THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF BUKOBA)

AT BUKOBA

LAND APPEAL No. 47 OF 2018

(Arising the District Land and Housing Tribunal for Kagera at Bukoba in Land Application No. 45 of 2018)

SUDI ABDI ATHUMANI ---------- APPELLANT

Versus

NATIONAL MICROFINANCE BANK
PLC BUKOBA BRANCH ---------- RESPONDENT

Judgment

15/10/2020 & 27/10/2020
Mtulya, J.:

On the 11th day of September 2018 our parliament sat in capital city of Dodoma to insert new version of law in the **Civil Procedure Code [Cap. 33 R.E 2019]** (the Code) via **Written Laws (Miscellaneous Amendments) (No. 3) Act** No. 8 of 2018 (the law). Section 6 of the law amended the Code by adding new section 3A and 3B in the Code. The former enacted the overriding objective principle whereas the latter sanctioned parties in civil disputes to assist this court in attaining just determination of civil disputes, apart from other duties imposed to parties.

Section 3B (1) (a) & (b) of the Code requires this court to use available judicial resources effectively and efficiently to dispose civil

proceedings timely at affordable costs. However, that principle has been receiving impediments and hurdles from some of the parties in disputes filed in this court. It is also displayed in the present appeal filed in this court.

Seventeen day after the insertion of the sections in the Code, that is 28th September 2018, Mr. Sudi Abdu Athumani (the Appellant) preferred **Land Appeal No. 47 of 2018** in this court stating that he was seriously aggrieved by the District Land and Housing Tribunal for Kagera at Bukoba (the Tribunal) in **Land Application No. 45 of 2017** (the Application). In his Memorandum of Appeal, the Appellant registered two grounds of appeal, briefly that:

1. The Tribunal erred in law and fact to hold that the Appellant breached the loan agreement; and
2. The Tribunal erred in law and fact to base its decision in the **Mortgage Financing (Special Provisions) Act**, 2008.

In order to appreciate the present appeal and the new enactment in the Code, it is necessary to invite the historical background of the dispute, albeit in brief: On the 15th day of September 2016, the Appellant approached the National Microfinance Bank PLC Bukoba Branch for loan agreement amounting to Tanzanian Shillings Fifteen Million (15,000,000/=). The loan was secured by the

Appellant's house valued Tanzanian Shillings Forty Million (40,000,000/=) located at Custom Area within Bukoba Municipality.

As the house was erected in an unregistered land, the parties agreed to register their loan agreement under the provisions of section 113 (5) & (6) of the **Land Act** [Cap. 113 R. E. 2002] (the Land Act), as amended in 2004. The Respondent sought Appellant's wife consent on the loan and was granted. The loan agreement contained a verse, which is currently part of the dispute in this appeal, and it was drafted in paragraph (b) of the second page of the agreement:

> *Endapo Mkopaji atapitiliza mkopo kwa awamu mbili, yaani miezi miwili (siku sitini) na halipi mkopo hadi awamu ya tatu ikawadia, basi kiasi chote cha deni kitakachokuwa kimesalia kitachukuliwa kuwa ni deni linalodaiwa. Benki itakuwa na hiari ya kuchukua hatua stahili za kurudisha deni hilo ikiwa na pamoja na deni la msingi, riba na gharama nyingine.*

Following this protection clause, the Respondent advanced the loan to the Appellant believing that the Appellant would honour his promise or in case of default, it will move for the loan security. However, that was not the case. The Appellant defaulted the

agreement just after payment of three instalments as per repayment schedule hence the Respondent issued him a demand note on 16th January 2017. Following the demand note and failure of the Appellant to pay the loan, the Respondent initiated a move to attach the house, something which irritated the Appellant. In order to secure his house from being attached by the Respondent, the Appellant rushed to the Tribunal and filed the Application praying for several reliefs, including:

1. Permanent injunction order to restrain the Respondent or his agents from attaching, auctioning and selling of the house;
2. An order of extension of time up to two (2) years for repayment of the loan remained amount;
3. An order to declare the Respondent has no legal right to sale the house; and
4. An order against the Respondent to pay compensation of Tanzanian Shillings Ten Million (10,000,000/=) for illegal breach of terms of the loan agreement and damage suffered by the Applicant.

