

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE SUB-REGISTRY OF DAR ES SALAM**

**AT DAR ES SALAAM**

**CIVIL CASE NO. 227 OF 2019**

**BENEDICT MICHAEL KAZYOBA ..... PLAINTIFF**

***VERSUS***

**MUNAWER MOHAMED HUSSEIN ..... DEFENDANT**

**JUDGMENT**

11<sup>th</sup> May & 8<sup>th</sup> June, 2022

**KISANYA, J.:**

The plaintiff, Benedict Michael Kazyoba sued the defendant, Munawer Mohamed Hussein, praying for judgment and decree as follows:-

- i. An order that the Defendant is in breach of contract and is liable to repay the outstanding amount.*
- ii. Interest 12% compounded interest monthly on (i) from 2/2/2015 to date of filing of this suit.*
- iii. Interest of 12% from the date of filing suit to the date of judgment and decree.*
- iv. Interest of 12 % from date of judgment of sale and realization of the debt.*
- v. As a result of paragraph 6, (i), (ii),(iii) and (iv) above, an order of sale of the suit premises.*

*vi. Costs be provided for.*

For better understanding the gist of this suit, it is apt to highlight the background facts of this case as gleaned from the plaint: On 13<sup>th</sup> August, 2014, the plaintiff and defendant entered in a loan agreement. In the said agreement, the plaintiff agreed to advance a loan of Tshs. 120,000,000/= in favour of the defendant in consideration that the latter would transfer the property comprising certificate of title No. 43371 Plot No. 594 Block K Mbezi, Kinondoni (henceforth "the landed property"). Executing the terms of the loan agreement, the plaintiff disbursed Tshs. 70,000,000/= and Tshs. 30,000,000/= on 13<sup>th</sup> August, 2014 and 2<sup>nd</sup> February, 2015, respectively.

However, he alleges that the defendant breached the loan agreement by failing to collect the final balance of Tshs. 20,000,000/= and failing transfer the suit property to him. Therefore, the plaintiff sued the defendant for the foresaid reliefs.

The case proceeded in the absence of the defendant who neither filed the written statement of defence nor entered appearance. The framed issues for determination of this suit were as follows:-

- 1. Whether the plaintiff and defendant entered into a loan agreement.*
- 2. If the first issue is answered in affirmative, whether the defendant breached the loan agreement.*
- 3. To what relief(s) are the parties entitled.*

During the hearing of this case, the plaintiff was advocated by Mr. Amin Mshana, learned advocate.

Generally, the plaintiff's case is premised on evidence adduced by the plaintiff himself as PW1 and three documentary evidence to wit, Loan Agreement dated 13<sup>th</sup> August, 2014 (Exhibit P1), Addendum to Loan Agreement dated 2<sup>nd</sup> April, 2015 (Exhibit P2), Certificate of Title in respect of Plot No. Plot No. 594 Block K, Mbezi, Kinondoni (Exhibit P3) and Discharge of Mortgage- Land Form No. 44 (Exhibit P4).

I have carefully considered the plaint, evidence adduced by PW1, the documentary evidence (Exhibits P1, P2, P3 and P4) and the law. In terms of section 110 of the Evidence Act [Cap. 6, R.E. 2019], a person who claims on existence of certain fact is duty bound to prove such fact. That being the case, the duty to prove the case lies with the plaintiff.

As indicated earlier, the first issue is whether the plaintiff and defendant entered into a loan agreement. It was PW1's testimony that,

on 13<sup>th</sup> August, 2014, he entered into a loan agreement with the defendant. PW1 went on to testify that, on 2<sup>nd</sup> April, 2015, he and the defendant signed an addendum to the loan agreement after the second installment of the loan to the tune Tshs. 30,000,000/=.

Supporting PW1's oral testimony are the loan agreement and addendum to the loan agreement which were admitted in evidence as Exhibits P1 and P2 respectively. Both exhibits show that the plaintiff and defendant entered into a loan agreement whereby the former agreed to advance the loan of Tshs. 120,000,000/= in favour of the latter. From the foregoing analysis, the first issue is answered in affirmative, that the plaintiff and defendant entered in a loan agreement.

The next issue is whether the defendant breached the loan agreement. Some of the terms and conditions are to the following effect: *One*, the plaintiff was to advance to the defendant Tsh. 120,000,000/= in terms of loan. *Two*, the recitals display that the defendant was selling to the plaintiff, a suit property described under Certificate of Title No. 43371 which was subject of mortgage to Akiba Commercial Bank, in consideration of the said Tshs. 120,000,000/=. *Three*, the defendant intended to use the loan to discharge the mortgage secured by Certificate

of Title No. 43371. *Four*, the plaintiff agreed to disburse Tshs. 70,000,000/= upon signing the loan agreement. *Five*, Tshs. 50,000,000/= was to be disbursed after the discharge of mortgage and the defendant handing over the Certificate of Title No. 43371 to the plaintiff and signing the transfer documents. *Six*, the defendant undertook to take the necessary step to complete transfer of the property to the lender.

Reverting to the second issue, PW1 deposed that he complied with the terms of agreement by giving the defendant a sum of Tshs 70,000,000/= at the time of signing the loan agreement (13/08/2014). He further testified that Tshs. 30,000,000/= was paid on 2<sup>nd</sup> April, 2015 when the parties signed the addendum to the loan agreement. Although PW1 did not tender evidence to prove payment of Tshs. 70,000,000/= clause 1 of recitals of the addendum to the loan agreement shows that the defendant acknowledged receipt of Tshs. 70,000,000/= from the plaintiff.

