THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

CIVIL APPEAL NO. 105 OF 20

(Appeal from the Judgement and Decree of the District Court of Kilombero at Ifakara, by Hon. L.O KHAMSIN SRM dated 18th February 2021 arising from Civil Case 44 of 2019)

CRDB BANK PCL.....APPELLANT

VERSUS

NOKWIM INVESTMENT CO. LTD.....1ST RESPONDENT

NOVATUS AKWIRINO MWANANENGULE.....2ND RESPONDENT

JUDGEMENT

Last Court Order on 08/11/2021

Judgement 18/11/2021

NGWEMBE; J,

This is an appeal against the judgment and decree of the District Court of Kilombero at Ifakara, in Civil Case No. 44 of 2019, which decision was made in favour of the respondents. Being aggrieved with that decision, the appellant exhausted his rights to appeal to this court.

The historical background of this appeal, traces back to 5th April 2016, when the 1st respondent applied and obtained loan facility worth TZS. 100,000,000/ from the appellant. The loan was granted after signing a loan facility letter. Since the 1st Respondent was a legal entity, in its

behalf, the 2nd respondent signed it and acted as a guarantor putting his house as collateral or security for that loan.

In turn, the 1st Respondent failed to heed to the terms and conditions of the loan agreement, hence the appellant rightly, decided to exercise power of sale. Being so determined to sale those securities to recover that debt, the Respondents, on 23rd December 20219 instituted a civil proceeding in a District Court of Kilombero at Ifakara, in Civil Case No. 44 of 2019.

Respondents herein claimed against the appellant herein for proper interpretation of the loan agreement, plus interest thereof. Claimed that they had performed all their obligations under the third party contract in accordance with the loan facility letter, whereby verification was duly conducted by the responsible Ministry and District Administrative Secretary (DAS) together with the District Executive Director (DED) who acknowledged by a letter indicating that the 1st respondent ow them money. Thus, the respondents alleged to have not defaulted any contractual terms associated with that loan facility.

Upon hearing both parties, the trial court entered judgement in favour of the respondents, and proceeded to declare the 2nd respondent not in breach of the contract, hence the bank was estopped to sale collaterals put as securities for that loan.

Being aggrieved with that decision, the appellant preferred this appeal armed with five (5) grounds enumerated hereunder: -

1. The trial court erred in law and in fact by granting the suit without considering the strong evidences advanced by the appellant;

2. The trial Magistrate erred in law and in fact by failure to base her judgement and decree on the terms and conditions of the loan letter facility entered by the appellant and the 1st respondent;
3. The trial Magistrate erred in law and in fact by introducing new issues of lifting corporate veil in the judgement and proceeded to hold that the 2nd plaintiff did not breach the contract;
4. The trial Magistrate erred in law and in fact by producing confusing judgement by stating that the 2nd respondent is not in direct breach of the contract; and
5. That the Honourable Trial Magistrate erred in law and in fact by not discussing in her judgement the 2nd issue which is the main issue, thereby reaching a wrong conclusion.

Thus, proceeded to ask this court to quash the judgement and decree entered by the trial court and order the 1st respondent to pay the outstanding amount of loan to the appellant, if fails, the appellant to proceed with right of sale of the 2nd respondent's house put as collateral for the loan facility, also the court may grant costs.

In this appeal, both parties procured legal services of learned advocates. While Ms. Spencioza Ndunguru appeared for the appellant, the learned advocate Juma A. Mwakimatu appeared for the respondents. Both counsels agreed and asked this court to order them file written arguments, which prayer was grated, hence both have complied with the scheduling order.

Briefly, the appellant argued on the first and second ground jointly, that the trial magistrate failed to consider strong evidences adduced by the

appellant during trial and that the documentary evidence of the loan facility letter speak itself. Further submitted that, since the loan advancement process were reduced into writing, it could not be overridden by an oral account as it is done by the trial Magistrate, who disregarded the terms and conditions of the loan agreement. Proceeded to cite section 100 (1) of the Evidence Act CAP 6 (R.E 2019), which has the effect of prohibiting oral evidences to replace documentary evidences.

