IN THE HIGH COURT OF TANZANIA
MWANZA DISTIRCT REGISTRY
AT MWANZA
CIVIL CASE No. 23 OF 2019

SOPHIA SIMON ----------
JADILI MARIATABU (As Admimistrator
of the estate of the late Mariatabu **--------PLAINTIFFS**
Fugugu Kilimuludubi @ Ludubi) ----------

VERSUS

AZANIA BANK TANZANIA COMPANY LIMITED ----------DEFENDANT

JUDGMENT

25th June & 19th July, 2021

TIGANGA, J.

In this case the plaintiffs are individual persons who are the administrators of the estate of the late Maliatabu Fugugu Kilimuludubi who died an unnatural death on 21st July 2018 as he is suspected to be murdered or to have committed suicide. The defendant is a Bank registered in Tanzania and having branches in various places in Tanzania, including the one in Geita Region which is located in Geita Township.

According to the plaint as supported by evidence it has been established that before his death, the deceased owned and maintained a

Bank Account No.013013124693260001 with the defendant bank at Geita Branch. He took a loan of Tshs. 300,000,000/= with the interest of Tshs. 103,536,986.30/= thus making a total payable amount to be Tshs. 403, 536, 986.30/= for a period of three years. The loan was secured by the collaterals which are immovable properties.

According to paragraph 7 of the plaint, the loan agreement required the collaterals to be insured with comprehensive insurance cover against fire and burglary which is arranged through the defendant's appointed Real Insurance Co. Limited which is enclosed with the defendant's interest as a condition of acceptance of loan.

According to paragraph 9 of the plaint, it is said that, as a prudent banker and according to the general duty imposed by law, the defendant is duty bound to advise the deceased customer the impact of each product including the loan/credit life insurance collaterals as a means of risk management, transparence and fairness in events of death or incapacity of the borrower or fire.

Also that according the terms of loan agreement entered between the borrower and the defendant, it was an implied term that, upon the occurrence of death or incapacity of the borrower, the defendant was

entitled to the indemnity from the insurer in respect of the credit insured, while in the case of occurrence of fire resulting to the collaterals being gutted, the insurer shall reinforce the said collateral so that the banker may realize its money in event of default.

However, after the deceased had lost his life, contrary to the expectation of the plaintiffs, the defendant demanded from the plaintiff the whole amount contrary to the implied terms of the loan agreement.

Also that, it has come to the light of the plaintiffs that the Bank of Tanzania Risk Management Guidelines for Banks and Financial Institutions, adopted the Code of Banking Practice which casts to the defendant among other things, duty to act fairly and reasonably in dealing with its customer to ensure sufficient credit insurance cover is in place to protect the borrower and/or his family in case of death or disability was not complied with.

That failure of the defendant to properly advise the deceased to ensure that sufficient credit insurance cover is in place to protect the borrower and/or his family in case of death or disability the defendant committed a tort of professional negligence.

Also that deduction of 0.295% of the collateral market value non refundable fee from the deceased's account for necessary insurance premiums as determined by the defendant, but without remitting such premiums to ensure it, is a breach of contract and trespass to property by conversion. It has also been pleaded that, the defendant's demand of any payment of any loan amount from the plaintiff notwithstanding the occurrence of insurable risk also amount to the breach of contract.

Also that the effort by the plaintiffs to have the matter settled amicably out of court has been malignant due to the defendant's reluctance to settle.

The plaintiffs claim the followings:

i) The reversal of any moneys deductions, or appropriation made by defendant as a set-off from the deceased's Account No. No.0130131246932600O1 made after the demise of the deceased.

ii) Discharge of mortgage in respect of the deceased's landed properties. CT No.55313; Plot No.460; Block "KK" Nyakato in Mwanza City and CT No.64700; Plot No.1; Block "A" Lwamgasa in Geita District.

iii) Payment of Tshs. 200,000,000/=being general damage for breach of contract, tort of conversion, negligence and suffering on the deceased's estate.

iv) Interest of the decretal sum as from the date of demise of the deceased to the date of final payment at the bank rate.

v) Costs of the case onto the defendant's shoulders.

vi) Any other relief as this court may deem right.

