

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY

IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MBEYA)
AT MBEYA

LAND CASE 04 OF 2017

NEWTON MWASABWITE MWATOJOBI.....1ST PLAINTIFF
JENIPHA AZIZ.....2ND PLAINTIFF

VERSUS

SHABAN ALIKI MWASOPO.....1ST DEFENDANT
NCBA BANK TANZANIA LIMITED.....2ND DEFENDANT
NUTMEG AUCTIONEERS AND
PROPERTY MANAGERS CO. LTD.....3RD DEFENDANT

JUDGEMENT

Date of Hearing : 26/02/2021
Date of Judgement: 20/05/2021

MONGELLA, J.

The plaintiffs herein have sued the defendants for the following reliefs:

- (a) A declaratory order that the mortgage transaction between the 1st and 2nd defendants is null and void.
- (b) Permanent injunction restraining defendants in entering, interfering and doing any activity in the premise in dispute.
- (c) General damages.
- (d) Costs of the suit, and any other reliefs deemed just by the court.



In the plaint it was alleged that, in 2011 the plaintiffs guaranteed a loan to the tune of one hundred and seventy million (170,000,000/-) advanced to the 1st defendant by the 2nd defendant trading in the name of **Commercial Bank of Africa** (now **NCBA Bank Tanzania Limited**). The purpose of the loan was to enhance the 1st defendant's business. In guaranteeing the loan, the plaintiffs mortgaged their matrimonial house located at Mwakibete area within Mbeya City.

The plaintiffs claimed that the 1st defendant faithfully repaid the loan installments until the full amount was almost realised. In 2013 however, without the plaintiffs' consent, he obtained a second loan using the same security thereby raising the debt to the tune of T.shs. three hundred nineteen million and four hundred forty four thousand (319,444,000/-). On 24th February 2017 the plaintiffs heard a public advertisement by the 3rd defendant that their matrimonial home is about to be sold following the 1st defendant's default in repaying the second loan to the 2nd defendant. The plaintiffs claimed to have no knowledge of the second loan advanced to the 1st defendant. They claimed to have not been involved or consented in mortgaging their matrimonial property in securing the said loan. In the premises they claimed that the said second loan is unlawful and unjustifiable.

On his part, the 1st defendant admitted all the facts stated in the plaint, thus it was only the 2nd and 3rd defendants who defended the case. The 2nd and 3rd defendants disputed the plaintiffs' claims. In their WSD they averred that on 29th November 2013 the plaintiffs consented to and guaranteed a variation/restructuring of the overdraft credit facility to the

tune of T.shs. 319,444,444.42/- which was advanced to Sop's Food and Grains Investment Limited, the borrower. They claimed that all the transactions undertaken in securing the said loan were lawful and the plaintiffs are responsible in settling the outstanding liability of the borrower to the 2nd defendant.

The 2nd and 3rd defendants also filed a counter claim however, during hearing of the defence case, their counsel, Mr. Joseph Mbogela prayed to withdraw the said counter claim. The same was accordingly marked withdrawn.

During the final pre-trial conference, three issues were framed for determination of the matter at hand being:

1. *Whether in 2013 the 1st defendant obtained a second loan amounting T.shs. 319,444,000/- from the 2nd defendant and secured the same using the plaintiffs' matrimonial property without their consent.*
2. *Whether the 1st plaintiff and the 1st defendant had personally guaranteed the said loan by signing a personal limited guarantee and indemnity.*
3. *To what reliefs are the parties entitled to.*

The plaintiffs in proving their case mounted two witnesses. On the other hand, the 2nd and 3rd defendants mounted 1 witness. In proving the first issue, **PW1, Newton Mwatojobi (the 1st plaintiff)** testified that, he and his wife, the 2nd plaintiff, guaranteed a loan issued by the 2nd defendant to

the 1st defendant. The loan guarantee was through mortgaging their matrimonial house located at plot No. 175, Itongo street, Block I Mwakibete area within Mbeya city. The loan was to the tune of T.shs. One hundred and seventy million (170,000,000/-) and was to be repaid within twelve months. In 2013 however, the 1st defendant obtained another loan from the 2nd defendant to the tune of T.shs. 319,414,000/-. He claimed that the said loan was obtained using the same mortgage documents that were used in the first loan without their consent thus obtained fraudulently. He claimed to have learnt about the second loan on 24th February 2017 through an advert on sale of his house.

