight whose properties were placed with him as security. In fact, he admitted that four (4) people have sold their property to repay the loans he had lent them. This needs to be discouraged by the court and precedent be set in that vein. The court cannot consecrate this illegal money lending business. In the case of **Edge-low versus MacElwee (1918) 1 K.B 205,** it was held that:

> "A man does not become a money-lender by reason of occasional loans to relations, friends, or acquaintances, whether interest be charged or not. Charity and kindliness are

not the basis of usury. Nor does a man become a money – lender merely because he may upon one or several isolated occasions lend money to a stranger. **There must be more than occasional and disconnected loans. There must be a business of money-lending, and the word "business" imports the notion of system, repetition, and continuity** ... The line of demarcation cannot be defined with closeness or indicated by any specific formula. Each case must depend on its own peculiar features. It is ever a question of degree ..." (emphasis is mine).

In view of the above definition of money lender, the plaintiff is palpably a money lender. He has crossed the threshold. The practice is not uncommon in Tanzania and Africa at large. Many people have found themselves trapped in a worse situations on efforts to solve their financial woes. In the case of **Bafour versus Yeboah and Ameyew, African Law Report 423,** decided by the **Court of Appeal of Ghana,** it was held that:

"Money lender who has not registered his name in accordance with the Money Lenders Ordinance (Cap 176) Section 4 (under which a money lender must take out a license showing his true name and authorized name) cannot make a valid agreement as to the advance and repayment of the money or taking security for it, and any such transaction is void whether it is the money lender or the borrower who brings the matter before the court. The money lender cannot compel the

borrower to return the money lent, and the borrower, being one of the classes which the ordinance was presumably designed to protect can have a declaration that he is entitled to recover the security he has given as a loan ..."

That said, it is my holding that the Plaintiff is not registered as a bank or a licensed micro finance institution. Under **Section 6 (1) of the Banking and Financial Institutions Act, 2006;** it is unlawful for unlicensed individual or organization to lend money and take security for it. The section provides:

6. – (1) A person may not engage in the banking business or otherwise accept deposits from the general public unless that person has a license issued by the Bank in accordance with the provisions of this part.

(2) Any person who contravenes the provisions of this section shall be guilty of an offence and on conviction shall be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding five years or to both such fine and imprisonment."

Even the repealed **Banking and Financial Institutions Act, (Cap. 342),** under section 4, 5 and 6 had provisions prohibiting individuals without banking license. In this case, the Plaintiff will be entitled to the money he lent to the Plaintiff on three agreements signed in 1997. I will allow not a single cent as interest to the loans.

As for the property deposited as collateral, it is a declaration of this court that the Defendant should have his property. The law does not allow taking of security by unlicensed money lender. All clauses on three agreements signed in 1997 regarding to the property being deposited as collateral and interest charges are declared void. One cannot benefit from one's own wrongdoing.

I now turn to second issue as whether the parties properly performed the terms of the agreement dated 18th October 2003. As I have pointed above, the agreement dated 18th October 2003 came after the Defendant failed to repay the loans taken way back on 1997. The 18th October 2003 states categorically that it was for the loans taken on 7th and 16th October 1997.

On reading the 18th October 2003 agreement, it is a Lease Agreement. After that agreement, the parties changed the relationship from that of **'lender and borrower'** to that of **'Landlord and tenant'.** The agreement reproduced above, indicates rent would be **USD 36,000/-** per year. Mutually the Plaintiff and the Defendant agreed that **USD 18,000/-** will be paid to the Defendant.

The loan balance due as at 18th October 2003 was alleged to be **USD 175,000/-.** Again, the basis of this figure is unknown. If at all it was the interests charges, the charged interests are illegal.

Having held that the 1997 agreements were illegal, I will not deal with the issue of interests or validity of the first three Loan Agreements which have been declared to be illegal. I have in mind the decision in the case of **Thorpe v. Fasey (1949) 2 ALL E.R. 393, where Wynn Parr, J. held that:**

> " ...Where a contract is to be rescinded at all, it must be rescinded in toto, and the parties put in status quo. But here was an intermediate occupation, a part execution of the agreement which was incapable of being rescinded ..."

This is in line with the decision in the case of **Universal Cargo Carrier Corporation versus Citati (1957 2 ALL E.R. 70.** But we must also bear in mind that contracts were illegal and voidable for the lender had no license to carry banking business. The foundations of 2003 agreements are the three illegal agreements of 1997.

As correctly stated by Mr. Marando, the 2003 agreements are in two clusters of clauses. The first clusters are clauses No. 1, 3, 5, 9. 10, 11, 12 and 13. These clusters established a new relationship of the parties as landlord and tenant. The Agreement made it clear that the Plaintiff became the Tenant of the Defendant. It is on this Agreement of 18th October 2003 that the Plaintiff and the Defendant made a covenant over the suit premises. The parties agreed that the commercial rent was USD 36,000 per year. The Defendant agreed to have received the advance rent as stated in cluster 11, 12

and 13 thereof. These clusters were performed by the parties without a hindrance. The Plaintiff could sublet the premises and the proceeds there from to be deducted from the loan. The Plaintiff also had to give USD 18,000 per annum to the Defendant as rent. The Plaintiff paid rent from 1st December 2003 until March 2007.

