

**IN THE HIGH COURT OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA**

HC LAND CASE NO. 60 OF 2017

ROSEMARY HAWA MLEKA PLAINTIFF

VERSUS

HOTEL MAGNUM 1ST DEFENDANT

HENRY MATATA 2ND DEFENDANT

TPB BANK PLC 3RD DEFENDANT

JUDGMENT

Date of Last Order: 22nd February, 2021

Date of Judgment Date: 5th March, 2021

A.Z. MGEYEKWA, J

The history of this matter started on 6th May, 2017 when the Plaintiff who is the second defendant's wife institute a claim against the Defendants jointly and severally for a declaration that the sale of the landed properties

known as Plots Nos. 374, 375 and 376 Blok KV situated at Kirumba in Mwanza, were jointly acquired by the Plaintiff and the second Defendant. The Plaintiff claims that the same are matrimonial properties registered *vide* CT 7019 LR Mwanza. The plaintiff in her Complaint is seeking for the following reliefs:-

- i. *A declaration order that the suit premises comprised in Plots Nos/ 374, 375 and 376 at Kirumba Valley within the City of Mwanza and which was registered vide CT No. 7081 LR Mwanza is the Plaintiffs joint matrimonial property with the first Defendant.*
- ii. *A declaratory order that the mortgage of the said property by the second Defendant to third Defendant was null and void for want of the Plaintiff's consent.*
- iii. *An order to the effect that the third Defendant's intention to dispose of the said property is illegal.*
- iv. *A permanent injunction to restrain the third Defendant from disposing of the said property or otherwise interfering with the Plaintiff's quiet enjoyment of the same.*
- v. *The costs of this suit.*
- vi. *Any other and further reliefs that this Honourable Court deems fit to award.*

The first Defendant filed a Claim of Set off. The second Defendant filed an Amended Written Statement of Defence on 11th June, 2019, he did not dispute the Plaintiff's claims. He also filed By Way of Set off and a reply to the Counter Claim, disputing the claims and prayed for this court to dismiss the third Defendant claims with costs. On the other hand, on 21st May, 2019 the third Defendant, in response to the Plaintiffs' claims, filed an Amended Written Statement of Defence, a Counter Claim and a Reply to a Claim of Set Off, disputing some of the claims and prayed for dismissal of the Plaintiffs' claims with costs.

It is imperative at the outset to point out that, this matter has also gone through the hands of my brother; Hon. Gwae, J, who started to attend the case then the file was transferred to my learned sister Hon. Madeha J, who proceeded with the first pre-trial conference, and Hon. Siyani, J conducted mediation. I thank my predecessors for keeping the records well and on track. On 04th November, 2020 the file was transferred to me. I thus heard the testimonies of the witnesses for the parties and now have to evaluate the evidence adduced by the witnesses to determine and decide on the aforementioned issues.

At all the material time, the Plaintiff was under the services of Mr. Anthony Nasimire, the learned counsel, while the first Defendant was represented by Mr. Felix James and Mr. Gibson, learned counsels, the second Defendant was represented by Mr. Frank Obedi, learned counsel and the third Defendant enjoyed the service of Mr. Constantine Mutalemwa, learned counsel.

Upon completion of all preliminaries, the Final –Pre Trial Conference was conducted, and the following issues were framed by the Court:-

- 1) Whether the suit land comprises of Certificate of Title No. 7018 LR Mwanza is the property acquired jointly by the plaintiff and 2nd defendant.
- 2) Whether the plaintiff has any registered/ recognized matrimonial interest in the suit land.
- 3) Whether the suit land was mortgaged to the 3rd defendant by the 2nd defendant without the plaintiff's consent.
- 4) Whether the intended sale of the suit land by the 3rd defendant is legal & justifiable.
- 5) Whether the defendants are jointly & several indebted to the Plaintiff (3rd defendant) up to the tune of outstanding banking facilities Tshs. 461,717,850.69 as from 2018 November, 2017.

- 6) Whether the suit land stands as continuing security for recovery of outstanding banking facilities stated under the 5th Issue.
- 7) Whether the initial baking facilities availed to the 2nd defendant were later structured and extended to the 1st defendant and remain security by the suit land.
- 8) Whether the plaintiff (3rd defendant) is entitled to attach and sell the suit land towards the recovery of outstanding banking facilities at hand.
- 9) Whether the claim of Tshs. 50,000/=, as pleaded in the set off by the 2nd defendant against the 3rd defendant, is tenable.
- 10) To what relief(s) are parties are entitled to.