On the other hand, **DW1, Sibogo Maduhu**, an officer from NCBA Bank, who was the only witness for the 2nd and 3rd defendants, testified that the plaintiffs guaranteed the loan advanced to Sops Food and Investment Ltd by charging on mortgage a house located at Plot No. 175 Mwakibete area within Mbeya City. To back up his testimony he tendered the Credit Facility Letter and the mortgage deed which were admitted as "exhibit D2 and exhibit D1 respectively."

Explaining the contents of the mortgage deed, he said that the overdraft facility was of T.shs. 250,000,000/- and was signed on 06th July 2011. In case of default the bank had a right to recover T.shs. 100,000,000/- from the security offered by the plaintiffs. He said that under clause 7 of the deed continuity of security is provided to the effect that where there is variation, the property charged continues to secure the loan until when it is fully paid. However, he said, the loan was never repaid as agreed as it

remained at T.shs. 250,000,000/- after the agreed repayment period of twelve months.

DW1 testified further that given the non-repayment of the loan and the situation of the borrower (the 1st defendant), the 2nd defendant had to deploy ways of assisting him, hence another agreement was entered in 2012. To this effect another Credit Letter Facility was issued on 18th September 2012. This was admitted in court as "exhibit D3." As per this credit facility, the loan of T.shs. 250,000,000/- was divided into two parts:

The first part was T.shs. 150,000,000/- which remained as overdraft at 25% interest. It was payable on demand by the lender, but in absence of demand it was to be repaid within 12 months from date of disbursement. The terms also provided that should the borrower wish to extend the overdraft facility beyond 12 months, a request should be considered by the lender depending on the borrower's circumstances. DW1 also said that the overdraft was reduced for T.shs. 100,000,000/- with a purpose of financing working capital.

The second part was a term loan amounting to T.shs. 100,000,000/- at an interest rate of 25%. The repayment period was 3 years (36 months). The purpose of restructuring this part of the overdraft facility was to facilitate smooth repayment.

DW1 continued to testify that the collateral remained the same. He testified further that the loan was not repaid as per the agreement. Thus they had to enter into a fresh agreement. This was the third agreement

with the aim of enabling the borrower to repay the loan and avoiding the Bank going after the collateral. He said that in November 2013 another agreement was signed, whereby another credit facility letter titled "Credit Facility Restructuring" was issued. This was admitted in evidence as "exhibit D4."

As per the terms of "exhibit D4" the two previous groups of loans were merged into one loan, together with arrears on interests. In total it amounted to T.shs. 319,444,444.42. This was termed as "term loan" with a purpose of restructuring the loan at an interest rate of 24% and to be repaid in 60 months period (5 years). DW1 testified that the collateral remained the same, but there was an additional security of personal guarantee from Newton Mwasabwite Mwatojobe and Shabani Alik Mwasopo, the 1st plaintiff and 1st defendant, respectively. He said that Newton Mwasabwite Mwatojobe and Shabani Alik Mwasopo signed the personal guarantee before a commissioner for oaths. This presented T.shs, 400,000,000/-. It was admitted in evidence as "exhibit D5."

As per the personal guarantee, the agreement was to the effect that, in case of failure to repay, the guarantee shall be used to reclaim T.shs. 400,000,000/- plus interest and other charges. He concluded his testimony saying that the borrower still failed to repay the loan and the Bank reached a decision to recover its money through the collaterals charged.

With regard to whether the 1st plaintiff and the 1st defendant signed a personal limited guarantee and indemnity guaranteeing the loan, PW1 denied to have guaranteed the second loan. He only admitted

guaranteeing the first loan issued in 2011. He said that he never signed any documents guaranteeing the loan issued in 2013. He admitted the signatures in documents regarding the 2013 loan resembling his, but claimed that the same were forged. On cross examination he stated that he noted the forgery in 2017 through the written statement of defence by the 2nd and 3rd defendants. He said that he knew the first loan was repaid in full as he was told so by the 1st defendant through a phone conversation. When asked about the actions he took after learning about the forgery, he said that he never took any action.

PW2, one **Maria Dominic**, who was the Mtaa Chairperson of Itongo street between 2009 and 2014, testified to have verified the house belonging to the plaintiffs for purposes of facilitating advancement of a loan to the 1st defendant in 2011. She said that as Mtaa Chairperson, one of her duties is to verify if the properties charged in mortgage for bank loans belongs to the person mortgaging the property and is located in the street under her mandate. She thus said that as a leader at local government, she was only aware of the loan issued to the 1st defendant in 2011 by the 2nd defendant then known as CBA Bank.

