

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

LAND CASE NO. 6 OF 2019

JADECAM REAL ESTATE LIMITED.....PLAINTIFF

VERSUS

**INTERENATIONAL COMMERCIAL BANK
(TANZANIA) LIMITED.....DEFENDANT**

JUDGEMENT

Date of last order:22/06/2020

Date of Judgement: 29/07/2020

MLYAMBINA, J.

This is one of the very few (if any) cases in which the Bank (Defendant) has defrauded her client (Plaintiff). The summary history of facts leading to the finding of the court can be gathered in: **one**, the Plaintiff's claims and relief contained in the Amended Plaintiff filed in court on 1st October, 2009. **Two**, the Defendant's Written Statement of Defence and counter claim filed in court on 25th October, 2019. **Three**, the Plaintiff's three witnesses' evidences (Salutary John Meja (PW1), Richard Peter (PW2) and Huruma Anderson Kazoka (PW3). **Four**, the Defendant's sole witness one Bernard Bernard Kilomo Ngaswa. **Five**, the documents tendered and admitted by the court as exhibits. **Six**, the Plaintiffs and Defendants written closing submissions.

As is suggestive of its name, the Plaintiff is a limited liability company dealing with Real Estate in Tanzania. In this suit, it was represented by Samson Edward Mbamba, Advocate. The Defendant is a financial institution carrying

out banking business in Tanzania. She was represented by Stanislaus Ishengoma, Advocate.

It was the Plaintiff's case that, on or about 20th July, 2017 the Defendant advanced to the Plaintiff a Term Loan Facility of TZs 300 Million which was secured by the suit premises and it was an express term that it was a subject of security to the said specific facility, and no other.

The Plaintiff's claim goes further that, while the Plaintiff was in continuation of servicing the loan, in November, 2017 the Defendant approached the Plaintiff with an offer for a mortgage finance facility in respect of Plot No 63/27 popularly Uhuru Height Apartment (the Apartment) situated at Upanga Area, Dar es Salaam City, whereby the Defendant offered to issue a credit facility of USD 335,000 in respect of the said mortgage finance security and the Plaintiff accordingly applied for the same.

That in the said "offer" as aforesaid, the Defendant represented to the Plaintiff that the price of the Apartment is USD 335,000 based on the valuation done by the Defendant, and that it could generate gross income from annual rent in the sum of USD 54,000 and a net annual of USD 11,162.76 per year based on the cost benefit analysis done by the Defendant.

The Plaintiff alleged that, following the representations by the Defendant, Directors of the Plaintiff signed the Term Loan Facility Letter and the mortgage deed after the Defendant took advantage of their long business relationship and trust to lure Plaintiff to sign in a rush on explanation that sign of the "*Term Loan Facility Letter*" and the mortgage deed at that time was a mere formality to "*cover*" Defendant from Bank of Tanzania (BOT) on

end of the year side examination queries and Defendant pledged complete revision on the terms and conditions of the "*Term Loan Facility Letter*" to follow right after new year holidays for a fair deal. The Defendant also pledged to Plaintiff that copies of important documents to enable Plaintiff to conduct due diligence exercise including but not limited to:

- i) Title deed of the Apartment that the Bank intends to sell the Plaintiff;
- ii) Mortgage documents which gives Defendant power to sell the Apartment and;
- iii) Valuation report of the property to support the value indicated in the "*Term Loan Facility*" before signing of the sales agreements and transfer deed.

Among other relevant terms and conditions of the Term Loan Facility letter are:

- a) The Apartment intended to be sold to the Plaintiff by Defendant is Apartment no. 17, registered in the name of AL KARIM DEWJI;
- b) Loan Facility shall be released/disbursed only after creation of legal mortgages (that is suit premises and the Apartment) and other related security documents in favour of the bank;
- c) That, Term Loan Facility intended to be issued to the Plaintiff shall be secured by legal mortgage over the above-mentioned Apartment *after being transferred in to the Plaintiff's name;*
- d) That, 1st instalment of interest shall fall due on 7 months from the date of release/disbursement of the loan;

e) That, upon cancellation of the transaction, 1.42% flat shall be charged on any utilized or undrawn portion of the loan.

Next, it was contended by the Plaintiff that alongside the promise and representation to perfect the transaction as aforesaid, the Defendant went silent for considerable period but whenever Plaintiff called the Defendant, to come over for negotiations as agreed earlier, the Defendant kept on promising but in vein. On 5th March, 2018 the Plaintiff took the initiative to formally remind the Defendant about the pending revisions to the terms and conditions of the Term Loan Offer Letter but since then they have been exchanging endless communications and vague promises from the Defendant.

It was complained that the Defendant in one of their correspondences informed the Plaintiff that the revision of the Term Loan can only be possible after three months and that their loan was a "*take over*" from another non-performing loan and not a "*direct purchase*" as understood earlier. The Plaintiff was surprised and did not agree with the Defendants new position because from the inception of the Apartment deal they had never wished/agreed /requested to "take over" from a non-performing loan but to secure a mortgage credit facility to facilitate purchase of Apartment at Uhuru Height as indicated and understood in the Term Loan Offer Letters. That, as a matter of fact, to date, the Defendant has refused to amend the terms of the Term Loan Facility for a fair and transparent deal as earlier promised by them. In fact, what can be discerned from the series of correspondence from Defendant, each time they keep on shifting goal posts by changing their

position and denouncing their earlier undertakings, a conduct which one will not expect from a reputable international banker.