The Tribunal, after hearing the parties and visiting exhibits tendered, decided in favour of the Respondent. At 10 page of the decision, the Tribunal stated that:

Tribunal assessors are of the view that the Applicant defaulted to pay the loan, and that the mortgaged properties should be auctioned to realize the defaulted amount...the third issue whether the Respondent is entitled to foreclosed the mortgaged security by the Applicant, is answered in affirmative as the Applicant was supposed to pay the last instalment, but he failed and admits that even when he was testifying that he was indebted [by the Respondent].

Upon perusal of the proceedings conducted on 16th November 2018, as depicted at page 6 of the proceedings of the Tribunal, the Applicant testified that:

The advanced sum [is] Tshs. 15,000.000/=... I am indebted Tshs. 9,900,000/=. I pray that this Tribunal be pleased to grant me 6 months to arrange myself before paying... after that I pray the court to allow me to pay the Respondent Tshs. 500,000/= as a monthly instalment...

When this appeal was scheduled for hearing on 15th October 2020, the Appellant appeared in person without any legal

representation whereas the Respondent invited the legal services of learned counsel Mr. Josephat S. Rweyemamu to argue the appeal. The Appellant briefly submitted that the Tribunal was wrong in stating that he breached the contract while the loan payment was supposed to end in the month of December 2017.

However, the Appellant explained the reasons of default in this appeal. He stated that after the payment of the first to third instalments, he suffered financial difficulties and loss hence paid the fourth and fifth instalments in difficult circumstances. With the second ground, the Appellant submitted that the Respondent wanted to enforce the loan agreement which was entered by the parties contrary to the law in **Mortgage Financing Act of 2008**.

In reply of the submission registered by the Appellant, Mr. Rweyemamu argued that the contract was breached as per terms of loan agreement which allowed the Respondent to foreclose the house after default of payment in two months' time. Mr. Rweyemamu stated that the Appellant defaulted payments and was issued the notice by the Respondent, but did not comply. Mr. Rweyemamu argued further that the Appellant did not dispute the breach of the contract in the Tribunal, but prayed for amendment of the loan agreement to extend for six months period. In that way, according to Mr. Rweyemamu, the

Appellant was vacating terms of loan agreement, which cannot be allowed.

With the second ground, Mr. Rweyemamu submitted that the loan agreement was admitted in the Tribunal as P.1 and was drafted in accordance to section 113 (5) & (6) of the **Land Act** which regulates informal mortgages of unregistered lands. According to Mr. Rweyemamu, this law was not affected by the amendments brought in 2008 by the **Mortgage Financing Act (Special Provisions) Act**, Act No. 12 of 2008. To the opinion of Mr. Rweyemamu, informal mortgages are operative to date and continue to be regulated under section 113 (5) & (6) of the **Land Act** to secure loan for unregistered lands.

On my part, I think this is one of the flimsy appeals filed in this court without considering the texts in section 3A & 3B of the Code. The second ground will not detain this court. The enactment of the **Mortgage Financing (Special Provisions) Act, 2008** came to amend the **Land Act** and other two laws, *viz*: **The Land Registration Act** [Cap. 334 R. E. 2002] & **Civil Procedure Code** [Cap. 33 R.E. 2002]. In its twenty five (25) provisions, none has touched section 113 of the **Land Act**.

With the first ground of appeal, I said from the outset of this judgment that the current law in section 3A & 3B of the Code requires this court to use available judicial resources effectively and efficiently to dispose civil proceedings timely at affordable costs. I am wondering in a situation where everything is settled and certain, why the Appellant preferred the present appeal in this court to use judicial resources time and costs.

In the present appeal, the Appellant admitted in the Tribunal and this court that he defaulted payments of instalments after the three initial instalments. With paragraph (c) of the loan agreement entered and duly signed by the parties and was tendered in Tribunal by both sides, as exhibit P.1 and D.1. Page 7 and 18 of the proceedings in the Tribunal shows that and at page 9 of the proceedings, the Appellant admitted that he failed to repay the loan instalment since 15th of March 2017. On extension of time the Appellant at page 10 of the proceedings is recorded to have testified that:

> *I mortgaged my property as security. It is a piece of land located at custom road...my wife issues a spousal consent to the mortgage...the case, I filed is request to the court to help me in finding the better way of paying, though*

the Tribunal was not party to the contract of mortgage. There are no terms in the contract which stated the Tribunal can extend the time of paying...even the contract does not state that the schedule of payment can be extended...extension of time to pay for 6 months.