With regard to the remaining balance of Tshs. 50,000,000/= the addendum (Exhibit P2) shows that parties agreed that the said loan would be paid in two installments. According to PW1 and Exhibit P2, the first

installment comprised payment of Tshs 30,000,000/= which was paid on 2<sup>nd</sup> April, 2015 when the parties signed Exhibit P2 and the defendant handed over to the plaintiff, the Certificate of Title No. 43371 and Mortgage Discharge Certificate. PW1 tendered the Certificate of Title No. 43371 (Exhibit P3) and Mortgage Discharge Certificate (Exhibit P4) to prove that clause 1 of the Addendum was complied with by both parties.

However, the addendum (Exhibit P2) required the defendant to receive the last installment of Tshs. 20,000,000/= upon signing the transfer of the certificate of title and transfer of the suit property to the plaintiff. These terms are reflected in clauses 2 and 3 of Exhibit P2 as produced hereunder:

*The borrower shall receive last instalment of Tshs. 20,000,000 upon borrower signing the transfer of the said Title to the lender and complete transfer of the property to the lender.*

*That the borrower shall soon sign transfer of the said title to the lender and complete transfer of the property to the lender.*

Apart from the above terms stipulated in the addendum, clause 4 of the loan agreement (Exhibit P1) shows that the defendant was duty

bound to take the necessary steps to complete transfer of the suit property to the plaintiff.

Now, PW1 testified that the defendant did not transfer the landed property to him (plaintiff) thereby breaching the loan agreement and its addendum. Upon examining evidence of PW1, Exhibits P1 to P4, I am convinced that the plaintiff executed the terms of the loan agreement. This is when it is considered that the defendant handed over to him the certificate of title and the discharge mortgage as agreed to in clause 1 of Exhibit P2. The defendant was then expected to comply with clauses 2 and 3 of Exhibit P2 and Clause 4 of Exhibit P1 by transferring the suit property to the plaintiff. It is clear that the plaintiff has not paid the remaining amount of Tshs. 20,000,000/= because the defendant has not done his part. That being the case, the second issue is also answered in affirmative.

As regards the reliefs to which the parties are entitled to, it is common ground that this matter is based on breach of contract. Therefore, in terms of section 73 of the Law of Contract, Cap. 345 R.E. 2019, the plaintiff is entitled to compensation arising from the defendant's

breach of the loan agreement and its addendum. In addressing the issue of relief, I prefer to consider the reliefs prayed by the plaintiff.

The first relief is for an order that the defendant is in breach of contract and thus, liable to repay the outstanding sum. Having decided in this judgment that the defendant is in breach of the loan agreement, the first limb of the first relief is hereby granted by issuing a declaratory order to such effect. With regard to the second limb of the first relief, it is my considered view that the words "outstanding amount" used in the plaint suggest that the plaintiff is praying for special damages. The law is settled that special damages must be pleaded and specifically proved.

In this case, the outstanding amount pleaded in clause 5 of the plaint is Tshs. 100,000,000/=. As alluded earlier, PW1 and Exhibit P2 proved that the defendant received from the plaintiff, the said amount of Tshs. 100,000,000/= in consideration of transferring the landed property to the plaintiff. Now that the defendant is in breach of the loan agreement, this Court decides that the plaintiff is entitled to recover Tshs. 100,000,000/= being the outstanding amount paid to former.

The plaintiff further prayed for interest on decretal sum as per items (ii) (iii) and (iv) of the plaint. Awarding of interest is governed by



Order XX, Rule 21(1) of the CPC. The trial court's mandate is to award at the rate of 7% per annum from the date of judgment until satisfaction of the decree or such other rate not exceeding 12% agreed upon by the parties before or after the delivery of judgment. Unless it was agreed upon by the parties, this the trial court cannot award interest on the decretal sum, before institution of the case. It is in evidence that, the loan agreement and its addendum (Exhibits P1 and P2) have no clause in relation to the loan advanced to the defendant. Therefore, interest on decretal sum at the rate of 12% compounded monthly from 2<sup>nd</sup> February, 2015 to the date of filing of this suit cannot be granted. Guided by Order XX, rule 21, I hereby hold that the decretal sum shall attract interest at the rate of 7% per annum from the date of judgment until satisfaction of the decree.

With respect to an order of sale of landed property, PW1 deposed that the proceeds thereto will be used to realize the money which was paid to the defendant. It is my considered view that such order can be issued during execution stage. This is when it is considered that there are procedures to be complied with before making an order of selling the judgment debtor's property.

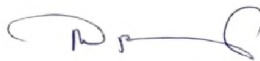
As to the costs of the suit, the law is settled that costs follow the event. Given the fact that the plaintiff has proved his case, the defendant is condemned to pay costs of this suit.

In the event, the plaintiff's case is found meritorious to the extent stated in this judgment. Consequently, the judgment and decree are hereby entered in favour of the plaintiff as follows: -

1. The defendant is in breach of the loan agreement and thus, ordered to pay the Plaintiff a sum of Tshs. 100,000,000 /= being the outstanding amount of money paid to him (the defendant).
2. The defendant shall pay interest on the decretal sum in paragraph 1 herein at the rate of 7 % per annum from the date of judgment till payment in full.
3. The defendant shall pay costs of this suit.

It is so ordered.

DATED at DAR ES SALAAM this 8<sup>th</sup> day of June, 2022.



S.E. Kisanya  
JUDGE

COURT: Judgement delivered this 8<sup>th</sup> day of June, 2022 in the presence of the plaintiff and in the absence of the defendant. B/C Bahati present.



S.E. Kisanya  
**JUDGE**  
08/06/2022