DW1 on the other hand tendered Exhibit D5, the "Personal Limited Guarantee and Indemnity" to signify that the 1st plaintiff guaranteed the loan by signing the personal guarantee.

After considering the testimonies of the witnesses for both parties and thoroughly gone through the exhibits tendered in evidence, I find that there is no dispute that the plaintiffs guaranteed the loan initially

advanced to the 1st defendant trading as **Shaban/Wajina Alick Mwasopo T/a Sopo Grains Merchant**. The plaintiff in his testimony said that the loan was T.shs. 170,000,000/-. This however, is negated by the contents of exhibit D1 and D2, which he did not dispute. DW1 also testified to the same effect. As exhibited in exhibit D1 and D2 the initial loan was to the tune of T.shs. 250,000,000/-. There was also discrepancy as to the exact amount of the outstanding loan, which is the subject of the matter at hand. However, as per exhibit D4, the amount is T.shs. 319,444,444.42.

Having cleared that I move to the question as to whether the amount of T.shs. 319,444,444.42 issued as "term loan" was issued as a second loan to the 1st defendant. After closely scrutinizing the exhibits tendered, I have noted that the initial loan of T.shs. 250,000,000/- was advanced to **Shaban/Wajina Alick Mwasopo T/a Sopo Grains Merchant, of P.O. Box 5040, Mbeya** as the borrower. This is per exhibit D1 and D2. On the other hand, as per exhibit D4 and D5, the term loan of T.shs. 319,444,444.42 was advanced to **Sop's Food and Grains Investment Limited of P.O. Box 71534, Dar es Salaam**. I thus agree with Mr. Pomboma in the arguments he advanced in his final submission that these are in fact two different borrowers.

Being two different borrowers I do not agree with the testimony of DW1 and the submission by Mr. Mbogela that the restructuring of the loan of T.shs. 250,000,000/- advanced to **Shaban/Wajina Alick Mwasopo T/a Sopo Grains Merchant, of P.O. Box 5040, Mbeya** could result to a term loan of T.shs. 319,444,444.42 advanced to **Sop's Food and Grains Investment Limited of P.O. Box 71534, Dar es Salaam**. I have gone through the exhibits

presented by the 2nd defendant and have not come across any clause suggesting that the two borrowers are one and the same.

It is trite law that where there is presence of documentary evidence on terms of contract it surpasses oral evidence. See: **First National Bank (T) Limited v. Miles Solutions Co. Ltd & 2 Others**, Commercial Case No. 108 of 2017 (HC Com. Div. at DMS, unreported). See also: **Section 100 and 101 of the Evidence Act, Cap 6 R.E. 2019**. The testimony of DW1 is contradicted by exhibit D1, D2, D4 and D5 which like I have already pointed out shows that the borrowers are different. The contents of exhibit D4 show that the purpose of credit facility restructuring was to restructure the existing facilities into one Term Loan Facility.

In the premises, it is my view that, in the absence of express provisions in the credit facilities to the effect that the loan advanced to **Shaban/Wajina Alick Mwasopo T/a Sopo Grains Merchant, of P.O. Box 5040, Mbeya** is one and the same as that issued to **Sop's Food and Grains Investment Limited of P.O. Box 71534, Dar es Salaam**, the loan of T.shs. 319,444,444.42 becomes a fresh loan issued to the 1st defendant. If there was indeed a loan prior issued and had to be restructured to enable smooth repayment, then the same must have been advanced to **Sop's Food and Grains Investment Limited of P.O. Box 71534, Dar es Salaam** and not to **Shaban/Wajina Alick Mwasopo T/a Sopo Grains Merchant, of P.O. Box 5040, Mbeya**, which the plaintiffs agree to have guaranteed.

The plaintiffs claimed that the amount of T.shs. 319,444,444.42 advanced to the 1st defendant by the 2nd defendant was secured using their

matrimonial property without their consent. In addition to that they denied the "Personal Limited Guarantee and Indemnity" to have been signed by the 1st plaintiff. In his testimony, the 1st plaintiff claimed that the signature resembled his, but was forged. On the other hand, DW1, when cross examined by the plaintiffs' advocate, Mr. Barnabas Pomboma admitted that there was a slight difference on the 1st plaintiffs' signature between exhibit D1 and exhibit D5. He however defended that the 1st plaintiff signed before the commissioner for oaths as seen on exhibit D5.