The claim was opposed by the defendant by filing the Written Statement of Defence in which the claims are disputed for being baseless and of no legal justification. The defendant averred that, at all material times, it adhered to the guideline regulating the banking business. It is also pleaded by way of clarification that the mortgaged property in question was not insured by Real Insurance Co. Limited but rather it was insured by Britam Insurance (Tanzania) Limited against fire, where 0.295% of the mortgaged properties market value was agreed to be deducted for insurance purpose.

It has also been averred that the deceased was dully advised before entering the loan agreement. It is also averred that the plaintiffs have never asked any bank statement from the defendant, but the defendant

wrote the plaintiff a letter dated on 24/08/2018 containing advice but the plaintiff did not comply with the advise in the said letter. It has also been averred that the mortgaged properties were insured against fire, and that there was no life insurance contract entered between the parties.

That as the only insurance was in favour of the mortgaged property against fire, then the plaintiffs being administrator of the estate of the borrower, are duty bound to pay the outstanding loan according to the loan agreement failure of which the defendant is legally justified to proceed against the collateral in accordance to the loan agreement.

The defendant prays for the dismissal of the suit with costs, and an order that Tshs.282,592,712.32/= being the principal sum and the accrued interest up to 29/05/2019, which interest continue to accrue till payment in full.

Alternatively, an order for sale of the mortgaged property held under certificate of titles CT No.55313; Plot No.460; Block "KK" Nyakato in Mwanza City and CT No.64700; Plot No.1; Block "A" Lwamgasa in Geita District be made. Costs of the suit and any other relief the Hon. Court may deem fit and just grant.

During final pretrial conference seven issues were framed namely;

a) Whether there was a breach of loan agreement by the defendant?

b) Whether the loan agreement was covered by the credit life insurance?

c) Whether the mortgagor was properly advised by the defendant in respect of insurance policy covering credit life insurance?

d) Whether the defendant is liable for tort of professional negligence?

e) Whether the defendant is liable for trespass to property specifically conversion?

f) Whether the defendant was entitled to embark on the legal remedies to recoup the loan advanced to the plaintiff instead of the insurer?

g) To what reliefs are the parties entitled?

In endeavor to prove the case the plaintiff called two witnesses namely Sophia Simon Mnyali, and Jadidi Maliatabu Fugugu Kilimuludubi both being the plaintiffs and had their evidence recorded as PW1 and PW2. In their testimonies, they both said to know the borrower, as he was a husband of PW1 and a father of PW2.

They all said that he died on 21/07/2018 and tendered the death certificate as exhibit P1. Following the demise of the said borrower, they were both appointed as joint administrator of the estate of the deceased, which they proved by tendering Form No. IV (the letter appointing them administrators) as exhibit P2, a copy of judgment in Mirathi No. 10 of 2018 and Katoro Primary Court of Geita District as exhibit P3 and an introduction letter dated 31/10/2018 introducing them, as exhibit P4. PW1 testified that, the deceased left her with the children to take care, she said she heard her deceased husband had a loan with the defendant but did not leave him with the briefing over his loan. And on cross examination PW1 said she did not go in the company of her deceased husband when he went to take a loan.

PW2 on his side said that, after the death of his father, two officers from the defendant bank Geita Branch who introduced himself as a manager and loan office respectively, visited them and informed him after being introduced to them by one Mathayo, who used to be a driver of the borrower, that his late father had a loan with the bank which was not paid in full. Soon thereafter those bank officers served him with the default notice requiring him to pay the debt.

He tendered the said default notice which was admitted and marked as exhibit P5. He testified that, upon being served with the notice, he conducted search where he found a letter of offer which stands as a loan agreement, but it was in a photocopy form, he tendered it together with a schedule of payment as a secondary evidence as exhibit P6.