A grievance of the Plaintiff was that the perfection of the transactions aforesaid was not forthcoming as promised despite of follow-ups by the Plaintiff. Eventually, the Defendant declared to have no valuation report of the Apartment being sold, and opted to instruct his valuers to conduct valuation of the Apartment but subject to the payment to be made by the Plaintiff a condition which the Plaintiff fulfilled. The report showed that the Apartment was valued at USD 182, 250 and USD 335,000 as misrepresented by the Defendant.

It was pleaded that the Plaintiff complained and invited the Defendant into discussion of the anomalies and fundamental terms of the facility with intention to seeking review of the terms of the facility but the Defendant represented that the review of the terms could not be possible as the sale was a "*take over*" and not a "*direct purchase*".

Further, the Plaintiff decided to carry out the official search of the Apartment with a view to establishing the ownership and encumbrance status of the same, only to be surprised that it was neither registered in the name of the Defendant as misrepresented nor in the name of one ALKARIM DEWJI as purported in the Term Loan Facility Letter rather it was registered in the name of BAHADUR DEWJI HASHAM. Hence, it could not have been possible for the disposition by way of a mortgage finance as represented to the Plaintiff by the Defendant as the said registered owner was not ever part of this transaction. Further, the Plaintiff noted that the Apartment was under a

mortgage finance with the Plaintiff but the same has been registered in the name of BAHADUR DEWJI HASSHA, with an encumbrance of a mortgage to secure TZs 670,000,000 (USD 295, 154) registered on 14th April, 2015.

It was the grievance of the Plaintiff that on 24th July, 2018 the Plaintiff conducted an official search of Plot No. 182 Block C, Mbezi Beach area Kinondoni Municipality which had previously secured a Term Loan of TZs. 300,000,000, which search indicated that the said property was encumbered to secure a loan of TZs. 500,000,000 (unknown to the Plaintiff), as well as USD 335,000 (never received by the Plaintiff) without the Plaintiff's approval and documentation. Following the anomalies and the complete deviation of the terms from what had been represented to the Plaintiff, the said Plaintiff called upon the Defendant to review the terms and reach to the consensual finality of the deal but the Defendant stood adamant and the said deal was halted.

That admit al the misrepresentations and fraud stated above, and without perfection of the transaction as aforesaid the Plaintiff noted that the Defendant has been to covertly debiting its USD account No. 060100001001 operated by the said Plaintiff at Mikocheni Branch, in connection with the liability as to the said mortgage finance , without any Plaintiff's mandate.

On the other hand the Plaintiff alleged to had instructed the Defendant to liquidate the previous loan term which was secured by Plot No. 182 Block C CT. No. 117157, Mbezi Beach area by debiting its TZs Account No. 060100001102 and USD Account No. 060100001001 and discharge the mortgaged property but the Defendant ignored to timely carry out explicitly

instructions as result, they proceeded to charge interest against this facility whilst aware of the instructions and has started formalities toward sale of the suit premises hence a demonstration on ill intention by the said Defendant.

By reason of the matters aforesaid, the mortgage finance committing Plot No. 182 Block C, CT No. 117157 Mbezi Beach, Dar es Salaam, was not only based on fraudulent misrepresentation but also was itself fraudulent, incomplete and incompetent.

Thus, the Plaintiff decided to discontinue with the Apartment purchase transaction effectively from 6th August, 2018 and formally inform the Defendant via letter with reference number ICB /TL/APT/2018/13 dated 6th August, 2018. The Defendant being aware of the cancellation of the transaction by the Plaintiff has issued a 60 days "*notification of default*" with intention to sell the suit.

According to the Plaintiff, the *particulars of fraud* on which this suit are based includes:

- a) The Defendant fraudulently concealed and or distorted some relevant and fundamental facts about the Apartment being sold, both in preliminary meetings carried out with the Plaintiff and in the invitation letter in relation to the nature of the transaction, purpose of the loan, effective date of the loan, and real value of the Apartment being sold with ill intention to mislead the Plaintiff;
- b) Knowingly that terms in the facility letter are different from what has been agreed upon in the preliminary meetings and provided in the

invitation letter, which was actually accepted by the Plaintiff to sign the facility letter without affording him sufficient time to go through the same while taking advantage of the festive season as it was at the end of the year vacations where Plaintiffs staff including lawyers were not in the offices and were due to travel upcountry;

- c) The Defendant fraudulently misrepresented that it had a legal interest and capacity to subject the Apartment to the mortgage finance facility derived from ALKARIM DEWJI but in reality, the Apartment is registered in the name of BAHADUR DEWJI HASSHAM, who is not a party of any agreement or mentioned in the Term Loan Facility Letter. The said Apartment is encumbered with TZs. 670,000,000/= which is much less than the purported purchase price of USD 335,000;
- d) The finance mortgage of the Apartment was based on the false valuation report which was fraudulently highly exaggerated and which was misrepresented to the Plaintiff, that is USD 335,000, USD 182,000 revealed by the current valuation report;
- e) The Defendant sidestepped the fraud, after failing to demonstrate the proprietary interest and capacity to transact and after failure on its part to facilitate the signing of a sale agreement and transfer deed, by "*resetting*" the mortgage finance as a "*take over*" facility, quite a different and distinct facility never agreed upon;
- f) The Defendant fraudulently registered the mortgage of the suit premises to secure TZs 500,000,000 while knowingly the Plaintiff has not signed any document agreeing to mortgage the suit premises for such amount;