I now proceed to evaluate the evidence adduced by the witnesses to determine and decide on the aforementioned issues.

To prove the above issues, the Plaintiffs' side had one witness, Mrs. Rose Mary Mleka, who testified as **PW1**. The 1st defendant had only one witness, Mr. Masele Nassor, who testified as **DW1**. The 2nd defendant called one witness, Mr. Henry Mtinda Matata, who testified as **DW2**, and the 3rd defendant summoned four witnesses; Oswald Galus Gwaoka, Hellena Kidai, Justian Anthon Luhendela and Sadoki Simwanza.

To prove her case, the Plaintiff and the only witness one Rose Mary Hawa Mleka (**PW1**) testified that she does not know the person with the name of Rose Matata Elias. She testified that she is residing at Kilimavali Plot No. 374, 375 and 376 with her husband one Henry Matata. According to **PW1**, the two of them were married on 22nd October, 1995 in Mwanza. To substantiate this fact, PW1 tendered Exhibit P1, the Marriage Certificate.

PW1 continued to testify that she is a businessperson and that in 1988 and constructed a building, one side is residential house and the other side is used for business. PW1 added that the Plot is registered in the name of the husband' but for now the building is registered in the name of Magnum Hotel. PW1 testified that DW2 did not involve her in changing the names. She went on testifying that in 2011 she found a letter that Henry Matata obtained a loan from Twiga Bancorp Bank now it is known as Tanzania Postal Bank.

PW1 further testified that the Bank has an intention to sell the house. She testified that she asked his husband if he obtained a loan from the bank he denied but later he admitted that he obtained a loan in a tune of Tshs. 6,000,000/= and mortgaged the house. PW1 testified that DW2 never consulted her and she did not give her consent. PW1 testified that Magnum

Hotel is their business premises, it belongs to her and DW2. PW1 added that she has sued the Twiga Bancorp Bank because they want to sell the house. PW1 testified that the Twiga Bancorp Bank has no right to sell the house because the Plaintiff did not give her consent. PW1 urged this court to restrain the third Defendant from selling the house. She added that in case they want to sell the house she is ready to pay Tshs. 6,000,000/=. PW1 concluded her testimony by stating that she was not aware of the debt stated in the counter claim of Tshs. 461,717,850.60/=

The first Defendant on his side called one witness, Mr. Masele Nassor Amily. He testified that he is the manager working with the Hotel Magnum from 1974 to 1998, he is supervising the lodge and bar. He testified that the name of Henry Matata was used in all payments. He stated that he Magnum Hotel (T) Ltd is not known to him. He testified that he used to collect money from the Hotel business of Henry Matata and deposited the same in the accounts. DW1 testified that Rose Mleka is the wife of Henry Matata.

When DW1 was examined by Mr. Mutalemwa, he testified that he is not a shareholder of Magnum Hotel and he is not aware that the Hotel has a loan of the Tshs. 400,000,000/=. He insisted that he is not aware that Rosemary was the Director of the hotel.

Upon cross examination by Mr. Nasmire, DW1 testified that he was not entrusted with any document regarding Magnum Hotel. He testified that he was supervising the bar, lodge, and hotel which were handled over to him for operation. He stated that the hotel is called Magnum Hotel and not Magnum Hotel (T) as stated in the certificate of incorporation. DW1 testified that he does not know the debt of Magnum Hotel (T) Ltd.

DW2 one, Henry Mtinda testified for the 2nd defendant, that Rosemary Mleka is his wife. They were together since 1988 and they have acquired matrimonial assets including Plot No. 374, 375 and 376. He testified that they also own a ship, a boat, a bus, and Plots of land. DW2 testified that they also own a hotel Magnum which includes a lodge and disco and Hotel Magnum (T) Ltd is different from Hotel Magnum. DW1 testified that in 2006, obtained a loan in his name from Twiga Bancorp and mortgaged his houses and vehicles both bearing his names, Henry Matata. DW2 testified that he took the loan without the consent of his wife because the bank did not require him to submit the documents.

DW2 did not end there, he testified that he serviced the loan thus he is not indebted. DW2 testified that at there was a time when he wanted an additional loan, but the bank required him to have a limited company as a

condition thus with the help of the Manager they inserted the word Limited in the documents. DW2 testified that the zonal office approved the said loan but the same was rejected at the Headquarters after releasing that it was a non-existing company for the reason that the company was not registered and there was no any Directors' body resolution. DW1 testified that Magnum Hotel is a matrimonial asset. He stated that if the bank will prove the debt he is willing to pay.

