

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

LAND APPEAL NO. 24 OF 2020

**(C/F Application No. 177/2017 of the District Land and Housing Tribunal of Arusha at
Arusha)**

JOSEPHINE PETRO NNKO.....APPELLANT

VERSUS

CRDB BANK PLC.....RESPONDENT

JUDGMENT

4/03/2021 & 27/05/2021

GWAE, J

The appellant, Josephine Petro Nnko aggrieved was with the decision of the District Land and Housing Tribunal for Arusha in Application No. 177/2017, has lodged this appeal with a total of four grounds namely;

- i. That, the trial tribunal erred in law and in fact by dismissing the application while the appellant presented a strong case.
- ii. That, the trial tribunal erred in law and in fact by granting the prayers that the appellant should pay the loan while the respondent did not rise a counter claim.

- iii. That, the tribunal erred in law and in fact by taking into consideration the respondent's evidence adduced during trial which were very weak and unreliable.
- iv. That, the tribunal erred in law and in fact by delivering a judgment which does not collocate with the evidence adduced during trial.

Brief facts giving rise to this appeal are best captured as follows; that, on the 19th March 2014 the appellant secured a loan from the respondent in the tune of Tshs. 50,000,000/= where the appellant mortgaged her house located at Engutoto within Arusha Municipality. The credit facility period was for 24 months where the monthly repayment schedule was explained and included in the loan agreement. It appears from the trial tribunal's record, the appellant made payment for only two installments ever since the loan was advanced to her and since then she had never made any repayments of the outstanding balance.

Following the appellant's failure to repay the outstanding balance, on the 6th August 2014 the respondent issued the appellant with the reminder notice requesting her to pay Tshs. 2,315,081.17 being arrears, yet the appellant did not make any repayment to the respondent. Consequently, on 07/10/2014 the respondent issued the appellant with a demand notice of 60 days to pay the money due on the term loan amounting to Tshs. 47,910,413. 07 being the principal sum plus accrued interests owing to the respondent in respect of term loan granted to the appellant. Failure to repay the outstanding balance within the specified time

the respondent was to sell the pledged property for the purpose of recovering the outstanding loan balance.

After being issued with the demand notice, on 31/07/2017 the appellant filed an application before the District Land and Housing Tribunal alleging that she has been repaying the loan as per the loan agreement but to her surprise she was issued with a demand letter requiring her to repay the outstanding loan balance within six weeks and failure to that, the mortgaged property was to be sold. The appellant prayed for the following reliefs;

- ~~i. A declaration that the intention of sale of the appellant's property is illegal.~~
- ii. A permanent injunction restraining the respondent, their agent's servant or workmen from evicting the appellant from the suit premises and or denying the appellant with her peaceful enjoyment of the suit premises.
- iii. Payment of general damages.
- iv. Any other relief (s) the tribunal deem fit to grant.

In proving her case, the appellant, summoned one witness while the respondent secured two witnesses. After hearing of the application, the tribunal dismissed the application and the appellant was ordered to repay the loan to the respondent.

On hearing of this appeal, the appellant was represented by the learned counsel **Mr. Melkzedeck Hekima** while the respondent enjoyed legal services of **Mr. Ngereka Miraji**.

Submitting on the grounds of the appeal Mr. Hekima abandoned grounds number 2 and 3 and argued on grounds number 1 and 4 where he stated that the issue before the tribunal was on injunction to restrain the respondent from selling the appellant's house however the tribunal dealt with the issue of loan agreement. He was therefore of the opinion that by not determining the issue before it, the decision of the DLHT was a nullity.

On the part of Mr. Miraji, he argued that, the decision of the DLHT based on the issues that were framed by the parties and were in accordance with the parties' pleadings. He went further to state that, the appellant in her testimony admitted to have taken a loan of Tshs. 50,000,000/= from the respondent and that she had failed repaying the loan therefore the argument that the appellant presented a strong case is unjustifiable. Mr. Miraji was of the view that this appeal is nothing but a wastage of time and essentially it is intended to bar the respondent from executing his right as this court is an appellate court and cannot grant the sought injunction order sought by the appellant counsel.