- g) That knowingly that transaction to sale the Apartment failed and never completed including the fact that the Apartment was neither registered in the name of Plaintiff nor handed-over to him and further there was no disbursement of the said loan. Defendant fraudulently purported to issue "notice of default" to sale Apartment and suit premises but in actually sense, the notice was aimed to fraudulently auction the suit premises as the Apartment is not in the name of the Plaintiff;
- h) Apart from not signing the sale agreement and transfer deed, the Defendant has, to date, neither handed over nor formally introduced the Apartment nor registered the same in the name of the Plaintiff nor disbursed the facility. Therefore, the act of issuing default notice is without bases rather it is the fraudulent move.
- i) That despite the fact the Defendant is aware the Apartment purchase transaction was already formally cancelled by the Plaintiff since 6th August, 2018 pursuant to the terms and conditions of facility letter, the Defendant fraudulently proceeded to issue notice of default intended to auction the suit premises alleging that the Plaintiff did not comply with terms and conditions of the credit facilities a fact which is not true.
- j) Defendant issued "notice of default" to sale suit premises Apartment No. 1706, unknown to the Plaintiff whilst aware that, the Term Loan Facility letter indicates Apartment to be purchased as No 17, and the valuation report instructed by himself indicates the purported Apartment is number "F" 17 floor. This fraud is committed with intent to hold Plaintiff suit premises for fraudulently auctioning the same.

It was alleged that sometimes in April, 2019 the tenant of the Plaintiff on Form-Scaff Tanzania Limited paid to the Plaintiff a sum of USD 38, 232.00 (TZs. 88,260, 866) through the account maintained by the Plaintiff with the Defendant, the sum being rental fees in respect of Plot numbers 1034 and 1035 Block G Mbezi Kawe Area, Dar es Salaam, for a period from 1st April, 2019 to 30th September, 2019.

It was further alleged that the Defendant unlawfully withheld the rental payment on the ground that the same was used to liquidate the loan and instalments for which the suit premises were used as collateral for the loan, which loan as already stated hereinabove, was already liquidated, hence the action by the Defendant was illegal, unlawful improper and unjustified.

Wherefore, the Plaintiff prayed for judgment and decrees as follows:

- a) A declaration order that the purported default notice dated 27th December, 2018 issued to the Plaintiff is not valid and of no legal effect, as the transaction to purchased Apartment in Plot No. 63/27 "Uhuru Height Apartment" situated at Upanga area hereinafter "the Apartment" Dar es Salaam was already cancelled pursuant to the terms and conditions of the facility letter entered between the parties herein.
- b) Alternative to the above, a declaration that the mortgage finance involving Plot No 63/27 Uhuru Height Apartment "*situated in Upanga Area*" Dar es Salaam is false, fraudulent and illegal.
- c) That the unilateral act by the Defendant to commit Plot No.182 Block C, CT No. 117157 Mbezi Beach Area, to secure a term loan facility

associated with a mortgage finance of Plot no 63 /27 "Uhuru Height Apartment" Upanga Area, was illegal and unlawful.

- d) The act by the Defendant to refuse to release the Title Deed involving CT 117157, Plot no. 182 Block C, Mbezi Beach area, Dar es Salaam, by refusing to liquidate the loan by debiting a USD Account No. 060100001001 is illegal and unlawful.
- e) Declaration that the withholding of the Defendants' money in the sum of USD 38,232.00 (TZs 88, 260,866) on account that it was subjected to liquidation of the loan and instalments is improper, illegal, unlawful and unjustified.
- f) Refund of the said sum of USD 38,232.00 (TZs. 88,260,866) to the Plaintiff with compound interest at the commercial bank rate from April, 2019 to the date of judgement.
- g) An order that the Defendant release Title No. CT 117157 Plot No. 182 Block C, Mbezi Beach, to the Plaintiff.
- h) An order to refund the Plaintiff the sum of about USD 3,900 which was illegally withdrawn by the Defendant without Plaintiff's mandate.
- i) Cost of the suit.
- j) Any other relief (s) that the court shall deem fit to issue.

The Plaintiff's claims were disputed by the Defendant in her amended Written Statement of Defence. She stated that the Plaintiff is not entitled to any relief whatsoever as alleged.

The Defendant stated that the Plaintiff upon request was advanced with the said facilities of TZs 500,000,000/= and TZs. 300,000,000/= and a further extension of USD 335,000 for mortgage finance. Letters of offer and

acceptance were executed in that regard and in all above said loans the landed property under Plot No. 182 of CT No. 182 of CT No. 117157 Mbezi Area Kinondoni Municipality was brought forward as a security for the loans. Further that in all advanced loans the Plaintiff has defaulted.

It was averred by the Defendant that the Plaintiff placed Plot No. 182 of CT No.117157 Mbezi Area Kinondoni Municipality as a security for the advanced loan of TZs 300,000,000/- and which loan has not been fully discharged having an outstanding amount of TZs 15,277,004.83.

The Defendant stated that the Plaintiff agreed to use the suit premises upon extension of credit facilities in future and in the subsequent credit facilities the said suit security vide Certificate Title No. C.T 117157 over Plot No. 182 Block C, Mbezi Beach was extended to cover the advanced loans. The Defendant stated further that the controlling documents over the mortgage finance facility is the letter offer dated 19th December, 2017 whose terms and conditions conclusively binds the parties upon execution.

The Defendant denies the contents of paragraphs 13 and 14 of the Amended Plaint save that the Defendant informed the Plaintiff the nature of the transaction of an Apartment F Plot No. 62/27 Uhuru Height 17th floor as to take over the loan and not direct purchase as stated.