When DW2 was examined by Mr. Mutalemwa, he testified that Hotel Magnum (T) Ltd does not exist. DW2 testified that he fabricated the signature appearing in annexure D1 in order to obtain a loan. DW2 testified that on the counterclaim, the bank raised its claims against the Hotel Magnum and him. He testified that annexure D5 was prepared after he received the loan and the property is in the bank as a security.

During cross-examination by Mr. Nasmire, DW2 testified that, he signed annexure D1 and Rose noticed the same after receiving a demand notice and the loan was not mature since the Hotel Magnum was not registered.

Mr. Oswald Galus Gwaoka, **(DW3)** testified for the 3rd defendant. He testified that he was working with Twiga Bancorp from 1999 to 2012 at

Mwanza branch as an accountant and a Branch Manager. He testified that, he knows Henry Matata as a client of Twiga Bankcorp who took a loan in a tune of Tsh 55,000,000/= by his name, later in 2010, the name of the Hotel Magnum Company Limited was substituted to his personal name. He testified that DW2 applied for an additional loan and he signed exhibit D1 on 04.03.2010.

DW3 continued to testify that the total amount extended to Hotel Magnum was Tshs. 366,683,355.50 and he mortgaged Certificate of Title No. 7018, for Plot No. 374, 375 and 376 at Kirumba Valley within Mwanza Municipality. He testified that DW2 did not serve well his loan thus on 02.10.2010 the bank wrote him a reminder latter (Exh.D2) to inform him that Hotel Magnum (T) Ltd has a liability of Tshs. 366,683,355.50/= and the 21 Notice elapsed without servicing the loan. DW3 testified further that bank sent DW2 a Demand Notice to pay the loan (Exh.D3). He testified further that, they issued Land Form No. 45 which was admitted and stamped by Hotel Magnum (T) Ltd. DW3 testified that until he retired from bank employment on 10.04.2012 DW2 did no furnish the loan.

Upon cross-examination by Mr. Nasmire, DW3 testified that, the bank has a system of client to withdraw money from the bank using withdrawal

vouchers and the customer can request for the bank statement. He testified that a loan is granted upon application. DW3 testified that Mr. Henry Matata was the Director of Hotel Magnum Ltd.

When cross-examined by Mr. Gibson, DW3 stated that, Twiga Bancorp owed the Hotel Magnum (T) Ltd a loan of Tshs. 461,000,000/=. He testified that, the loan was first issued to Henry Matata with the consent of his spouse and later it was transferred to Hotel Magnum (T) Ltd.

At cross-examination by Mr. Frank, DW3 told the Court that, for a company to be issued with a loan it must exhibit the bank with documents such as Memorandum of Association, Board Resolution, and trading license, DW2 did so and the documents are with the bank.

The second witness for the 3rd defendant was Hellen Elianjiringa Kidai. She testified as DW4. She stated that she was worked with Twiga Bancorp at Liberty Branch. DW4 stated that she know Magnum Hotel as one of their client who was serviced with the loan and failed to pay. DW4 went on to testify that in June 2016 they wrote off Tshs. 416,717,860.69 as a loss and started the procedure to recover it. To substantiate her testimony she tendered exhibit D4 a statement of the customer signed on 05.01.2018.

Upon cross examination by Mr. Nasimire, DW4 testified that the statement covers the period from July 2013 to 30.08.2017 and she stated that they did not conduct a search at BRELA to see if Hotel Magnum existed.

DW4 was also cross examined by Gibson and testified that the bank owes Hotel Magnum (T) Ltd and its Directors and not at as an individual or at personal level. DW4 testified that the Hotel Magnum (T) Ltd has a certificate of incorporation, TIN, and VET, the same are kept in the bank.

The 3rd defendant called one, Justian Anthon Luhendela, (**DW5**) who testified that he worked with Twiga Bancorp. According to DW5 in 2006, Henry Matata applied for a loan in a tune of Tshs. 113,500,000/= and he mortgaged his Certificate of Occupancy of the Title Deed No. 374, 375 and 376 with a spouse consent. He testified that they signed the loan agreement on 30.10.2006 of Tshs. 113, 5000,000/= between Henry Matata, the borrower and Twiga Bancorp, the lender. To substantiate his testimony DW5 tendered exhibit D5, a spouse consent which was admitted as exhibit D7 and a Mortgage Deed which was admitted as exhibit D6. DW5 testified that DW2 did not service well the loan and that DW2 was advised to file an application to change his name to Hotel Magnum (T) Limited and DW2 complied with

the advice. The witness tendered the spouse consent which was admitted into evidence as exhibit D9.

