IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

LAND CASE NO. 05 OF 2019

NARGIS GAJJAR.....1ST PLAINTIFF

SUBCON (TANZANIA) LTD.....2ND PLAINTIFF

Versus

TPB BANK PLC..... 1ST DEFENDANT

TAMBAZA AUCTION MART AND GENERAL BROKERS.....2nd DEFENDANT

JUDGMENT

Date of Last Order: 15th June, 2022

Date of Judgment: 15th July, 2022

E.E.KAKOLAKI, J.

By way of plaint, the plaintiffs sued the defendants jointly and severally praying for judgement and decree on the following reliefs. A declaration that, there is an invalid loan agreement between the 2nd Plaintiff and the 1st defendant, declaration that, the mortgage of a matrimonial property entered by the plaintiffs and the 1st defendant is invalid and therefore ineffectual, Refund of Tanzania shillings one hundred and fifty million (TZS 150,000,000.00) to the 2nd Plaintiff by the 1st Defendant. Other reliefs sought are the Permanent injunction restraining the defendants, its agents, workmen, assignees or any other persons working on that behalf, from

conducting auction/ sale of the matrimonial property, general damages, costs of this suit and any other reliefs this honourable court may deem fit and just to grant. The defendants on the other side vehemently disputed the claims levelled against them and implored this court to dismiss the Plaintiffs' case in its entirety for being devoid of merits with costs.

The gist of parties' dispute in this matter as gathered from the pleadings can simply be narrated as hereunder. The 1st defendant on 24/04/2016 executed a loan agreement with Twiga Bancorp Ltd which in the year 2018 was merged with the 2nd plaintiff with its liabilities and assets, for extension of overdraft facility of Tshs. 270,000,000, the facility which was secured by the property in Apartment No. 101, Flat No. 5 Plot No. 71, Ally Hassan Mwinyi Road Upanga, Dar es salaam City, vide mortgage deed duly signed by Prakash Damji Gajjar (PW1), the 2nd plaintiff's Company director and husband to the 1st plaintiff. It appears after utilization of the said loan the 2nd plaintiff's business did not perform well, hence she failed to re-service the said loan, the act which forced the 1st defendant to employ recovery measures by engaging the 2nd defendant. A notice of repayment of the said loan and an intention to sale the mortgaged property in default was issued by the 2nd defendant to the 2nd plaintiff, the move which forced her to

approach the 1st defendant for negotiation on how to repay the loan. In that course the 2nd plaintiff managed to pay Tshs. 150,000,000/- in two instalments out of more than Tshs. 332 million she was indebted to the 1st defendant, before she consulted her lawyer and, advised that the loan agreement and mortgage deed were invalid for want of signatures by some officers from both parties. It is from that piece of advice the plaintiff withdrew from further repayment of loan and preferred this suit in which the defendant is vehemently contesting its merit. In essence the plaintiffs are claiming against the defendants jointly and severally for entering into an invalid loan agreement with the 1st defendant for an overdraft facility of Tshs. 270,000,000/- consequently lead to ineffectual mortgage which lead to unlawful intention to auction the 1st Plaintiff's property valued more than Tshs. 450,000,000/=.

At the hearing both parties were represented. The plaintiff was hired the services of Mr. John Gamaya, learned advocate while the defendants enjoyed the services of Mr. Emmanuel Mwakyembe and Ms. Adeline Elisei both learned counsels at different times. Both plaintiffs and defendants called one witness each, and it is only the plaintiffs who preferred to tender four (4) documentary exhibits. The admitted exhibits were the loan agreement and

mortgage deed (exh. PE1 collectively), two letters dated 22/01/2019 and 25/01/2019 respectively by the 2nd plaintiff to the 1st defendant, DTB transfer form of 22/01/2019, two fund transmission notifications of 22/01/2019 and 11/02/2019 and a letter of 11/02/2019 from the 2nd plaintiff to the 1st defendant (Exhibit PE2 collectively), A letter dated 24/01/2019 from TPB to the 2nd plaintiff and the letter dated 25/01/2019 from the 2nd plaintiff to TPB PLC (Exhibit PE3 collectively) and a copy of Bank statement in respect of account No.191505000359 in the name of SUBCON Tanzania Ltd (Exhibit PE4).