The Defendant admitted and communicated the fact that Apartment No. F. Plot No. 62/27 Uhuru Height 17th floor subject for the mortgage finance is registered in the name of BAHADUR DEWJI HASSHAM and not in the name of ALKARIM DEWJI HASSHAM which name is reflected in the Letter Offer. It was further stated that the two names represent two brothers and the two

brothers were advanced with the loan facility for mortgage finance at the same time for Apartments at Uhuru Heights. Further to that BAHADUR DEWJI HASSHAM purchased (Mortgaged) Apartment No. F at Plot No. 63/27, 14th floor Uhuru Height while AL KARIMU DEWJI HASSHAM purchased (mortgaged) Apartment F Plot No. 62/27 Uhuru Height 17th floor. That the Land Ministry Officers confused the names during preparation of the Title Deeds which event occurred while the Defendant had already registered the mortgage deeds over the Apartment in the name of AL-KARIMU DEWJI for Apartment F 17th floor and BAHADUR DEWJI HASSHAM for Apartment F 14TH Floor at Plot no. 63/27 Uhuru Height are AL-KARIMU DEWJI HASSHAM and BAHADUR DEWJI and mortgage deed.

It was the Defendant's reply that Plaintiff accepted and executed deeds to that regard and the Plaintiff was barred from disowning documents executed with free consent. It was stated that Plaintiff is till indebted under the loan agreement as stated and the alleged debiting (if any) was lawful. Further that the misrepresentation and fraud allegations are baseless and dismissive.

It was stated that the Defendant upon instruction liquidated the loan and there was an outstanding amount of TZs 15,277,004.83 It was denied that the whole loan for TZS 300,000,000/= as alleged was settled. It was further stated by the Defendant that the execution of the facility letter being a controlling document is conclusive of the acceptance and use and that allegations as to fraud and or misrepresentation are baseless and after thought.

The Defendant noted to the extent that the Plaintiff is indebted and the Defendant has the right to use the money in the account to repay the advanced credit facilities which have become due and payable.

Apart from her defence, the Defendant raised a counter claim against the plaintiff herein by claiming against the Plaintiff/Defendant the sum of TZs 15, 2770,004. 83 and USD 334,000.00 (say United States Dollars Three Hundred Thirty Five Thousands) being outstanding amount over the facility letter dated 20th July 2017 and the mortgage finance entered between the Defendant and the Plaintiff on or about 19th December, 2017.

It was counter claimed that the Plaintiff is a long-time customer of the Defendant and has been enjoying the services offered by the Defendant on various occasions. It was stated that on or before 20th July, 2017 the Plaintiff was advanced with a loan of TZs. 300,000,000/= for facilitating construction projects and as usual securities were placed and mortgage to secured the said loan. The Defendant stated that the securities advanced were Plot No. 182 Mbezi Area Kinondoni Municipality on CT No. 117157, Block C registered in the name of the Plaintiff. Further that the Plaintiff instructed the Defendant to liquidate the loan but upon liquidation there remained an outstanding amount of TZs 15,277,004.83 which is still due and payable to date.

The Defendant/Plaintiff in the counter claim pleaded that the Plaintiff has breached the terms and conditions under the mortgage finance loan agreement/facility letter dated 19th December, 2017 and hence an event of default has occurred.

That soon after the partial liquidation of the said loan as per the foregoing paragraph, the Plaintiff approached the Defendant for the mortgage finance over an Apartment F. 17TH floor at Uhuru Height and the deal was discussed and finally agreed upon by executing the facility letter. According to the Defendant, the Apartment itself was made among other securities a security together with Plot no. 182 Mbezi Beach area being an existing security. It was stated that the Plaintiff has defaulted in both loan categories and an event of default has occurred. Further the Defendant has on several times requested the Plaintiff to settle her loan obligations but all the efforts proved futile, hence issuance of default notices.

Wherefore, the Defendant prayed for the dismissal of the Plaintiff's claims and grant of the counter claim with costs. In particular, the Defendant prayed:

- a) Judgment and decree be entered in favour of the Defendant/ Plaintiff to counter claim and Plaintiff's claims be dismissed for want of merit;
- b) Judgment and decree be entered in favour of the Defendant/Plaintiff to the counter claim that the Plaintiff be ordered to pay the Defendant USD 335,000.00 being the amount due in the facility;
- c) Judgment and decree be entered in favour of the Defendant/Plaintiff to the counter claim that the Plaintiff be ordered to pay the Defendant TZs.15,277,004.83 being the amount due in the facility letter dated 20th July, 2017;

- d) An order that the securities be disposed for auction to recover the outstanding sum in the event the Defendant fails to satisfy the decretal sum;
- e) Interest at commercial rate from the date of filing the suit to the date of judgment;
- f) Interest of the decretal sum at court's rate interest;
- g) Cost of the suit;
- h) Any further that the court may deem fit to grant.

In its written statement of defence to the counter claim, the Defendant/Plaintiff denied the claim to the effect that the Defendant does not owe the Plaintiff the alleged amount or any part thereof. It however noted the counter claim to the extent that the transaction involving a loan facility of TZs 300,000,000/= was executed but the loan was liquidated in whole.

It was asserted that the Defendant is not aware of the so-called Apartment No. F17 floor at Uhuru Height and disputed for occurrence of an event of default.

When the suit came for final pre-trial conferences, with consent of the parties, the court framed the following issues for determination:

- a) Whether the Defendant's act of withholding Plot No. 182 Block C C.T No.117157 Mbezi Beach Area Dar es Salaam is lawful.*
- b) Whether the mortgage finance facility in respect of Plot No.63/27 was perfected.*

- c) *Whether the mortgage finance facility was a take over from a non performing loan or a direct purchase agreement.*
- d) *Whether the Defendant's act of withdrawing of USD 38,232 (Tshs.88,260,866/-) from the Plaintiff's account was lawful or justifiable.*
- e) *Whether the Defendant's act of withdrawing a sum of USD 3,900 from the Plaintiff's USD Account was lawful or justifiable.*
- f) *What rights are parties entitled.*

I will begin with the second issue for easy of flow. *Whether the mortgaged finance facility in respect of Apartment in Plot No. 63/27 17th floor Uhuru Height Apartment was perfected.* The Plaintiff's shareholder and Director one salutary John Meja (PW1) testified *inter alia* that:

Term loan two (TL2) was cancelled and it was not perfected.