Upon cross-examination DW5 testified that the Hotel Magnum Ltd fulfilled all conditions requires in obtaining a loan but he did not service it. DW5 testified that after 10 years the bank document are normally destroyed. He stated that DW2 gave him the spouse's consent.

The last 3rd defendant witness was Sadoki Simon Simwanza (DW6). He stated that he is employed by Tanzania Postal Bank at Kenyatta branch since the year 2019 but previously, he worked with Twiga Bancorp since 1994. He said that he knows the plaintiff, who claims that she was not involved when the loan was secured. DW6 testified that DW2 mortgaged landed properties in respect to Plot Nos. 374, 375 and 376 for a loan in a tune of Tshs. 461,717,850.69/=. DW6 testified that the fire incidence was reported to the bank but DW2 did not produce any evidence therefore, the claims were disregarded. DW6 urged this court to find that Twiga Bancorp owes the Hotel Magnum Tshs 416,717,850.69 and the amount to be recovered by selling the mortgaged properties. DW6 urged this court to disregard the claims of Tshs. 50,000/= of each day as claimed by DW2.

When DW6 was cross examined by Nasmire, he testified that Hotel Magnum Company Ltd was issued with a reminder to service his loan. DW6 testified that Rosemary is featured on exhibit D5 and she is among of the Directors. DW6 testified that exhibit D6 is a right of occupancy between Henry Matata and Twiga Bancorp, and persons who appended their signature were Matata Henry, Bendera, and Juma Hamisi Madawala but it was not signed by Rosemary.

DW6 continued to testify that a spouse's consent contains a picture of Rose Muhumo Matata, the Director of Hotel Magnum Company Ltd and her names appeared in the bank records. DW6 further testified that Rosemary gave her consent to DW2 to mortgage Plots Nos. 374, 375 and 376. He testified that he is aware of the Memorandum of Association and Articles of Association that show the powers of the Directors. He stated that he has not seen the Articles of Association of the company. He testified that that the Director's liability arises as they are the one who runs the business of Hotel Magnum and they make decisions.

When DW6 was cross-examined by Mr. Gibson, he stated that, Twiga Bancorp owes Hotel Magnum Tshs. 461,717,850.69/= the amount includes previous debts and the loan was obtained in 2006. He went on to testify that

the loan was advanced to the company. He testified further that the first person to apply for a loan was Henry Matata later he applied for transfer of the loan to Hotel Magnum Company Ltd and securities were Plots Nos. 374,375 and 376 and the spouse consent were in place.

Upon cross examination by Mr. Frank, DW6 testified that Henry Matata was required to bring his spouse. DW6 stated that Mr. Henry Matata did not service the loan as programmed and in 2010 DW6 applied for an additional loan and transfer the same to Magnum Hotel.

It is noteworthy to point out at this stage that the parties had on 19th December, 2020 agreed to make written final submissions for purpose of assisting the Court to determine the matter in controversy. The court blessed the agreement and proceeded to schedule the submission dates. Cheerful the order was compiled and honored by all parties.

After having received evidence from all the parties concerned, let me turn to analyse the available evidence based on the issues framed. I however, wish to state at the outset that, in the course of analyzing the evidence, I will re-arrange the issues and the interrelated and connected issues will be considered jointly. I will thus start with the first and second issues because

they are intertwined and I wish to refer to paragraphs 4, 5, 6, 7, and 9 of the Amended Plaintiff. On the first issue *of whether the suit land comprises of a certificate of Title No. 7018 Land Rent Mwanza is the property acquired jointly by the plaintiff and the second defendant. Second issue whether the Plaintiff has any registered recognized matrimonial interest in the suit land.*

Ms. Rosemary Mleka (the Plaintiff) challenged the sale of the mortgaged property which was secured by a certificate of Title No. 7018 Land Rent Mwanza, alleging, among other things that she is the legal wife of the second Defendant. To prove her case, PW1 testified to the effect that she was married to the second defendant in October, 1988. To substantiate her testimony she tendered a marriage certificate (Exh.P1). She testified that they are residing at Kilimavali Plots No. 374, 375, and 376. In order to prove that the property in regard to certificate of Title No. 7018 Land Rent Mwanza was acquired jointly by the plaintiff and the defendant. The question to ask is whether the disputed house was jointly owned. By virtue of Exhibit P1, which is a marriage certificate, the Plaintiff may be considered to have acquired an interest in the suit premise only if she proves that the disputed house was jointly acquired or she did something in developing it.

