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

CIVIL APPEAL NO. 185 OF 2019
(Originating in the Resident Magistrate Court for Pwani at Kibaha in Civil Case No. 16 of 2019)

NMB BANK PLC.....APPELLANT
VERSUS
KAFUKURI MWINGIRWA SHUBIS.....RESPONDENT

JUDGEMENT

16th & 24th November 2020

MASABO, J.:

The appeal emanates from a tortious suit in which the appellant was found liable for negligence. The brief background to the appeal is that the respondent had his house advertised for auction in recovery of loan purportedly advanced to one Aloyce Thomas who fraudulently mortgaged the house to secure the loan. Upon learning of the impending action, the respondent approached the bank and after a stalled process, it came to light that the respondent was indeed the rightful owner of the premise. The auction was stopped but the respondent was disgruntled by the way the appellant bank handled the issue. He sued the bank for negligence and was awarded a sum of Tsh 35,000,000/= as damages.

The appellant bank was not amused. It is now before this court armed with 4 grounds of appeal. **First**, the trial court erred in holding that the auction

was defamatory. **Second,** the trial court erred in holding that the appellant negligently and wrongly advertised the auction. **Third,** the general damages awarded by the trial court are on higher side and **lastly,** the court erred in law in holding that the appellant owed the respondent a duty of care. The first ground was abandoned during the hearing of the appeal.

At the hearing of the appeal which proceeded in writing, both parties had representation. The appellant was represented by Mr. John James Ismail, learned counsel. The respondent had the service of Mr. Mohamed Ally Nyenye, learned advocate. Both counsels filed their submission on time. I commend them for their diligence and industry in preparing the submissions which I have thoroughly read and considered.

The grounds of appeal and the submissions made by both parties demonstrates clearly that the appeal revolves around two main issues. The first is whether the evidence rendered at the trial court sufficiently established that the appellant was negligent and second, were the general damages excessively awarded? These two issues will form basis of our determination.

In preface, the term negligence as defined in **Black's Law Dictionary 8th Edition by Brian Garner** at page 1061, is:

> "The failure to exercise the standard of care that a reasonable prudent person would have exercised in similar situation; any conduct that fall below the legal standard established to protect other against

> unreasonable risk of harm except for conduct that is intentionally, wantonly, or willfully disregardful of others rights. The term denotes culpable carelessness. p. 1061

Winfield and Jolowicz, define the tort of negligence as "*the breach of a legal duty to take care which results in damage, undesired by the defendant to the plaintiff.*" (**Winfield And Jolowicz on Tort**, 15th Edn, 1998) by W. V. H. Rogers, M.A.). According to this definition and as correctly submitted by the parties, the tort of negligence, connotes a complex concept of duty, breach and damage suffered by the person to whom the duty was owed. As held by the Court of Appeal in ***Winfred Mkumbwa vs SCB Tanzania Limited,*** Civil Appeal No. 150 of 2018, CAT (unreported), for claims of negligence to succeed the plaintiff must prove that the respondent had a duty of care, there was breach of that duty of care and that he suffered damage as a result of such breach. This rule is exemplified by Vivienne Harpwood in a Book titled **The Principles of Tort Law**, 4th Edition, Cavendish Publishing Limited 2000 (cited in the above case). In this book the author states that:

> "The first matter to be proved is that the defendant owed a duty of care to the claimant. Unless it is possible to establish this in the particular circumstances of the case, there will be no point in considering whether a particular act or omission which has resulted in harm was negligent... The existence of a duty of care depends upon oversight\proximity and other complex factors. <u>It should be noted that in the vast majority of negligence cases there is no dispute about the existence of a duty of care</u>."[emphasis provided]

Guided by this definition and the authority in ***Caparo Industries Plc vs. Dickman [1990]2 AC 605***, and ***Marc Rich & Co v Bishop Rock Marine Co Ltd [1996] AC 211***], Mr. Ismail sternly disputed the existence of a duty of care. Fortifying his argument, he has reasoned that for the duty to exist three things must be proved, namely proximity, unreasonable foreseeability of the harm, and fairness of the liability. In view of this he ardently argued that the appellant owed no duty of care to the respondent because there was no proximity between them and the harm occasioned was unreasonably foreseeable. Therefore, it is neither fair, just nor reasonable to impose liability on the appellant as he acted honestly in accordance with the practices and standards applicable in the banking sector.

His main argument was that the bank employed all the necessary measures and steps as conducted in the ordinary cause of business thus it is unfair to condemn it for negligence. The disputed premise was accepted as security after the said Thomas presented what was honestly believed by the appellant to be a genuine sale agreement and the intended auction was no more than a lawful exercise of a legally sanctioned recovery measures against defaulting mortgagors. In Mr. Ismail's view, the appellant bank could not have foreseen the harm occasioned to the respondent under the circumstances.