PW1 earlier on did testify as follows:

According to the solicitation letter, the selling price of the Apartment was USD 335,000. The size of the Apartment was not stated in the solicitation letter. The value of the Apartment was also not stated...the Term Loan Two was to facilitate purchase of the Apartment. The security was legal mortgage over Apartment at Uhuru Height registered in the name of ALIKARIM DEWJI located on Plot No. 63/27 Apartment number (not disclosed) 17th floor along UWT Street Upanga Area Ilala Municipality. After transfer in the name of Judecam Real Estate Ltd, the Apartment could be a security. There has been no

transfer in the name of Judecam Real Estate Ltd. There has never been disbursement to Judecam real estate to date.

PW1 testified further that:

Disbursement was subject to the satisfactory compliance of the conditions. Condition L of Term Loan Two required the facility to be released only after creation of legal mortgage and other related security mortgage in favour of the Bank. It could be the mortgage after transfer in the name of JADECAM Real Estate Ltd. There has never been a mortgage for noncompliance of condition k and l.

The evidence of PW1 was supported by PW2 one Richard Perter Neona who worked with the Plaintiff as part time financial consultant, PW2 testified *inter alia* that:

The disbursement of Term Loan Two was subject to fulfillment of the conditions of Letter of Offer of which were not perfected. Due to non-perfection, JADECAM wrote a letter to International Commercial Bank to cancel that facility.

On the other hand, DW1 one Bernard Bernard Kilomo the loan Officer from International Commercial Bank testified correctly that there are about three types of mortgage financing. **First**, the bank pays money to the developer. After finishing, the developer handles the house to the Bank's client. **Second**, the bank gives money to the client. He/she constructs the house. **Third**, the bank sells the house to her client of which the first client failed to repay. There is no cash transaction on this loan. It is only book transaction.

DW1 testified inter alia that: *JADECAM got the third loan category BAHADUR and KARIM DEWJI are two brothers. During registration there was confusing of names of BAHADUR and AL-KARIM. The business they had with JADECAM was to take over the loan from Ali-Karim. The effect of signing the contract is for the bank to issue the loan. After signing of the contract the bank transferred the loan from AL-KARIM to JUDECAM. The second process required internal transaction, one of which was to sign transfer so that the title of BAHADUR could read JADECAM as the new owner of the house. This could not be done because JADECAM refused to continue with the whole transaction.*

In the course of evidence DW1 went further to testify that:

The disputed property was registered in the name of bahadur. Term Loan Two stated the property was registered in the name of Al-Karim. That was a mistake. JADECAM took a non performing loan from bahadur who is not in Term Loan Two.

From the afore evidences along with the tendered exhibits, it must be noted that, the accepted elementary principle of evidence is that he who asserts must prove. This is the purport of *Section 110 of the Evidence Act Cap 6 (R.E. 2019)* which reads:

- (1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
- (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.*

From the evidences of PW1, PW2 and DW1, it is clear that in order for the mortgage finance facility over Plot no 63/27 Uhuru Height to be binding, the parties had to fulfil the conditions contained in a letter of Term Loan two which was tendered by PW1 and being admitted as exhibit P2. Going through Term Loan Two, one will find the first condition was articulated in clause IX which stated:

The TL-2 Facility, shall be secured by:

Legal mortgage over Apartment at Uhuru Height registered in the name of AL-KARIM DEWJI, located on Plot No. 63/27 Apartment No. "F" Floor along UWT Street Upanga Area-Ilala Municipality, Dar es salaam city, after transfer in the JADECAM Real Estates Limited with an open market value (OMV) of USD 525,000.00 (Equivalent to TZs 1,179,150,000.00 and force sale value (FSV) of USD 329, 175.95 (equivalent to TZs 739,000,000.00)

It follows, therefore that for the facility to be perfected, must had the following conditions: **First**, security, as a mandatory condition. The security in this case, according to the exhibit, was registered in the name of AL-KARIM DEWJI. It was described as Apartment no. 17th floor Plot No. 63/27. **Secondly**, the Apartment, would only act as security for the facility, as such, after transferring it from the said name of AL-KARIM DEWJI into the name of JADECAM Real Estates Limited (the Plaintiff).

As correctly stated by the Plaintiff, clauses (k) and (1) of exhibit P² (TL2) were, all insistent on the need for compliance of the terms by providing the following:

"(k) Any disbursement shall be subject to the satisfactory compliance of these conditions and ensuring the account conduct is proper and regular.

(i) the facility shall be released only after creation of legal mortgage and other related security documents in favour of the Bank" Emphasis added)

It further follows correctly that the signing of Term Loan Two (TL-2) (exhibit P2) was only part of the condition precedent. Clause XI of exhibit P2 provides:

As part of the conditions precedent, precedent, before the TL-2 facility is made available to the borrower, the documentation as stated below, each in form and substance, satisfactory to the bank at its sole discretion, must have been received by the bank and /or executed and competed or presented for registration in the relevant registry or authorities, as the case may be. (Emphasis added).

As a further indication that the signing was only a part of the condition to do list towards perfecting the facility, clause XIII of the same exhibit P2 provided:

Upon fulfillment of all terms and conditions in this letter of offer including conditions precedent and only upon completion of all the necessary legal documentation, including creation of legal mortgage in favour of the bank. (Emphasis added).