I understand that a landed property may be under the name of one spouse, the other spouse may have a contribution to the acquisition, maintenance, and or securing of that property. Also when the suit property was acquired by one spouse before marriage, the property is legally known as matrimonial assets. As it was held in the case of **Gabriel Nimrod Karwijilia v Theresia Hassani Malongo**, Civil Appeal No. 102 of 2018. In the instant case, the Plaintiff contends that she was doing small business *thus* she was able to contribute in constructing the house by supervising the construction process.

Regarding the issue of caveat, I am not in accord with the submission made by Mr. Mutalemwa, learned counsel for the 3rd Defendant that the plaintiff has ever registered her caveat for protecting her alleged matrimonial interest. The record reveal that PW1 testified to the effect that she did not register any caveat at the Registrar of Title. Prior to the amendment of section 114 of the Land Act, Cap. 113 which was effected through section 8 (2) (3) of the Mortgage Financing Act, the duty was imposed on the mortgagee under section 59 (1) of the LMA compelling any party who had an interest over a property to be mortgaged to register a caveat so as to preserve his/her interest. After the amendment, the lodging

of a caveat is no longer a requirement of the law as per section 8 (2) (3) of the Mortgage Financing Act which has shouldered the responsibility to the mortgagor to disclose the information of the spouse. For ease of reference, section 8 reads as follows:-

"... it shall be the responsibility of the mortgagor to disclose that he has a spouse or not and upon such disclosure the mortgagee shall be under the responsibility to take reasonable steps to verify whether the applicant for a mortgage has or does not have a spouse."

That is the position of the law and it was the position of the Court of Appeal of Tanzania in the case of **Hadija Issa Arerary v Tanzania Postal Bank**, Civil Appeal No. 135 of 2017.

Apart from the issue of caveat, the Plaintiff in her testimony did not testify how she made her contribution in acquisition of the alleged matrimonial property. However, as per DW2 he testified that the matrimonial property was acquired by both spouse and he even tendered a spouse consent to the bank. Therefore, the same suffice to prove that the matrimonial property was acquired by joint effort. Therefore, the first and second issues are answered in affirmative.

Now next for consideration is the third issue; *whether the suit land was mortgaged to the third Defendant by the second Defendant without Plaintiff's consent.* The main complaint of the plaintiff is that the suit property could not have been mortgaged because it was a matrimonial property in which her consent was to be sought and obtained. However, in this case the DW2 submitted that he presented a spouse consent to the Bank in order to obtain loan. In his testimony the DW2 testified that he did not ask his wife for her consent. DW2 also testified that he signed the consent on behalf his wife. He even confidently stated that he fabricated the documents in order to obtain loan. In my considered view, it was not the fault of the third Defendant, since they believed that the Plaintiff's consent was given. The DW2 is barred by the principle of estoppel articulated under section 123 of the Evidence Act, Cap. 6 [R.E. 2019] that:-

"When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief, neither he nor his representative shall be allowed, in any suit or proceedings between himself and that person or his representative, to deny the truth of that thing. "

The spouse consent was presented to the Bank and the third Defendant acted on the strength of that spouse consent, there was no reason that prevented the third Defendant from disbursing the loan. I therefore subscribe to the testimony of the DW2, who did state that the spouse consent was in place and the DW2 is the one who prepared and signed it. I also subscribe to the submission of Mr. Mutalemwa, learned counsel for the 3rd Defendant that the first and second Defendants cannot benefit from such wrongs. Taking into account PW1 when she was cross examined stated that Twiga Bancorp Bank has a right to sell the house because her husband obtained a loan. In the cases of **Leila Jalaludia Haji Jamal v Sharifa Jalaludia Haji Jamal**, Civil Appeal No. 55 of 2003, **Chain Food International Company Limited v Rena Calist and Alpha Choise Limited**, Land Case No. 49 of 2015 (unreported).