On the respondent's part, Mr. Nyenye did not dispute the principles underlining the tort of negligence. However, he argued that, in this case, the banker's negligence rests in its failure to exercise due diligence in accepting

the sale agreement as proof of ownership of the house. He reasoned that, the appellant was duty bound to exercise due diligence in inspecting and examining the detailed contents of the sale Agreement so as to satisfy itself of the authenticity of the agreement. His further argument was that the appellant was duty bound to comply with the laws regulating mortgage as provided for under the Land Act [Cap 113 RE 2019] its regulations, and especially, the Procedure for Mortgage of Land Regulation of 2019 together with its predecessors of 2017 and 2018 whose regulation 6 require submission of such documents as Certificate of title, Leasehold, Derivative, and a valuation report approved by chief valuer and Mortgaged deed.

Mr. Nyenye argued that these are standard requirements and the appellant bank was duty bound to adhere to them prior accepting the house as mortgage but negligently failed to. Therefore, the appellant bank ought to foresee the harm of its action to the persons who would have been injured by such negligence, in this case, the respondent. Moreover, it was argued that had the appellant exercised its professional duty it would have discovered that the said Thomas was not the lawful owner as the disputed premise as it was in a surveyed land Plot with No.217A, situated on Block 6 at Ukuni Bagamoyo, with Certificate of Title No.93315 bearing the respondent's name as its legal owner. As for the principle of flexibility and fairness, he cited the case of ***Caparo Industries Plc vs. Dickman*** [1996]2 AC 605 where it was stated that the term proximity and fairness do not have a universal definition. Their application varies depend on the circumstances of a particular case.

Having considered the arguments fronted by the parties, I am unable to agree with Mr. Ismail's contention as to the absence of duty, proximity and foreseability. Whereas it is correctly as argued by the learned counsel that the existence of proximity between the parties is crucial in determining the suit of negligence, the proximity between the appellant and the respondent in this case is not hard to find. Before I demonstrate how it exists in the instant case, let me state that, as held by Lord Bridge in **Caparo Industries Plc vs. Dickman** (supra):

> the concepts of proximity and fairness are not susceptible of any such precise definition as would necessary to give them utility of practical test, but amount in effect to little more than convenient labels to attach to the feature of different specific situation as law recognize pragmatically as give rise to the duty of care of a given scope common to the whole field of negligence" [emphasis added]

In negligence claims, the term 'proximity' as held by the Supreme Court of Canada in **Hercules Managements Ltd. v. Ernst & Young**, [1997] 2 S.C.R. 165, connotes the circumstances where the relationship between the plaintiff and the defendant are " *of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs.*"

Exemplifying this relationship further, in **Cooper *v.* Hobart**, [2001] 3 S.C.R. 537, 2001 SCC 79, the Supreme Court of Canada stated that,

> Defining the relationship may involve looking at expectations, representations, reliance, and the property or other interests involved. Essentially, these are factors that allow us to evaluate the closeness of the relationship between the plaintiff and the defendant and to determine whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant. [emphasis supplied].

Moreover, it stated that,

> The factors which may satisfy the requirement of proximity are diverse and depend on the circumstances of the case. One searches in vain for a single unifying characteristic. As stated by McLachlin J. (as she then was) in *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, at p. 1151: "[p]roximity may be usefully viewed, not so much as a test in itself, but as a broad concept which is capable of subsuming different categories of cases involving different factors" (emphasis supplied)

Needless to say, in negligence claims, the duty of care and proximity are independent from contractual relationships. In the case at hand, the fact that the plaintiff had no contractual relationship with the appellant bank does not preclude him from instituting an action on negligence. As it could be vividly seen from the decisions above, the proximity rule leans heavily upon Lord Atkin's legal neighbour principle in **Donoghue v Stevenson** [1932] AC 562 where he emphatically stated that:

> "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is

> my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question." (Emphasis added.)

When the above question is applied to the instant case it attracts a positive answer as the rightful owners of premises negligently accepted as collaterals stand to be directly affected lenders'/creditors' (mortgagee's) negligent acts or omission of creditors. The appellant bank and other creditors are reasonably expected to have such owners in contemplation. Therefore, in this case, the duty of care, proximity and foreseeability cannot be disputed.

As correctly argued for the respondent, in the ordinary course of business, banks are duty bound to exercise due diligence in dealing with their clients. They are intrinsically expected to be vigilant throughout the entire life cycle of the bank-client relationship rest they risk their operation and reputation and may inflict harm on *bonafide* third parties and the society. It is in this context the 'Know your Customer (KYC)' requirement has become an integral part of banking business worldwide

In lending and securities, it is expected that creditors would have a strong ex-ante due diligence processes in place to avoid financing high risk activities and fraudulent customers such the one in the one in the case at hand. Search, assessment of the actual value of the property; physical visitation to ascertain the existence and ownership of the property offered as security are

some of the essential ex-ante due diligence processes. As held by this court in **National Bank of Commerce Ltd v B & E Investment Limited and Dorein Francis Kanemile**, Commercial Case No.14 of 2002 High Court of Tanzania Commercial Division of at Dar es salaam (Unreported), a bank anticipating to accept a property as mortgage has a duty to conduct an inquiry through conducting physical verification of the owner of the property and the property itself before advancing a credit facility to the borrower. The exercise of such duty shields both, the bank and *bonafide* rightful owners from the vice of fraudulent borrowers. Its omission, is certainly a breach of the duty owed to the *bonafide* rightful owners. In my firm view, a bank that neglects this duty cannot escape responsibility for the harm inflicted on the rightful owners.