Supported her argument with a case of **Agatha Mshote Vs. Edson Emmanuel & 10 others (Civil Appeal No 121 of 2019)** (CAT). Concluded on these two grounds by submitting that, the trial Magistrate erred in treating the loan agreement as third part agreement while it was not.

On the third ground, the learned advocate for the respondent submitted quite strongly that, the trial magistrate erred in law and fact by introducing new issues related to lifting of corporate veil in her judgment. Argued that from the beginning to the end of trial, there was no record related to an issue of lifting of corporate veil. Unfortunate such issue was raised by the court *suo motto.* In so doing the court ended up with unfair judgement, she added. To comprehend her argument, she referred this court to the case of **Pili Ernest Vs. Moshi Musani (Civil appeal no. 39 of 2019)** (CAT – Mwanza) and in the case of **Mbeya- Rukwa Auto parts and Transport Limited Vs. Jestina George Mwakyoma (2003) T.L.R 251.**

Advancing her argument on fourth ground, the learned advocate based her argument on the failure of trial Magistrate to compose a proper judgement, instead declared the 2nd respondent not "in direct" breach of the contract. She emphasized that the phrase "in direct" is confusing in a way, that it has two or three meaning and that, it is not specific whether the respondents breached the loan facility letter or not. To insist on this ground she cited the case of **Juma Jaffer Juma Vs. Manager of the Peoples Bank of Zanzibar ltd & 2 others (2004) T.L.R. 332.**

On the last limb of her submission, argued that the learned magistrate did not discuss in her judgement the second issue, which is the main issue, thereby reaching into a wrong conclusion. On this ground she cited Order XX Rule 5 of the Civil Procedure Code CAP R.E 2019, and supported with a case of **Sheikh Ahmad Said Vs. The Registered Trusteed of Manyema Masjid (2005) T.R.L 61.**

In turn, the respondents jointly replied that, on the 1st and the 2nd grounds the trial court did consider the evidence adduced during trial, including and not limited to the loan facility agreement alone. Also cited section 100 (6) of the Evidence Act which allow admissibility of oral evidence to explain on facts contained in the documents. Therefore, there was no conflict between the loan facility agreement and the oral testimonies. Thus, the trial court was correct in interpreting the conditions of payment of the loan, was directly relied on the respondent's being paid by the District Council (Kilombero and Ulanga Districts). As such, the judgement of the trial court was correct and

based on the proper application of the law and evidence adduced therein.

Regarding the third ground of appeal, the respondents refuted that there was no new issue that was introduced. On the aspect of lifting corporate veil, they submitted that, it was not an issue, but rather was raised purely as legal principle in company laws. Further distinguished the cited case of **Pili Ernest Vs. Moshi Musani (Supra)** as irrelevant.

On ground four the respondents submitted that the judgement of the trial court is not confusing. They cited the book of the late Judge Buxton D. Chipeta in Civil Procedure in Tanzania; A Student Manual at Page 203. Also cite Order XX Rule 4 of the Civil Procedure Code in respect to the contents of judgement. Concluded that the judgement of the trial court met the criteria and that the phrase *"the 2nd respondent is not indirect in breach"* does not at all bring confusion.

Submitting on the last ground, the respondent argued that the trial magistrate did in fact give her findings and reasons on each issue, including the 2nd issue and humbly drew the attention of this court to page 8 in paragraph 2 of the trial court's judgement.

In conclusion the respondents prayed to separate the 2nd respondent with the 1st respondent, which is a legal entity as opposed to the natural person.

In brief rejoinder the appellant reiterated on what she submitted in chief. Further insisted that the issue of lifting of a corporate veil was totally new issue, which was introduced by a trial magistrate without

inviting parties to address on it. Submitted that the whole judgement was confusing and the 2nd respondent is not in direct breach of the contract, rather is in breach of contract. More so, the second issue was the main issue, but was never discussed by the trial court, hence arrived into a wrong conclusion.