The same prayer of six (6) months extension period if found at page 6 of the proceedings of the Tribunal. In short the Appellant prayed in paragraph 7 (b) of his Application for two (2) years extension whereas during trial he prayed for six (6) months extension period. In other words, from the above quoted text and paragraph 7(a) of his Application, the Appellant was not disputing breach of the loan agreement and text in paragraph (b) or (c) of the loan agreement, but was praying for amendment of the repayment be enlarged for six (6) months or two (2) years period.

That is the thing I am astonished. It leaves me with a lot of questions. Can a mortgagee ask courts of law, up to the appellate level, an enlargement of time to repay loan or else to adjust the repayment schedule in favour of defaulters? Was there no room for discussion? If it was, what went wrong? Assuming all was bad, but this suit was filed in the Tribunal on 18th April 2017 and in this court on 28th September 2018. It is more than two years since the dispute

was registered in this court and more than three years since it landed in the Tribunal. This is more than what was prayed by the Appellant in the Tribunal. It shows that the Appellant brought up this appeal in bad faith.

This court as said in a number of times. Financial instructions must be protected, not only because they offer loans, but it is because the monies in financial institutions belong to the people of this country, not financial institutions. Those who prefer loans and try to use courts of law to delay or obstruct payment of the loan amount affect not only the financial institutions community, but also our populations at large. This court in **F.B.M.E Bank v. John Kengele & Two Other**, Commercial Revision Case, No. 1 of 2008, stated categorically that:

> *I think this application can be conclusively disposed off on the basis of these findings alone. Before I conclude, let me say a thing or two about the source of the dispute that led the Bank to file a suit to recover the monies it had advanced to the respondents. I understand from the nature of the preliminary objections in the District Court that the debt was not disputed. What was the issue is that repayment period had not*

started. It was due on 31 December 2007. This is July 2008. If it is true that the complaint by the respondent was made bona fide, that is, in good faith, they ought to have paid the same by now, technicalities notwithstanding. I think, credit institutions, like the applicant here, are entitled to be anxious in situations where customers do not live to their words but defaults in payment of their loans.

I think, to my opinion, this is the position of this court and after insertion of section 3A & 3B in the Code, it is certain that if a defaulter approach this court in bad faith or register depraved reasons, will not persuade this court to decide in his favour.

Having said so, and considering that our state has been classified as a lower-middle income country, the Appellant must either pay or his house be foreclosed. Defaulters cannot be allowed to faults economic progress of this country. This appeal must fail with costs. It fails because the Appellant uses this court as a shield of his liabilities, instead of court of justice. In dispensing justice, courts are rendering valuable services to the society and financial institutions. The consumers of our justice must continue to have trust and confidence in our judicial system.

This court was cautioned by our superior court in 2012 in the decision of **Samwel Kimaro v. Hidaya Didas**, Civil Application No. 20 of 2012, in the following alert:

> *...in dispensing justice, the courts are no doubt, rendering or giving valuable service to the society at large and to the consumers of our justice system in particular. If so,* ***the society or consumers must continue to have trust and faith in our system****...*
>
> (Emphasis supplied).

The warning came after an alert made by the same court years back. In 1996, in the precedent of **VIP Engineer and Marketing Ltd. v. Said Salim Bakhresa**, Civil Applicant No. 47 of 1996, the Court stated:

> *...it must not be forgotten that there is a danger of consumers of justice losing confidence in the courts if judicial officers are ... to stray into that error is to aid the judicature's grave diggers.*

All these statements from our superior court were howled after enactment of article 107A (2) (b) of the **Constitution of the United Republic of Tanzania** [Cap. 2 R. E. 2002] on expeditious justice,

but before insertion of section 3A & 3B in the Code on efficient and effective use of resources time and costs. This court has no option rather than to uphold the instructions from the Court.

In the final analysis, I think the Appellant, Mr. Sudi Abdi Athumani has brought this Appeal in this court in bad faith and failed to persuade this court to determine this appeal in his favour. This appeal is hereby dismissed with cots for want of good reasons.

Ordered accordingly.

F. H. Mtulya

Judge

27/10/2020

This Judgment was delivered in Chambers under the seal of this court in the presence of the Appellant Mr. Sudi Abdi Athumani and in the presence of the Respondent's learned counsel Mr. Josephat S. Rweyemamu.

F. H. Mtulya

Judge

27/10/2020