Further to the above, the minutes of the meeting held on 25th June, 2018 (exhibit P7) indicate parties to have appreciated that, up to that moment,

the facility signed on 17th December, 2017, (six months back) was not yet perfected because a sale agreement was not signed and keys not handed over to the Plaintiff. Item 5 indicates that parties to have agreed:

To release the security namely extension of mortgage CT. No 117157 Block C, Mbezi Area, Kinondoni Municipal, once the legal mortgage over Uhuru Apartment No. 1716 on 17th floor is perfected. *Once the legal mortgage over uhuru Apartment no. 1716 on 17th floor is perfected. Once the sale agreement is executed the bank will hand over the keys of JADECAM Real Estate Ltd. (Emphasis added).*

Worse indeed, the Apartment was, at the end of the day found not to be in the name of AL KARIM DEWJI as indicated in TL2 (exhibit P2) so as to be able to be transferred from AL-KARIM DEWJI to JADECAM Real Estates Ltd. It was in the name of BAHADUR DEWJI HASHAM, quite a different person and not only a non-party to the facility, but also not privy to the contract. There was a misrepresentation of a fundamental term, with regard to the subject matter of the contract. That is why the court is of view that the bank has defrauded her client.

DW1's evidence that during registration there was a confusion of names, was in my view, easily answered by the Plaintiff evidence that the deviation of names in which the property subject of contract was registered is not as simple as argued. In order for a contract to be binding contract, parties must be at *ad idem* to the subject matter for which the contract is being *made concensum add idem*, a *latin* maxim to mean "*meeting of the minds*" of

contracting parties to the subject of the contract is very essential for the formation of any valid contract.

The difference in name made the Defendant to lack capacity to contract over a property registered not in the name disclosed in a Letter Offer (exhibit P2) which governed their contractual relationship. While the said Letter Offer (TL2) (exhibit P2) obligates to transfer the Apartment from the said AL-KARIM DEWJI to the Plaintiff, it could not be possible and practicable to transfer it from BAHADUL DEWJI HASHAM who is the real owner of the Apartment subject of the contract, into the name of the Plaintiff. None of the parties to the Letter Offer could enforce transfer of his (BAHADUR'S) property who was not privy to the contract. Again, this was a fraud by the Defendant to the Plaintiff. Worse, it is in evidence that by a variety of correspondences (Exhibit P3 and Exhibit P4), parties were exchanging commentaries and discussing to amend the terms of offer letter (Exhibit P2), in order to cure the illegalities and misnomers which had been appreciated by both parties. At end of the day all the efforts for amendment flopped, after which the Plaintiff informed the Defendant by a letter date 6th August 2018 (Exhibit 8) that it was ditching out the intention to enter into the agreement. It is to be noted that up to that point the facility had not been perfected. Page 2 of Exhibit P11 stated;

Because of the foregoing, we would like to formally inform you that, we do not like to continue with the purported purchase of Apartment no. "F" 17th Floor Uhuru Height Anymore.

Given that all the conditions precedent were not performed and at the end of the day the Plaintiff vindicated through (exhibit P8) that it was no longer proceeding with the facility, the answer to the second issue; whether the mortgage finance security in respect of Plot no. 63/27 Uhuru Height was perfected is in the negative.

In order for a mortgage of the Apartment securing the facility to have been perfected, *Section 41 (1) 2 and (3) of the Land Registration Act, Cap 334 R.E 2019* comes into play. It states:

- 1. The disposition of land shall be registered by the registrar.*
- 2. An applicant for disposition of land shall submit to the registrar all relevant document accompanied by a prescribed fee.*
- 3. When so registered, a disposition shall be effectual to create, transfer, vary or extinguish any estate or interest in any registered (Emphasis added)*

In the present case the mortgage of the Apartment subject of the suit was not registered under CAP 334. Without registration of the Apartment as a mortgage in respect of the facility under discussion, it cannot be said that the facility was perfected as being alleged by the Defendant.

With the above finding, I will go on to determine the third issue; whether the said mortgage finance facility was a takeover from a non performing loan or a direct purchase agreement. PW1 denied the existence of a take over from a non performing loan. He testified by defining the concept of Term Loan and Take Over thus:

Term loan is the loan for money with the requested purpose. Takeover is about taking the loan of someone who has failed to repay the loan from the Bank. It may involve a tripartite agreement.

PW1 denied to have ever had any takeover agreement. On the other hand, DW1 testified to the contrary, that: the business they had with JADECAM is a takeover of the loan from AL-KARIM DEWJI.

Having carefully considered the evidences and exhibits, I find there is no take over provided for in exhibit P2. Clause (iii) of exhibit P2 (page 1-7) which provide for the purpose of the facility stated:

TL-2 is to facilitate the purchase of Apartment offered as security to the existing not performing loan under loss category in the name of AL-KARIM DEWJI as part of the compromise agreement.

It follows clear that the purpose of the loan was, therefore, to facilitate the purchase of Apartment. The Apartment that was to be purchased was the one offered as security for the loan which had been taken by AL-KARIM DEWJI, who appears not to have serviced it.

I do agree with the Plaintiff that if it was a takeover as alleged, there could have been a tripartite agreement between the DEFENDANT BANK, JADECAM REAL ESTATE LTD (the Plaintiff) and AL-KARIM DEWJI to indicate that the said AL KARIM DEWJI had failed to liquidate the loan and was now surrendering the property to JADECAM REAL ESTATE LTD who was taking over the loan for repayment, upon terms and conditions that would have been made clear to the parties.

The answer, therefore to issue No. 3 is that the mortgage finance was not a takeover of a non performing loan but a direct purchase using the expected loan.