Mr. Nasimire in his final submission, contended that the spouse consent is fraught with a number of problems. However, in my view, the issues concerning the defects on the spouse consent, PW1 admitted that it was her picture which was affixed in the spouse consent and DW2 admitted that he is the one who prepared and presented the said spouse consent to the bank. He is the one who made the bank to believe that it was a genuine

spouse consent. Therefore, it is not right to come before this court and to blame the third Defendant who effected the loan based on the spouse consent issued by the second Defendant. The cited case of **Mrs. Shakila Parves v Mutabasam Parvers Shabridin**, Land Case No. 46 of 2015 cited by Mr. Nasimire is distinguishable from the instant case because in the cited case the spouse consent was not in place while in the instant case the spouse consent is in place. Therefore, the third issue is answered in negative.

Next for consideration is the fourth and eight issues. These issues are intertwined too, and therefore I will determine them together. The said issue revolves around paragraphs 5 and 6 of the Amended Written Statement of Defence by the third Defendant and paragraphs 27 of the Counter Claim. The issue is *whether the intended sale of the suit land by the third Defendant is legal and justifiable* and *whether the plaintiff is entitled to attach and sale the suit land towards the recovery of outstanding banking facilities at hand*. The third Defendant to prove his case in counter claim summoned three witnesses and tendered seven exhibits which intend to prove the third Defendant claims.

The third Defendant has raised his claims that his sale of the suit land is legally and justifiably. To prove his position, DW1 testified to the effect that the second Defendant obtained a loan in the security of Plots No. 374, 375 and 376 at Kirumba Valley Mwanza City with a certificate of Title No. 47018.

The certificate of title (Exh.D8) in which the legal mortgage was registered shows that the suit land stands as a security for the repayment of unspecified amount at the Tanzania Postal Bank, formerly known as Twiga Bancorp Limited. DW3 in his testimony testified to the effect that on 21st October, 2010 a call for facility was issued and accepted by the second Defendant. DW3 claimed that the loan was extended to Hotel Magnum whereby DW2 obtained a loan in a tune of Tshs. 366,683,355.58/= and he mortgaged a Certificate of Title No. 7018 a property allocated in Plot Nos. 374 375 and 376 at Kirumba valley within Mwanza Region. The 3rd defendant's witnesses testified to the effect that the outstanding amount to date is Tshs. 366,683,355.58/=.

Moreover, DW1 tendered exhibit D1 which shows the loan amount of Tshs. 366,683,355.58/= the amount which was transferred to Hotel Magnum Company Limited. When DW1 was cross examined he stated to the effect that DW2 obtained a loan in a tune of Tshs. 366,683,355.58/= the

loan has not been paid to date. The third Defendant tendered a legal mortgage (Exh.D6), the document was prepared by the third Defendant and signed by Henry Ntinda Matata and his Advocate and the third Defendant also appended his signature. The document empowers the third Defendant, the Bank to sell the mortgaged landed property in case of any default by the lender. I reproduce Clause 4.01 for easy of reference. The legal mortgage reads that:-

" At any time after the mortgagor or the debtor is in default the lender shall have power to sell the property and remedies confers on mortgages in accordance to section 125 of the Land Act..."

Based on the above Clause it is clear that the second Defendant and the third Defendant had agreed that at any time after the mortgagor or the debtor is in default the lender would have the power to sell the property. Having said, it is obvious that *the 3rd defendant is entitled to attach and sell the suit landed property towards the recovery of outstanding banking facilities at hand.*

It is settled law that parties are bound by the agreements they freely entered into and this is the cardinal principle of law of contract that there should be a sanctity of the contract as lucidly stated in the case of **Abdualy**

Alibahai Azizi v Bhatia Brothers Ltd [2000] TLR 288. WITH THE same spirit of the principle of sanctity of contract and being mindful with the agreement of additional loan and restructured facilities (Exh. D1) As long as the second Defendant entered into an agreement freely with sound mind with the third Defendant and the agreement had all attributes of a valid contract means the second Defendant admitted the liabilities and at the time when he entered into the agreement, he did not complain about that his spouse consent.

The DW2 did not complain that the agreement was obtained by coercion, undue influence, fraud or misrepresentation in order to make it voidable in terms of provision section 19 (1) of the Law of Contract Cap. 354 [R.E 2019]. I therefore wish to emphasize that since the second Defendant was of sound mind, he must adhere and fulfill the terms and conditions of the said Agreements, (Exhibit.D1) and (Exhibit D.6).

Having determined the above issues at length, it is my considered view that this issue is answering the 8th issues *that the plaintiff in counter claim is entitled to attach and sell the suit land towards the recovery of the outstanding banking facility*. Therefore the fourth and eight issues are answered in affirmative.