Having calmly gone through the evidence on record as well as the rival arguments advanced by both learned counsels, I find it imperative to point out undisputed facts before I may consider the crux of the appeal itself.

From the outset, parties should always remember that court's decisions are based on available evidences, applicable laws and the prevailing circumstances. It is not in contention by both parties that the genesis of their dispute arose from a loan agreement, which was reduced into a written document comprising terms and conditions executable by each party.

Moreover, the respondents do not dispute to have accessed loan of TZS. 100,000,000/= and that they have not repaid to the appellant. Also, it is undisputed fact that the appellant is in this court struggling against the respondents with a view to recover her money.

To substantiate these undisputable facts, during trial, the loan facility letter was tendered and admitted marked exhibit N1. The contents of the loan facility letter is self-speaking as quoted hereunder:-

In paragraph 7. Repayment schedule:-

April 2017 total payment is TZS. 65,454,545/=

April 2018 total payment is TZS 65,454,545/=

Grand total is TZS 130,909,091/=

Paragraph 8: Security that the loan shall be secured by 1st Residential House built in CT. No. 88069 in Plot No. 37 Block "E" Mkamba Minor Settlement area in Kilombero District and 2nd Letter of Hypothecation of Goods. The guarantor's Guarantee and Indemnity signed by Novatus Akwilino Mwananengule and Albina Lazaro Kwai'

The contract continued to explain events of defaults in paragraph 11 and right of set–off in paragraph 13 in including sale of securities.

Much as I would agree with the respondents, the borrowed amount of money was intended for business purposes involving Government institutions, and that those institutions committed to pay the respondents, but to date they have failed to heed to their commitments. Thus, resulted into serious financial conflict between the disputants. Above all, the terms and conditions of the contract stood unchanged to date and the bank is pressing for recovery of its money from the respondents.

Moreover, it is clear that the loan amount was payable in two instalments; the first instalment was payable on April 2017 and the last instalment was payable on April 2018. Unfortunate to date such loan remained unpaid.

The second area of concern is the relationship of the 1st respondent which is a legal person and the 2nd respondent who is a natural person. Reading from the trial court's records, indicates that Nokwim Investment Co. Ltd took loan to the appellant. But the 2nd respondent acted as a guarantor to the 1st respondent's loan, thus, not direct responsible to

that loan. The 1st respondent as a legal entity has neither brain nor blood. It cannot operate on its own, rather operates through human beings, be it shareholders, board of directors and management of the company. Therefore, in respect to this appeal, the 1st respondent took loan from the appellant through shareholders, board of directors and management. Legally, the 2nd respondent is not directly responsible to that loan, but is the one who issued collateral or security for that loan. In fact, even the appellant, I am sure is less concern with the 2nd respondent had he not interfered on its intention to sale those collaterals.

I would therefore conclude that the 2nd respondent is directly responsible so long he continues to resist the sale of securities for the loan advanced to the 1st respondent.

There are certain issues which are well-developed in our jurisdiction, one of them is the application of documentary evidences as opposed to oral evidences. Certainly, the contents of the document should be taken as the best evidence, unless contradicted by another documentary evidence. Oral testimonies against the contents of the existing document is inadmissible. This position is clear in our laws, like a brightest day light unencumbered by clouds. Section 100 (1) of the Evidence Act Cap 6 R.E. 2019, is quoted hereunder for ease of reference:-

> *"When the term of a contract, grant, or any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be*

given in proof of the terms of such contract, grant, or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which a secondary evidence is admissible under the provision of this Act"

This section is *imparimateria* with Indian Law of Evidence as was amplified by **Sarkar on Evidence; (15th Edition) at page 1269:-**

"It is a cardinal rule of evidence, not one of technicality, but of substance, which it is dangerous to depart from, that where written documents exist, they shall be produced as being the best evidence of their own contents. Whenever written instruments are appointed, either by the requirement of law, or by the contract of the parties, to be the repositories and memorials of truth, any other evidence is excluded from being used, either as substitute for such instrument, or to contradict or alter them".