The 4th and 5th issue are: *Whether the Defendant's act of withholding the sum of USD 38,232 (Tshs. 88,260,866.00) from the Tshs. Account maintained by the Plaintiff was lawful or justified; and whether the Defendant's act of withholding the sum of USD 3,900 from the USD account maintained by the Plaintiff was lawful or justified.*

The Defendant in pleadings and the testimony of DW1 conceded that it withheld USD 38,232.00 or (TZs. 88,260,866.00). The Defendant argued that it did so because the Plaintiff was indebted and the money was deducted and withheld to service the loan interest. Paragraph 25 of the Amended Plaintiff pleaded:

That sometimes in April, 2019 the tenant of the Plaintiff one Form Scaff Tanzania Limited paid to the Plaintiff a sum of USD 38, 232.00 (TZs. 88,260.866) through the account maintained by the Plaintiff with the Defendant, the sum being rental fees in respect of Plot numbers. 1034 and 1035 Block G Mbezi Kawe Area, Dar es Salaam, for a period from 1st April, 2019 to 30th September, 2019.

Responding to the pleading, paragraph 16 of the Amended Written Statement of Defence pleaded:

The Defendant takes note of the contents of paragraph 25 and 26 of the Amended Plaintiff to the extent that the Plaintiff is indebted and the Defendant has the right to use the money in the account to repay

*the advanced credit facilities which have become due and payable.
(Emphasis added)*

Further, a bank statement dated 3rd May, 2019 (exhibit P9) indicates a credit entry in the account of the Plaintiff in the sum of TZs. 88,260,866.00 (which is USD 38,232.00). There is, therefore, no dispute that the amount was deposited to the account of the Plaintiff by Form Scaff Ltd as testified by PW2. Indeed, there is no dispute that the Defendant withheld the amount. The only dispute is whether the deduction of the amount was proper.

Going through exhibit P9 (bank statement) for USD as well as the testimony of PW1, it was conceded by DW1 that the Defendant wrongly charged and deducted a total of TZs. 24,000,000 or equivalent in USD in its USD account from what it called "*mortgage finance interest*" in respect of TL2 while the same was not due.

The records show that during the meeting of 25th June, 2018 (exhibit P7) which was also acknowledged by DW1, it was agreed, amongst other things on;

reversal of interest already collected in the loan account related to the interest account on loan during the moratorium period *be credited back to current account to the JADECAM Real Estate Limited.* (Emphasis applied)

The Defendant alleged the out of the loan of TZs. 300 Million in the first facility involving TL1 (exhibit P1), the Plaintiff did not liquidate the whole loan but instead TZs. 15,277,004. 83 remained outstanding. The Defendant claimed the said TZs. 15,277,004.83 in the counterclaim. However, DW1

conceded that JADECAM was wrongly deducted 1000 USD in its USD Account. The Defendant acknowledged wrongful charging and deduction of TZs. 24,000,000 (or equivalent in USD) and, therefore being in wrongfully possession of the said amount. It is clear that it is not justified to claim TZs. 15, 277,004.83 from the Plaintiff but to offset it and credit the remaining balance of USD 3,900 (or equivalent in TZs) to the account of the Plaintiff which has not been done.

DW1 has told the court that JADECAM was not given money. That is why its account has no credit entry of USD 335,000. Therefore, the Plaintiff was not indebted to the Defendant and the withholding of USD 38,232 deposited by Form Scaff Ltd was not valid because the Plaintiff was not indebted in respect of USD 335,000 as the facility was not perfected. The Defendant bank had wrongly charged and deducted TZs. 24,000,000) or equivalent amount in USD) n excess of what it was entitled to and hence he liability to reverse the balance to the Plaintiff. The Plaintiff claims for the balance of USD 3900 or equivalent in TZs.

On the other hand, from the evidence on record, the Defendant itself acknowledges that the Plaintiff was not indebted in respect of the loan of TZs 300,000,000 (TL1) Exhibit P1. In a notice of default (exhibit P12), the Defendant addressed the Plaintiff to have defaulted to repay the loan of USD 335,000 Only. The notice does not address the Plaintiff to default to repay the loan or any part of TZs. 300,000,000 or TZs 15,277,004 as they allege in the counterclaim. Furthermore, in a meeting the minutes of which were recorded by (Exhibit P7), it was agreed to release the title over Plot No. 182 Block C Mbezi Beach, which had secured the loan of TZs. 300,000,000. If

there was any amount outstanding in respect of the loan of TZs. 300,000,000 the Defendant would not have talked about the release of the title. In the counter affidavit evidence on oath of Marie Mangenya (ExhibitP13) it was acknowledged that the loan of TZs. 300,000, 000 was fully liquidated upon instruction to liquidate the deficit from a dollar account.

From the above evidences and exhibits, it is safe to observe that, so long as the loan facility of USD 335,000 was not perfected and the Plaintiff is not indebted and; so long as the loan of TZs 300,000,000 was fully liquidated, partly the deposits of the amount in the account of local currency and partly from the wrongly charged interest on mortgage finance facility in the USD account, a fact which was acknowledged by the minutes of the meeting (exhibit P7) as well as DW1, and (exhibit P11). The Plaintiff was not indebted to the Defendant and the withholding of USD 38,232,000 (Tshs.88,260,866) was illegal.

As regards the first issue, *whether the Defendant's act of withholding certificate of Title No. 117157 in respect of Plot No. 182 Block C, Mbezi Beach, Dar es Salaam was lawful*, the Certificate of Title secured the credit facility of TZs. 300 million vide exhibit P1 which, as narrated above, was fully liquidated. In fact, it would have been released long time ago if a sale agreement perfecting TL2 was signed, (see exhibit P7) which to date, remain unsigned. The Defendant asserted that it is the Plaintiff who refused to sign, however, as intimated earlier, the Plaintiff was justified because the Defendant acted fraudrently in the whole process.