It is therefore crucial at this stage to determine whether the appellant bank exercised its duty. Having carefully considered the evidence on record, I have come to the conclusion that when the evidence rendered by the parties is assessed as a whole, it demonstrates quite clearly that in advancing the loan to the said Thomas and in accepting the sale agreement, the appellant bank did not exercise the due diligence required in the ordinary course of banking business and in so doing breached its standard duty towards the *bonafide* rightful owner of the premise, who is the respondent in this case.

The testimony of **DW1**, Hosea Lyatuu, vividly demonstrates that the appellant bank, apart from being fully aware of the need to exercise due diligence to ascertain the ownership of the disputed property, negligently

chose to proceeded to admit the sale agreement presented by the said Thomas. In page 30 of the word-processed proceedings, DW1, testified the measures employed by the bank after receipt of the respondent's complaint. He states as follows:

> "Hence from there, bank made a follow up, on the complaints filed by the plaintiff. Bank had to do so due to the reason that the plaintiff came with a title deed of the same plot which the customer Thomas/ brought mortgaged by sales agreement. Hence, we made follow up using the title deed so that to prove the ownership of the property, he did it through Land Registry. Land Registry proved that the property belongs to the plaintiff. Hence the sale agreement cannot be trusted as much as the title deed as it was not confirmed by the Registrar of Land. The Bank had also visited the Local Government Office so that to prove as to if the sale agreement was genuine or not. The street secretary information was not effective hence it was not helpful to the bank. Even neighbors proved the house to be of the plaintiff." [Emphasis supplied]

From this account, I do not entertain doubts in mind that had the appellant employed this measure before accepting the property as security it would have ascertained that the said Thomas had no mortgageable interest over the land. As no reason is advanced as to what prevented the bank from conducting a due diligence by among other things, visiting the local government offices or the locality of the disputed premise before accepting the sale agreement, it can safely be concluded, as it is hereby done, that the appellant bank acted negligently. To cap it all, the sale agreement relied

upon in advancing the loan was not rendered in court, hence it remains doubtful as to whether it did exist.

Assuming that the sale agreement did exist and was presented to the appellant bank as asserted and that the bank acted in good faith in accepting it as submitted by Mr. Ismail, that alone, does not exonerate the appellant from responsibility because what matters is whether or not the bank acted diligently. Needless to say, the test of whether the person is guilty of negligence does not rest on one's goodwill. Rather, it is on the conduct of a prudent man in a particular circumstance. Wherefore in this matter the test here is what a prudent bank would do before advancing credit or admitting a landed property as collateral. To that extent I see no reason to fault the findings of the trial court and I proceed to answer the first issue in the affirmative.

Regarding the second issue the Mr. Ismail cited the case of **Davies v Powell** 1942 1 All ER 657, **Henry Hidaya Hanhga v Manyema Manyoka** [1961] EA 705, **Coper Motor Corporation v Moshi Arusha Occupational Health Services** [1990] TLR 96 (CA), and **Peter Joseph Kilibika v Patrick Aloyce Mlingi**, Civil Appeal No. 37 of 2009 CAT at Tabora and argued that it is within the jurisdiction of this court to revise the general damages awarded by the trial court. He proceeded to argue that the general damages awarded are excessively high as the court failed to consider the remedial measures taken by the appellant to mitigate the harm. On the Respondents part, Mr. Nyenye argued that, the award is well founded as it

based on materials rendered by the respondent in the course of trial. He submitted that the advertisement of the intended auction severely injured the respondent's reputation as people no longer trusted him and was a source of disharmony in his entire family.

Whereas I agree with the powers of the appellant to vary the amount awarded as general damages in certain circumstances, let me emphatically states as held in the authorities cited that it is trite law in our country that, the award of general damages is a matter of discretion of the trial court and that, since the assessment of general damages falls under the purview of judicial discretion, the figure arrived at by the trial court tend not to be disturbed on appeal unless it is based on erroneous principle or it is so low or so excessive that it must have been based on some incorrect reasoning.

This position was articulated in **Davies v Powel** 1942 All ER 657 and affirmed in **Nance v British Columbia Electric Railway Co. Ltd** (1951) AC 601 which has been cited with approval in numerous cases in our jurisdiction including in the case of **Winfred Mkumbwa vs SCB Tanzania Limited,** (supra). Guided by the principles above, I have keenly examined the record to see whether the circumstances of this case warrant the intervention by this court. In my firm view, the record has ably demonstrated that the respondent was entitled to general damages and the trial magistrate did not act on wrong principles in assessing the damages. The amount awarded was in my considered view commensurate with the harm suffered

by the respondent. The second issue consequently attracts a negative answer.

In the final result, having answered all the two issues negatively, as demonstrated above, I upheld the judgment and decree of the trial courts and dismiss the appeal with costs.

Dated at Dar es Salaam this 24th day of November 2020.

J.L. MASABO

JUDGE