This principle was wholly adopted by the Court of Appeal in the case of **Univeler Tanzania Ltd Vs. Benedict Mkasa t/a Bema Enterprises, Civil Appeal No. 41 of 2009** where the Court held:-

"Strictly speaking under our laws, once parties have freely agreed on their contractual clauses, it would not be open for the courts to change those clauses which parties have agreed between themselves. It was up to the parties concerned to renegotiate and to freely rectify clauses which parties find to be onerous. It is not the role of the courts to

re-draft clauses in agreements but to enforce those clauses where parties are in dispute"

Similar position was repeated by the same Court in **Civil Appeal No. 22 of 2017 between Miriam E. Maro Vs. Bank of Tanzania.** I fully subscribe to those guidance of the Court of Appeal, which in essence binds all subordinate courts, including this court.

Considering deeply on the crux of this appeal and the predicaments facing the respondents, no doubt they tried to utilize clause 2 of the loan facility letter which is quoted:-

2. **PURPOSE OF THE LOAN**

"To finance working capital for purchasing and distributing Mineral fertilizers in Kilombero and Ulanga Districts"

Based on this clause, the respondents ventured to take refuge to the contract executed between the respondents and Kilombero Disrtict Council related to distribution of mineral fertilizers. It is evident that, the council admitted in writing that they failed to pay the respondents for the supplied fertilizers (see letters dated 18/3/2019; 25/3/2019 and other documents of similar contents). However, the question is whether, the contract between the respondents and the Kilombero & Ulanga District Council, had any relationship with the appellant's loan? In one way, such money from the appellant was for recapitalization to supply mineral fertilizer as per paragraph 2 of the Loan Facility Letter. On the other side, the appellant was not made a party to such contract with Kilombero & Ulanga District Council. Therefore, whatever done by the respondents and other parties could not affect the loan procured from the appellant.

More so, there is no clause in the loan facility letter that connected payment of the appellant's loan and payment of the respondents by Kilombero & Ulanga districts council.

As such, the trial court misinterpreted the conditions provided for in the loan facility letter with payment of the respondent by the District Council (Kilombero & Ulanga Districts).

There are various decision of the Court of Appeal which has insisted on the need to consider the evidence of both parties and failure to do so is bad in law. This was underscored in **Hussein Iddi and Another Versus Republic [1986] TLR 166,** where the Court of Appeal of Tanzania held that:-

> " *It was a serious misdirection on the part of the trial Judge to deal with the prosecution evidence on it 's own and arrive at the conclusion that it was true and credible without considering the defence evidence* "

The Trial Magistrate neither considered nor analysed the defendant (appellant) evidence before making her decision.
Had the trial magistrate directed her minds on the validity of the loan facility letter, she would have arrived in a different conclusion. Since she failed to consider properly the terms and conditions of the executed contract, unfortunate she arrived into incorrect conclusion.

Having so concluded on this issue, the question is whether there is any need to consider the remaining grounds of appeal? Even if I may consider them, they won't change the already arrived conclusion. I find no need to labour much on the rest instead safely, conclude that the

whole decision of the trial court was not backed by the contents of the loan facility letter.

For the reasons so stated, this appeal has merits same is allowed. The appellant is entitled to recover its money or sale securities placed as collaterals for that loan. Above all the respondents are jointly responsible to settle such loan within three months from the date of this judgement, otherwise, the appellant shall proceed to realize its debts from securities placed as collaterals.

It is so Ordered.

Dated at Dar es Salaam this 18th day of November, 2021.

P.J. NGWEMBE
JUDGE
18/11/2021

Court: Judgement delivered at Dar es Salaam in Chambers on this 18th day of November, 2021 in the presence of Mr. Kisawani Mandela for Ms. Spencihoza Ndunguru for Appellant and Novatus Akwirino Mwananengule 2nd Respondent.

Right to appeal to the Court of Appeal explained.

THE HIGH COURT OF TANZANIA

P.J. NGWEMBE
JUDGE
18/11/202