The certificate was, further, an extended facility to the mortgage finance transaction for USD 335,000 which aborted without being perfected. After the abortion of transaction, the certificate became free and was to be returned to the Plaintiff. It was not and is still being withheld by the Defendant illegally. PW1 testified, and was not shaken by cross examination, that by reason of withholding of a Certificate of Title the Plaintiff failed to lease the same @ USD 10/m² for 24 months to tenants where from it would have earned rental proceeds in the sum of more than USD240,000.

It is correct, as submitted by the Defendant in their final written submissions, that one of the securities placed for the mortgage finance facility loan of USD 335, 000 was the landed property under Plot No. 182 Block C CT No. 117157 Mbezi Beach Area Dar es Salaam. However, as properly conceded by DW1, the loan of USD 335,000 was not given to the Plaintiff.

Therefore, it was not proper for the Defendant to withhold the Plaintiff's Certificate of Title No. 117157 in respect of Plot No. 182 Block C Mbezi Beach. That breach, makes the Plaintiff be entitled to general damages and not the anticipated earnings.

In totality of the above findings, I agree the Plaintiff is entitled to the grant of all the prayed relief (s) and general damages at the tune of TZs 100 Million. The counter claim is dismissed with costs. To validate the quantum of the awarded general damages of TZs 100 Million, I will be guided with the case **of Edwin William Mchetto v. Managing Director of Arusha International Conference Centre (1999) T.L.R 130 in which Mroso J. (As he then was) held:**

...the quantum of general damages, where awarded is assessed by the court.

In the case of **Tanzania Saruji Cooperation V. African Marble Company Ltd** (1997) T.L.R 155 the Court of Appeal held:

General damages are such as the law will presume to be direct, natural or probable consequence of the act complained of the Defendant's wrong doing must, therefore, have been cause, if not the sole, or particularly significant, cause of damage.

In this case, it is clearly being proved that the Plaintiff fully repaid Term Loan One but the Defendant withheld its Title Deed. It was clearly proved that the Defendant defrauded her client (Plaintiff) in respect of Term Loan Two. It was further proved by the Plaintiff that the Defendant illegally withheld the Plaintiff's sum of USD 38,232 and USD3900. All these complained acts of the Defendant have significantly and generally damaged the Plaintiff.

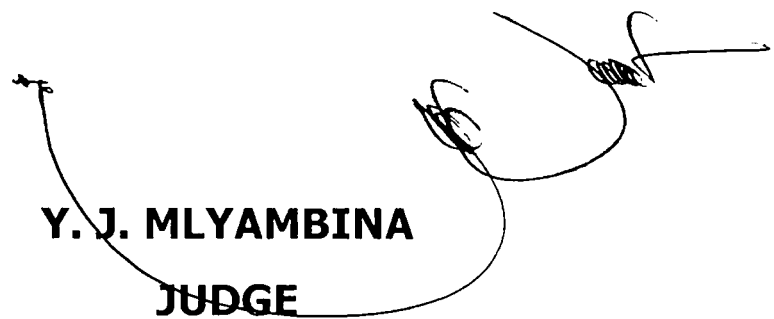
Specifically, the court enters judgment and decree against the Defendant as follows:

1. It is declared that the mortgage finance involving Plot No. 63/27 Uhuru Height Apartment "*situated in Upanga area*" Dar es Salaam is false, fraudulent and illegal.
2. It is declared that the unilateral act by the Defendant to commit Plot No. 182 Block C, CT No. 117157 Mbezi Beach Area, to secure a Term Loan Facility associated with a mortgage finance of Plot No. 63/27 "*Uhuru Height Apartment*" Upanga Area, was illegal and unlawful.

3. It is declared that the act by the Defendant to refuse to release the Title Deed involving CT 117157 Plot No. 182 Block C, Mbezi Beach Area, Dar es Salaam by refusing to liquidate the loan by debiting a USD Account no. 060100001001 is illegal and unlawful.
4. It is declared that the withholding of the Defendant's money in the sum of USD 38,232.00 (TZs. 88,260,866) on account that it was subjected to liquidation of the loan and installments in improper, illegal, unlawful and unjustified.
5. The Defendant to refund with immediate effect the said sum of USD 38,232.00 (TZs.88,260, 866) to the Plaintiff with compound interest at the Commercial Bank rate of 19% from April, 2019 to the date of judgment.
6. The Defendant to release Title No. CT 117157 Plot No. 182 Block C, Mbezi Beach, to the Plaintiff with immediate effect.
7. The Defendant to refund the Plaintiff with immediate effect the sum of USD 3900 which was illegally withdrawn by the Defendant without the Plaintiff's consent.
8. The Defendant to pay the Plaintiff general damages at the tune of TZs 100 Million.
9. The Defendant to pay the Plaintiff with all the decretal amount afore stated at the court interest rate of 12% from the date of Judgement till payment in full.
10. The Defendant to pay the Plaintiff costs of the suit.
11. The Plaintiff in the counter claim to pay the Defendant therein costs of the counter claim.

It is so ordered.





Y. J. MLYAMBINA

JUDGE

29/07/2020

Judgement pronounced and dated 29th July, 2020 in the presence of Counsel Stanislaus Ishengoma holding brief of Samson Mbamba for the Plaintiff and Stanislaus Ishengoma for the Defendant. Right of Appeal explained.





Y. J. MLYAMBINA

JUDGE

29/07/2020