By occupying the suit premises, the loan balance of USD 175,000 was being paid, as the Plaintiff had occupied the premises from December 2003 to the present. From his own testimony, the Plaintiff has managed to realize USD 269,000 by the end of the year 2012, nine years after the commencement of the lease. The principle loan was USD 175,000; the balance from the realized proceed is USD 94,000. The loan has therefore already been discharged as the Defendant pleaded and testimoned in court.

The Plaintiff, who became the tenant, did not communicate the cost and the type of the renovations carried on the suit premises to the Defendant/landlord. It is a cardinal principle in landlord and tenant relationship for the tenant to communicate with the landlord the type and costs of renovation.

The 18th October 2003 agreement which I have quoted above for the sake of convenience and clarity provided that the Plaintiff/tenant will renovate the premises at cost to good standards and he will advance the costs for renovation. This Agreement did not provide that the Defendant/landlord will repay the cost of renovation or

refund the Plaintiff. The Agreement only provided(s), under paragraphs, that the Plaintiff will be reimbursed his renovation costs if the Defendant decided to sell the suit premises as to pay the loan.

On whether the parties properly performed the terms of Agreement, I hold that the Defendant on his part has performed in accordance to the stipulated terms. The Defendant had been receiving rent from, the Plaintiff as agreed. As the landlord he has his right over his tenant. The Defendant issued a statutory Notice to the Plaintiff for failure to pay rent. The Plaintiff testified that he last paid the rents on August 2006, but the Defendant stated the Plaintiff last paid the rents on 1st December 2006.

In that course the Plaintiff is due to pay rental arrears from the time he ceased to pay to the time he vacates suit premises. Here it must be understood that there is a right for the Defendant to claim for arrears of right. The questions regarding the withdrawal of Notice and whether the Defendant had carried out a sale of the suit premises (Plot No. 5, ADA estate under CT. No. 10499 on 5th February 2007 to Taher Muccadam has not been proved. As regards the forgery the same has also not been proved if it was the Defendant who did so at the instance of the Plaintiff. Worse, I cannot establish if, the certificate was erroneously and dubiously returned to the Defendant without a clear evidence to that effect. All what is clear is that the Defendant is the owner of the suit

premises who is in possession of the title Deed to the suit premises. In the circumstances of the facts established in evidence on this point are now irrelevant. What is clear is the fact that the Defendant is still the landlord and has a right to claim for the arrears of rent. It is evident that the Plaintiff is in occupation of the suit premises belonging to the Defendant and that he is subletting the same. It is also evident that at the time of institution of this suit there was a balance of USD 94,000 after the principal debt of USD 175,000 is deducted, yet the Plaintiff decided to sue the Defendant while still in occupation of the suit premises and at the same time not paying the required rent. On this I tend to agree with Mr. Marando's contention in his final submissions when he intimated to the court saying these words:-

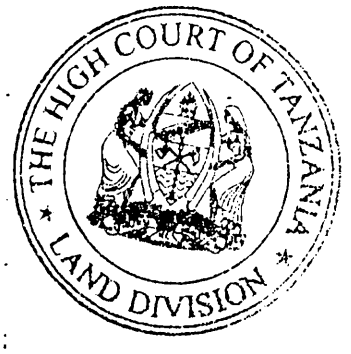
> *"One would expect the Plaintiff to have relinquished the house to the owner quietly after "citing" from the suit property for the last ten years. Instead he has come to court to enforce repayment of a loan that had been long repaid. His purpose is to have a huge monetary decree so that he can sell the house. We pray that this court may not allow such injustice to take place with its blessing. As the Kiswahili saying goes, the Plaintiff "hajui kula na kipofu". He is how touching the hands of a blind man who did not know that part of the plate with fullest chunks of the meat."*

For the foregoing reasons, in the end result, I must dismiss the Plaintiff's suit in its entirety. Partly allow the Defendant's counterclaim. I order the Plaintiff to pay the arrears of rent from 1st January 2007 to the date of delivery of this judgment at the rate of

USD 18,000 per annum. The Plaintiff shall have to pay USD 18,000 per annum from the date of delivery of this Judgment to the date he yields vacant possession of the suit premises to the Defendant. Failure to yield immediate vacant possession of the suit premises shall result into an eviction order against the Defendant from the said suit premises forthwith.

The Judgment Debtor shall have to bear interest at the court's rate per annum from the date of the delivery of this Judgment to the date of payment in full. In the circumstances of this suit, I make no orders as to costs. That is each party shall bear his own costs.

**Order Accordingly.**




**A. F. NGWALA**

**JUDGE**

**25/07/2014**

**Date : 25/07/2014**

**Coram: Hon. A.F. Ngwala, J.**

Plaintiff - Absent

For Plaintiff – Mr. Rutabingwa

Defendant - Absent

For Defendant - Miss Crescensia Mwita

B/C Jane

**Court:** The Judgment of the court is delivered in court in the presence of the aforesaid respective advocates for the parties in this suit.

**Court:** Right of Appeal to the Court of Appeal of Tanzania explained.

THE HIGH COURT OF TANZANIA * LAND DIVISION *

**A. F. NGWALA**

**JUDGE**

**25/07/2014**

CERTIFIED TRUE COPY OF THE ORIGINAL

Signature ..... Date 12/8/2014

REGISTRAR / DEPUTY REGISTRAR

HIGH COURT OF TANZANIA

LAND DIVISION