In his final submission, Mr. Mbogela argued that the 1st plaintiff alleges that his signature has been forged but has failed to prove the forgery. He argued that the law is settled to the effect that the one who alleges must prove. He contended that the allegation of forgery by the 1st plaintiff is wanting as no proof to that effect has been provided under the law. In support of his argument he referred to the case of **Registered Trustees of Alli Mberesero Foundation v. Kapesa Benedict Mberesero**, Commercial Case No. 176 of 2017 (HC Com. Div. at DSM, unreported).

In my considered view, as much as I agree with Mr. Mbogela that the law requires the one alleging to prove, I find the circumstances in this case being different. First, as argued by Mr. Pomboma in his submission and admitted by DW1 during cross examination, the 1st plaintiff's signature in exhibit D1 differs from that appearing in exhibit D4 and D5. The difference is quite obvious and I do not agree that it needs proof of a handwriting expert as argued by Mr. Mbogela. Second, as I have already observed above, since the two loans appear to have been advanced to two different borrowers, then the benefit of doubt goes to the plaintiffs.

In the premises I find the 1st issue answered in the affirmative. The plaintiffs never consented to their matrimonial property located at plot No. 175, Itongo street, Block I Mwakibete area within Mbeya city to be used in securing the loan advanced to the 1st defendant in the name of **Sop's Food and Grains Investment Limited of P.O. Box 71534, Dar es Salaam**. The 2nd issue with respect to the 1st plaintiff is answered in the negative. The 1st plaintiff did not did not sign the personal limited guarantee and indemnity.

DW1 testified that the loan of T.shs. 250,000,000/- advanced to the 1st defendant and guaranteed by the plaintiffs remained unpaid. In my view, I find this being a subject of another matter. If indeed the said loan was not repaid, the 2nd defendant can recover its money as per the terms of exhibit D1 and in accordance with the provisions of the law. He cannot however recover the same through a loan advanced to another borrower, that is, **Sop's Food and Grains Investment Limited of P.O. Box 71534, Dar es Salaam** as he purportedly tried to do.

To this point I move to the 3rd issue on the reliefs entitled to the parties. I wish to start with the general damages prayed by the plaintiffs to the tune of T.shs. 100,000,000/-. It is settled under the law that general damages are payable upon proof of the loss or injury suffered. See: **National Bank of Commerce Limited v. Lake Oil Limited**, Commercial Appeal No. 5 of 2014 (HC Commercial Div. at DSM, unreported); **MS FishCorp Limited v. Ilala Municipal Council**, Commercial Case No. 16 of 2012 (HC Commercial Div. at DSM, unreported); **Dr. Abraham Israel Shuma Maro v. National Institute for Medical Research (NIMR) and the Attorney General** [2015] LCCD 161;

Marine Services Company Ltd. v. Willbard R. Kilenzi [2015] LCCD 133; and **Tanzania Breweries Limited v. Nancy Morenje** [2015] LCCD 17 just to mention a few. The plaintiffs however, did not demonstrate any injury or loss suffered as a result of the defendants' actions. I thus shall not award any general damages.

The plaintiffs are therefore entitled to the following reliefs:

1. The mortgage transaction between the 1st and 2nd defendants charging the plaintiffs' property located at plot No. 175, Itongo street, Block I Mwakibete area within Mbeya city, with respect to the credit facility advanced to **Sop's Food and Grains Investment Limited of P.O. Box 71534, Dar es Salaam** is hereby declared null and void.
2. The defendants are permanently restrained from entering, interfering and doing any activity in the plaintiffs' premises located at plot No. 175, Itongo street, Block I Mwakibete area within Mbeya city, with respect to the credit facility advanced to **Sop's Food and Grains Investment Limited of P.O. Box 71534, Dar es Salaam**.
3. Costs of the suit.

Dated at Mbeya on this 20th day of May 2021.




L. M. MONGELLA
JUDGE

Date: 20/05/2021

Coram: Z.D. Laizer – Ag. DR

1st Plaintiff: Present

2nd Plaintiff: Absent

For the Plaintiff: Mr. Osiah Adam, Advocate

1st Defendant: Absent

For the 2nd Defendant: Absent

For the 3rd Defendant: Absent

B/C: Mapunda

Court: Judgement delivered in the presence of Mr. Osiah Adam, Advocate for the plaintiffs and the first plaintiff.




Z.D. Laizer
Ag. DEPUTY REGISTRAR
20/05/2021

Order: Right of appeal explained.


Z.D. Laizer
Ag. DEPUTY REGISTRAR
20/05/2021