He said he asked for the bank statement but they refused on the ground that, the account was still indebted. He tendered the bank statement of account No.0130131246932600O1 in the name of Maliatabu Fugugu Kilimuludubi as exhibit P7. He said as the loan was insured, therefore the same was supposed to be recovered from the insurance company not from the heirs. He said in his understanding, the insurance meant that, should the person who took the loan dies, the loan could be paid by the insurance cover.

Basing on that belief they engaged a lawyer who wrote a demand letter to the defendant bank, he tendered it as exhibit together with the reply from the defendant which was admitted and marked as exhibit P8. He asked the court to declare that the loan is payable by the insurance company, and they be paid general damage for the disturbance caused to them by the defendant.

On cross examination he said, although the borrower did not die a natural death, as he was suspected to have been murdered but the police have never arrested any body in that respect. He said he was not in the company of the borrower when the said borrower was going to ask for the said loan. He said the mortgaged securities are the properties of the borrower and that exhibit P6 has a signature of his late father, the borrower.

In re-examination, PW2 said he did not believe the report given by the police concerning the cause of death of his father. He said he has personally no power to investigate, he however told the court that the complaint here in court is on the loan payment not the cause of death of his father.

That marked the plaintiff case; its closure was followed by the defence case. The defence called only one witness Richard Kibeshi a Principal Officer from the defendant's bank. He said in his sworn testimony that whenever a person takes a loan from bank, that person is normally advised to take loan insurance either from an insurer of his choice or the insurance company of the bank. According to him, in the year 2016/2017 and 2017/2018 the insurance was only taken to secure the mortgaged

security in case the security was damaged either by human or act of God, then the insurance company was supposed to pay.

He said that is reflected at page four of exhibit P6, a letter of offer. According to him, the insurance in this case was covering the securities mortgaged to secure a loan. He asked to tender the cover note but the same was successfully objected for failure to follow the procedure in tendering the same.

He said the signing of the loan agreement was made by the said Maliatabu Fugugu Kilimuludubi, and the signing was signification that he understood the contents and undertook to be bound by the conditions therein. He said there was no life insurance taken to secure the life of the borrower; therefore the loan at hand was secured by the mortgage pledged by the borrower.

According to him, even if the policy of the life insurance (credit life insurance) would have been contracted to secure the loan, (which is not the case in this matter), still the same operates only to natural death unlike in this case where the borrower is alleged to have killed himself.

He therefore prayed the court to disregard the claim because what is claimed is far from the reality, as the insurance covered the properties

pledged as security, not the loan itself against the death or incapacity of the borrower.

He said that, the information they have is that the borrower died, he asked the court to order the administrator to pay the loan, the cost of this case, and that if they will fail then the defendant be allowed to proceed against the security so that they can recover the bank money.

On cross examination by Mr. Kajungu, learned counsel, he said that they advised the borrower Mr. Maliatabu Fugugu Kilimuludubi to insure his properties kept as security not the life of the borrower. He also said the death of the borrower in the circumstances where there is the pledged security the bank does not get loss as it is entitled to proceed against the security to recover the money.

He said that the advise that the bank was mandated to make is that of insuring the security. He said the borrower in this case had no credit life insurance; therefore the bank is entitled to proceed against the securities.

Referring exhibit P6 at page 4 paragraph 2(i) the interest which was referred is the security kept for loan and that under paragraph 2(iii) the 0.295% deducted as the premium was submitted to the insurance company. He said that the issues of life insurance was the option of the

client and that, the contract they have is lawful and enforceable by the parties.

In re examination, he said that, before taking the loan the client is always advised, and that not every advise should form part of the contract, for the contract contains only what is always agreed. He said in the contract, they agreed that the insurance must be for properties pledged as security. He said the borrower was given a letter of offer which he read, understood, and agreed with the terms before signing.