I will now direct my mind to the 5th issue, *whether the defendants are jointly & several indebted to the Plaintiff (3rd defendant) up to the tune of outstanding banking facilities Tshs. 461,717,850.69 as from 2018 November, 2017.* The third Defendant's witnesses proved their case by producing documents which reveal that one Henry Ntinda Matata transferred his right of occupancy to Hotel Magnum (T) Limited, the Transfer of a Right of Occupancy was tendered in court and the same was admitted as **Exhibit D9**. The document tent to prove that the transfer was made and the same was acknowledged by the second Defendant (Henry Ntinda Matata) who signed the transfer. Therefore in my view, the defendants are jointly & several indebted to the 3rd defendant. Therefore this issue is answered in affirmative.

Next issue for consideration is the sixth and seventh issues, I have opted to address them together because they intertwined. The issues are *whether the suit land stands as a continuing security for recovery of outstanding banking facilities stated under the 5th Issue.* The third defendant proved his case and convinced this court that the security for recovery of outstanding banking facilities of Tshs. 461,717,850.69 from 2018 November, 2017 to-

date is recognized as a security for recovery of the outstanding banking facility of Tshs. 461,717,850.69.

Then the first Defendant applied for additional loan in a tune of Tshs. 70,000,000/= and restricted facility to make a total of Tshs. 366,683,355.50. To substantiate his testimony DW1 tendered a letter titled Application for Additional Term Loan Tshs. 70,000,000/= and Restructured Facilities (Exh.D1) addressed to Hotel Mangum Company Limited whereas Mr. Henry N. Matata (DW2) accepted the offer and appended his signature the same bears a stamp of Hotel Magnum Ltd. Through a letter dated 2nd October, 2010 (Exh D2), the third Defendant wrote a letter to Hotel Magnum Company Limited extending the loan facility amounting Tshs. 366,683,355.50.

The first Defendant's Advocate in his final submission strongly disputed that the first Defendant is not jointly and several indebted to the third Defendant for the main reason that the third Defendant has a claim against Hotel Magnum Company Ltd and not the first Defendant whose name is Hotel Magnum. I have read the documents specifically, Exhibit D1, Exhibit D2 and Exhibit D4, the third Defendant was addressing the first Defendant as Hotel Magnum Hotel that is the name appearing in the said documents.

Although the Hotel stamp bears the name of Hotel Magnum Limited. DW1 testified to the effect that he is working with Hotel Magnum. The confusion of names is not on the part of third Defendant only but also the second Defendant in exhibit D1 appended a stamp bearing the name of Hotel Magnum Limited. Now, the third Defendant changed the name of the Hotel to Hotel Magnum.

In my considered opinion, I find that the omission of including the word Company was minor one, because the parties can be ordered to change the Hotel name. I have also considered that the 1st defendant has not been prejudiced in any way. Nevertheless, if the name was not properly stated the same can be amended and the court to proceed with entertaining the matter. The Court of Appeal in the case of **Christina Mrimi v Coca Cola Kwanza Bottlers Ltd**, Civil Application No. 113 of 2011 allowed the applicant to correct the name of the respondent, and the application was granted.

Similarly, in a recent case of **Victoria Rweyamamu Binamungu & Another v Geoffrey Kabaka**, Civil Application No. 602/08 of 2017 [TANZLII 10TH June, 2020], the Court of Appeal held that:-

" The issue of names is designed to get a mountain out of a molehill.

The error made by the applicant was made out of his knowledge since at all the time the applicant addressed the respondent by the same name..."

Applying the above authority, the evidence on record shows that in all the correspondence the first Defendant was addressed as Hotel Magnum Company Hotel. In the said circumstance, I have to say that the court in making its decision needs to base on substantive justice rather than technicalities. The second Defendant's Advocate contention on the names can hardly find path because the other three names ' HOTEL MAGNUM LTD of the second Defendant are correct, only the word Company is added, cannot preclude the second Defendant from the liabilities. .

Having discussed the above issue in length, I have to say that this issue is also answering the 7th issues that the initial banking facilities availed to the DW2 and extended to the DW1 remain secured by the suit land.

he ninth issue, whether the claim of Tshs. 50,000/= for each day, as pleaded in the Set off by the 2nd defendant against the 3rd defendant, is tenable. This issue is related to the set-off claims raised by the second Defendant. It is the requirement of the law that whoever alleges must prove.