In his rejoinder, the counsel for the appellant reiterated what he stated in his submission in chief. More so, added that this court has a mandate to give the order restraining the respondent from disposing the mortgaged property.

Having carefully considered the rival arguments advanced by the counsel for the parties and after having examined the record of appeal, the main issue to be considered by this court in this appeal is on evaluation of evidence before the trial tribunal and whether the appellant presented a strong case before the trial tribunal.

~~It is worth noting that this court being the first appellate court, it is entitled~~ to re-evaluate the entire evidence adduced by the parties before the trial tribunal and on record by going through it and subjecting it to a critical scrutiny. This position was observed by the Court of Appeal of Tanzania in the case of **Philipo Joseph Lukonde vs. Faraji Ally Saidi** Civil Appeal No. 74/2019 (CAT – Dodoma Unreported) where it was held that;

“This being a first appeal, this Court has a duty to subject the entire evidence on record to a fresh re-evaluation and come to its own conclusions.”

In determining the first ground of appeal as to whether the appellant presented a good case before the trial tribunal, this court will focus on the evidence adduced by the parties before the trial tribunal. Supporting his grounds of appeal,

the counsel's main argument is that, the trial tribunal did not deal with the issue of injunction which was before it but went on dealing with the issue of loan agreement, Following the appellant's contention, perhaps it is apposite if I should revisit the proceedings of the trial tribunal to ascertain the issues that were framed by the tribunal. At page 14 of the typed proceedings, it clearly shows that the parties through their counsel, Mr. Karata and Mr. Ngereka agreed on the following issues which were recorded by the trial tribunal;

- i. Whether by 07th October 2014 when the complained demand notice was issued the applicant was not in default of repaying loan due to the respondent.
- ii. To what reliefs are the parties entitled.

The Court of Appeal of Tanzania in the case of **Chantal Tito Mziray & another vs. Ritha John Makala & another**, Civil Appeal No. 59 of 2018 (CAT-DSM Ureported) emphasized that;

" Issues framed by the court and agreed by the parties in a trial of a civil suit are intended to draw the attention of the judge or magistrate and the parties to the precise matters which are in dispute, instead of allowing the case to be left wondering in a vague state. Issues, therefore, bind the parties and the court respectively to adduce evidence and make the decision in an orderly manner guided by the pleadings, the adduced evidence and the law."

Guided by the above principle of law, this court is now bound to venture into the evidence adduced by parties at the trial tribunal in relation to the framed issues. The appellant case was supported by the evidence of the appellant and that of PW2 who identified himself as Jackson Maganga. In her testimony the appellant plainly admitted to have obtained a loan of Tshs. 50,000,000/= from the respondent and to have paid two installments, and thereafter she was issued with a notice to repay the entire loan. A carefully scrutiny of the appellant's evidence, entails me to hold that, **firstly;** that, she was complaining that there was misrepresentation as she only signed the loan agreement without understanding what was in the loan agreement and the same was written in English language which she was not conversant with, **secondly,** that, she was the only one who signed the loan agreement and that her husband whom she identified him by the name of Jackson Maganga did not sign the same, **thirdly,** that she was required to surrender sale agreement instead of the Certificate of Right of Occupancy and **fourthly,** that, she was not told how much to repay in each installment. The testimony of the appellant's witness, PW2 did not add any weight to the appellant case as his testimony is only to the effect that the appellant took a loan from the respondent.

The respondent's evidence through DW1, a Credit Manager and DW2 Manager of Credit Operation established their relationship with the appellant and

how the appellant had defaulted to repay the outstanding balance and the subsequent actions taken by the respondent after the appellant had defaulted to repay the money. In defending their case, the respondent presented a loan facility admitted and marked as exhibit D1, the sale agreement, exhibit D2, demand letters dated August 2014 and October 2014 admitted and collectively marked as exhibit D3.