That also marked the defence case as well, hence this judgment. However parties opted to file final closing submissions to clarify some issues. In his final submission filed in support of the plaintiff case, after citing a number of laws and regulations as well as the international instruments such as the Banking and Financial Institution Guidelines, 2010 and the Tanzania Banking Bankers Association Code of Conduct, 2014, all of which imposing duty to the bankers to advise the consumer to make sure sufficient credit insurance for life of the borrower is in place in order to avoid un necessary inconveniences to the family of borrowers in event of death or permanent incapacity. He said DW1 did not prove that the deceased was advised, as that is not shown in the loan agreement or any

endorsement in the file of the deceased loan account proving to that effect.

He moreover cited a number of theories explaining the said duty of the banker, but throughout the submission he did not cited any authority whether statutory or case law which provide to the effect that failure of the banker to advise the client to take life insurance, exonerates the borrower from the liability of repaying the loan, should the borrower die or got incapacitated especially in the circumstances where the borrower had pledged securities and insured them.

In his submission Mr. Hezron, reminded this court that, the first issue is whether there is a breach of loan agreement. He cited the authority in the case of **Paulina Samson Ndawavya vs Theresia Thomas Madaha**, Civil Application No. 45 of 2017and section 110 of the Evidence Act, [Cap 6 RE 2019], on the burden and standard or proof, that the plaintiff is duty bound to prove the case on the balance of probability, but the plaintiffs in this case did not prove any term of the contract which has been breached.

On second issue which is whether the loan agreement was covered by the credit life insurance? He said the answer is in the negative, as the in

exhibit P6 the contract parties agreed to obtain comprehensive insurance in respect of all assets constituting the security. That contract was signed by the parties who are in every aspect are bound by the terms of the contract, not the terms which do not form the contract.

On the third issue which is whether the mortgagor was properly advised by the defendant in respect of insurance policy covering credit life insurance? He submitted that, the fact as to whether the deceased was advised or not can be best proved by the office of the defendant and the deceased, as DW1 said he was advised then, the evidence of PW1 and PW2 cannot be said to have proved that he was not advised because they did not participate in the process. Having resolved the third issue in affirmative then the 4th issue which is whether the defendant is liable for tort of professional negligence dies naturally.

Regarding the fifth and sixth issues, which is whether the defendant is liable for trespass to property specifically conversion and whether the defendant was entitled to embark on the legal remedies to recoup the loan advanced to the plaintiff instead of the insurer? He submitted that, as the general term of the contract, the security are pledged to be re couped, to

recover the amount advanced to the deceased, the borrower of a loan, that cannot be taken to be trespass of conversion.

Having resolved all these issues as he has proposed this court to find that the plaintiffs are entitled to nothing as they have failed to prove the case at the required standard, instead he prayed that what the defendant prayed in the written statement of defence be granted as prayed.

In resolving the dispute, this court, will be guided by the issues framed, and will for a better flow, deal with them in the manner and series they have been framed. I will, for that reasons, start with the first issue which is *"whether the defendand was in breach of the loan agreement?"*

The stand of the law as provided under the provisions of sections 110, 111 and 112 of the Evidence Act [Cap 6 R.E 2019] read together with section 3 (2) (b) of the same law, which when combined, set the principle of burden and standard of proof to the effect that, the burden of proof is on the shoulder of the person who wishes the court to rule in his favour on certain facts while the standard of proof in civil matter is on the preponderance of probabilities.

Further to that, on how and to what extent should the burden be discharged, I find very useful, a commentaries of by Sarkar on Sarkar's

Laws of Evidence, 18th Edn., ***M.C. Sarkar, S.C. Sarkar and P.C. Sarkar***, published by *Lexis Nexis,* (at p. 1896).

The learned authors had the following to say on the burden of proof;

> ***"... the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof.*** *It is ancient rule founded on consideration of good sense and should not be departed from without strong reason..... Until such burden is discharged the other party is not required to be called upon to prove his case.* ***The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party..."*** [Emphasis added].