Therefore, the burden of proof lies with a person who claims. The Rule finds backing from the provisions of sections 110 and 111 of the Law of Evidence Act, Cap.6 [R.E 2019] states categorically to whom the burden of proof lies as follows:-

" 110 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(3) 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 above position of the law, the burden of proof of the same at the required standard is left to the Plaintiff (first Defendant) being the one who alleges. What this court is to decide upon is whether the burden of proof has been discharged by the Plaintiff. After evaluating the evidence on record it is obvious that the Plaintiff (first defendant) had no any cogent evidence to prove his claims. Therefore this issue is answered in negative.

The last issue for consideration is *what relief (s) are parties are entitled to*. Guided by the observations and analysis of all nine issues, I have found that the plaintiff in his main case and defendants in counter claim are not entitled to any relief as they have failed to prove their claims. One of the

canon principles of civil justice is for the person who alleges to prove his allegation. The same was held in the case of **Abdul Karim Haji v Raymond Nchimbi Alois and Another**, Civil Appeal No. 99 of 2004 (unreported) the Court of Appeal of Tanzania held that:-

"...it is an elementary principle that he who alleges is the one responsible to prove his allegations."

The above position of the law was also observed by the former East African Court of Appeal in the case of the **East African Road Services Ltd v J. S Davis & Co. Ltd** [1965] EA 676 at 677, it was stated that:

" He who makes an allegation must prove it. It is for the plaintiff to make out a prima facie case against the defendant. "

Applying the above authorities, I have to say that the 3rd Defendant has proved this allegation to the required standard; a standard higher than the not have any flicker of doubt that the evidence of the 3rd defendant was true.

On the other side, it is my considered view that the plaintiff in her case and defendants in counter claim have failed to prove their case. That is in accordance with the elementary principle of he who alleges must prove as embodied in the provisions of section 110 (1) of the Evidence Act [Cap. 6

R.E. 2002]. The plaintiff and defendant in counter claim are not entitled to any relief; Rosemary Mleka failed to prove her case taking to account that his husband (second Defendant) has admitted that he is the one who signed the spouse consent (Exh. D7) the wrongdoing of a spouse cannot be used against the plaintiff in the counter claim. The DW1 in his set off is also not entitled for any relief as I have elaborated earlier that he did not tender any documentary evidence to prove his claims against the 3rd defendant. In the circumstance, both the plaintiff's claims and the defendants' claims are to be dismissed.

The plaintiff (3rd Defendant) in his counter claim has proved his claims. I am saying because DW1 proved that the plaintiff extended a loan in a tune of Tshs. 366,683,355.58 whereas a call for the facility (Exh. D1 and Exh.D2) was issued and accepted by the DW2 who is one of Directors of Hotel Magnum (T) Limited, therefore, this is a genuine outstanding debt. DW6 testified to the effect that the suit landed property still stands as a continuing security for the repayment of Tshs. 461,717,850.69/= also claimed that the total liability due and payable to the first Defendant was in a tune of Tshs. 461,717,850.69/= (Exh.D4). Therefore, the evidence on records proves that

the first and second Defendants are jointly and severally liable for repayment of Tshs. 461,717,850.69/= as pleaded by the plaintiff in the counter claim.

In the case at hand, the plaintiff in counter claim has prosecuted his case successfully and, certainly, has incurred costs in this endeavour. These are costs involved in the suit which the defendants must shoulder. I find no sufficient reason why the 1st and 2nd defendants should be deprived of the same. For the aforesaid reasons, the Plaintiff's case is dismissed with costs. The 3rd Defendant counter claim is granted in the following manner:-

1. The landed property comprises of certificate of title No. 7018 Plots 374, 375, and 376 be attached and sold towards the recovery of outstanding facilities of Tshs. 461,717,850.69/= due and payable.
2. The 1st and 2nd Defendants in counter claims to pay court interest of 7% on the outstanding facilities from the date of the judgment to the date of recovery thereof.

Order accordingly.

DATED at MWANZA this 05th March, 2021.


A.Z.MGEYEKWA

JUDGE

05.03.2021

Ruling delivered on 05th March, 2021 in the presence of Mr. Nasimire, learned counsel for the plaintiff, Mr. Frank, learned counsel holding brief for Mr. Felix, learned counsel for the 1st Defendant. Mr. Frank, learned counsel for the 2nd defendant and Mr. Mutalemwa, learned counsel for the 3rd defendant.



A.Z.MGEYEKWA

JUDGE

05.03.2021

Right to appeal full explained.