Looking at the summary of the evidence of the parties in relation to the first issue framed, the question is whether the appellant was in default to repay the outstanding balance by the time she was issued with the demand notice. Without beating around the bush, the evidence of the appellant is very clear that, she only paid two installments ever since 19/03/2014 when the loan was advanced to her to the date the matter was heard by the trial tribunal. This piece of evidence is backed up by the evidence of the respondent's witnesses who also testified that, the appellant at the time of hearing of the application at the tribunal, she had only paid two installments.

Looking at the loan facility letter the loan was advanced to the appellant on 19/03/2014 and at page three (3) it has been indicated that the loan was to be paid monthly in the manner that was prescribed in the repayment schedule. If the loan was advanced on 19/03/2014 and the demand notice was issued on 07/10/2014 which means four months after the said loan was advanced and if the

appellant as stated by herself that she had paid two installments, roughly, the appellant had defaulted to repay in two months installments when she was issued with the demand notice. Nevertheless, the records are also to the effect that, despite being issued with the default notice the appellant did not make any efforts to repay the outstanding balance to the time when she filed the application to the trial tribunal that is, on the 31st July 2017 almost three years from the date, she was issued with the demand notice. To any prudent person, given what has transpired above, will hold that, the appellant was in default to repay the outstanding amount owed by the respondent.

If at all the respondent had intention to repay the outstanding balance from the time, she was issued with the demand notice to the time of filing her application, she would have made efforts to repay the loan even the little that she could have managed to get. Therefore, this court is of the considered view that, the appellant's act of concentrating on the case praying for injunction orders and not bothering to make any attempt to repay the loan is as good as kicking the dying horse.

I have further noted that, the respondent raised some concerns with regard to the loan facility that, there was a misrepresentation, this assertion, is found to be an afterthought. One would ask why did the appellant repay two installments if at all she believed that there was misrepresentation? And the

contention that her husband whom she identified as Jackson Maganga did not sign the loan facility letter and therefore did not consent to the said loan facility is countered by the said Jackson Maganga who appeared as PW2 where on cross examination by Mr. Ngereka, he vividly denied to have any relationship with the appellant. This piece of evidence is detrimental to the appellant's case. More so the appellant when cross examined by the respondent's counsel, she repeatedly stated to have signed the loan facility letter while of sound mind. So, if she was of the sound mind at the time of making of the loan agreement and taking into consideration that, no fraud that has been established, the appellant cannot be justified to complain thereafter. In a very recent decision by the Court of Appeal of Tanzania sitting at Mwanza in the case of '**Simon Kichele Chacha vs. Aveline M. Kiwale**, Civil Appeal No. 160 of 2018 (Unreported) had the following to say with regard to sanctity of contracts;

"It is settled law that parties are bound by the agreements they freely entered into and this is the cardinal principle of the law of contract. That is, there should be sanctity of the contract."

See also a decision in **Abualy Alibhai Azizi vs. Bhatia Brothers Ltd** [2000] T.L.R 288 at page 289;

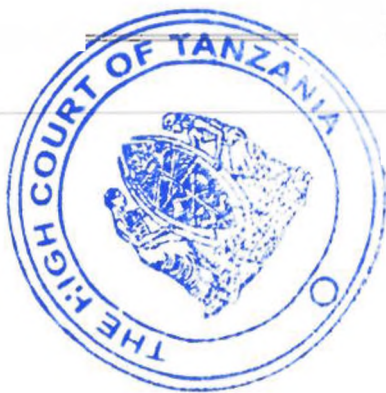
Since the appellant at the time of contracting the loan agreement with the respondent was of a sound mind and a free agent this court is therefore of the firm view as that of the trial tribunal that, she must adhere to and fulfil the terms

and conditions stipulated in the loan agreement by repaying the outstanding balance and accrued interests.

After evaluation of the evidence above, this court is consequently of the view that, the trial tribunal's decision was founded from issues framed immediately before commencement of the trial as opposed to the appellant's complaints and the judgment also speaks for itself.

In the event this appeal lacks merit and it is entirely dismissed with costs.

It is so ordered.



A handwritten signature in blue ink, appearing to read "M. R. Gwae", is written over a horizontal line.

M. R. GWAE
JUDGE
27/05/2021