The above extract found the reasoning of **Lord Denning, L J**, in ***Miller v. Minister of Pensions*** [1937] 2 All. E.R 372, and was cited with approval in the decision of the Court of Appeal of Tanzania in ***Paulina Samson Ndawavya v. Theresia Thomas Madaha***, CAT-Civil Appeal No. 45 of 2017 (unreported). The highest Court quoted the following passage:

> *"If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable*

to come to a determinate conclusion one way or the other, then the man must be given the benefit of the doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches of the same degree of cogency as is required to discharge a burden in a civil case. That degree is well settled. It must carry reasonable degree of probability, but not so high as required in a criminal case. If the evidence is such that the tribunal can say – We think is it more probable than not, the burden is discharged, but, if the probabilities are equal, it is not ...."

It was the duty of the plaintiff to explain and actually prove what term of exhibit P6 which has been breached. From the evidence given by PW1 and PW2, as well as DW1, it has not been made clear, what is the breached term in the exhibit P6. As earlier on pointed out, the contract between the borrower, (now the deceased), and the defendant is clear that, the deceased, took loan from the defendant with the promise to repay, and should he fail to repay, then the pledged securities would be recouped by the defendant to recover the money. It is evident that the deceased was paying, but he died before clearing the dues.

The issue now is what condition of the loan agreement was breached by the plaintiff. Looking at the plaint and evidence, the plaintiff are suggesting that the recovery was not supposed to be from the property of

the deceased which include the security he kept to secure the said loan, but from the insurance company, which would have insured the life of the deceased which unfortunately, the deceased did not do allegedly following the failure of the plaintiff to advise him to that effect. This complaint presupposed that, there was such a thing like life insurance which the defendant was mandatorily or by necessary implication, required as to per loan contract that is exhibit, P6 to advise the deceased to engage into. I have passed through the whole loan agreement that is exhibit P6 I found no such term stipulated in the exhibit P6 whether directly or by necessary implications which has been breached by the defendant. That said, the first issue is resolved in negative.

In the second issue, as to whether the mortgage agreement was secured by life insurance cover? In resolving this issue, I also find it evident that, there is no evidence in exhibit P6 showing that the same was secured by life insurance cover or policy, what is vivid, is that according to paragraph 7 of the plaint, the insurance was agreed to cover comprehensively the mortgaged property which were pledged as security.

It should be noted here that, the base of this suit is a contract, and in its express term, there is no such term referring to the life insurance.

The suggestion by the plaintiffs that there is, by necessary implication any term requiring the Bank to advise the party to the loan agreement to insure the life of the borrower, is not in the loan agreement that is exhibit P6. The deceased was required as to per loan agreement to furnish security, which he furnished. Had he been concerned with his life, I think even without advise from the defendant he would have insured his life.

The plaintiffs are suggesting by their prayer that failure to advise the deceased on life insurance cover, exonerates the heirs/who steps into shoes of the deceased from paying the debt. It is unfortunately that the counsel and the plaintiff have not cited any law exempting or exonerating them from such liability. There is no suggestion of where exactly should the defendant cover its money if there is no company which insured the life of the deceased.

That said, it remains a fact that what the deceased took from the defendant was a loan, which needs to be repaid back, the same was secured, by the comprehensively insurance covered mortgage which was secured against fire and other natural or human made calamities, the security are still there and probably in good shape. There is therefore nothing to prevent the defendant to initiate the recovery process and

recover its money. That said, I find all issues to have been resolved against the plaintiffs, therefore the plaintiffs deserves no any relief from the defendant.

However, the defendant has asked for some order as reflected in the written statement of defence, with all due respect, these orders would have been issued only when had the defendant filed the counter claim and proved it against the plaintiffs. Since the defendant did not raise the counter claim, then the court will have no base upon which to make such orders. What is contained in the WSD is the defence without the counter claim; it is not a suit under which the sought orders by the defendant can be granted. That notwithstanding, this order has no effect of pre empting the defendant from exercising its right under the mortgage agreement, to recover the loan. The suit at hand fails; it is dismissed for want of merits. The plaintiff should pay costs of the suit.

It is accordingly ordered.

DATED at **MWANZA**, this 19th day of July 2021

J. C. TIGANGA

JUDGE