At the conclusion of the trial the plaintiffs preferred to file their final submission and were accorded with that right. Throughout the trial both parties were seeking to prove or disprove the issues that were framed by the Court upon being consulted to assist it in determination of their dispute. The said issues go thus:

1. Whether there was /is a valid binding loan agreement between the 2nd Plaintiff and the 1st Defendant.
2. If the above is answered in the affirmative, whether there was a breach by the 2nd Plaintiff.

3. Whether the mortgage deed between the 1st plaintiff and the 1st defendant is binding.
4. Relief to parties.

In this judgment I am not intending to reproduce the whole evidence as narrated by both parties as the same will be referred in the course of addressing the raised issues. This court had enough time to hear and internalise both parties' evidence tendered in Court. What is gathered therefrom is that, the plaintiffs through PW1 do not dispute to have obtained and benefited from the loan (overdraft facility) to the tune of Tshs. 270,000,000/- dully advanced to the 2nd plaintiff. And that, the said loan agreement and mortgage deed (exh. PE1) were signed by PW1 on behalf of the 2nd plaintiff while the 1st plaintiff and PW1's wife consenting to the said mortgage. And further that, the 2nd plaintiff could not re-service the said loan as per the agreed terms due to slowing down of her business in the construction industry, the result of which the 1st defendant employed the 2nd defendant for recovery measures of debt by way of sale of the mortgaged property. It is further settled fact by PW1 that, following recovery measures employed by the 2nd defendant by issuing the notice of sale of the mortgaged property, a round table negotiation was sought between the 2nd plaintiff and

1st plaintiff for rescheduling and repayment of the due loan in which the 1st plaintiff managed to pay a total sum of Tshs. 150,000,000/- (exh.P2), before the decision to institute this suit was preferred on the basis of invalidity of the loan agreement and mortgage deed (exh. PE1). Banking on all those uncontested facts therefore, the first issue for determination by this Court is whether there was/is a valid binding loan agreement between the 2nd plaintiff and the 1st defendant. Responding to this issue, Mr. Gamaya in his submission says, both loan agreement and mortgage deed are tainted with illegalities hence invalid and void ab initio on the following reasons. **One**, the two instruments are not registered with the Registrar of documents and Registrar of titles contrary to the provisions of section 41(1) and (3) of the Land Registration Act, [Cap. 334 R.E 2019] and sections 8(1)(a) and 9 of the Registration of Documents Act, [Cap. 117 R.E 2002]. **Second**, the two documents contravened the provisions of section 47 of the Stamp Duty Act, [Cap. 189 R.E 2019] for not being stamped hence should be disregarded by this Court though the same were tendered by the plaintiffs themselves. In support of this position he cited to the Court the case **First National Bank (T) Ltd Vs. Yohane Ibrahim Kaduma and Another**, Commercial Case No. 128 of 2019 (HC-unreported) on inadmissibility by the Court of

unstamped documents. **Third**, both instruments were signed by single person from the 2nd plaintiff and one officer only from the 1st defendant for loan agreement contrary to section 38 and 39 of the Companies Act and section 92(b) and (c) if the Land Registration Act. On this reason he also relied on the case of **First National Bank (T) Ltd** on the need of the company document to be signed by director and company secretary or by two directors of the company.

It is the governing principle in proving civil cases that he who alleges must prove and the onus of so proving lies on the party who would lose the case if the alleged existing facts are not proved, as the standard of proof is on the balance of probabilities. This is in terms of sections 2(b), 110 and 111 of the Evidence Act, [Cap. 6 R.E 2019]. In the case of **Abdul Karim Haji Vs. Raymond Nchimbi Alois and Another**, Civil Appeal No. 99 of 2004 (CAT-unreported) on burden of proof under section 110 of the Evidence Act, the Court of Appeal held thus:

> *"…it is an elementary principle that he who alleges is the one responsible to prove his allegations."*

The above principle of the law was further illustrated in the case of **Berelia Karangirangi Vs. Asteria Nyalwambwa,** Civil Appeal No 237 of 2017 CAT – (Unreported) where the Court of appeal had this to say;

> *We think it is pertinent to state the principle governing proof of cases in civil suits. The general rule is that, he who alleges must prove….it is similar that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on the balance of probabilities."*

To start with the first reason, having revisited the cited provisions of the law, I am far from being convinced with Mr. Gamaya's proposition that, the said loan agreement ought to have been registered with both Registrars of titles and documents, save for mortgage deed which is the mandatory requirement under section 41(1) of the Land Registration Act. Section 41(1) of the Registration Act provides that:

> *41.-(1) The disposition of land shall be registered by the Registrar.*

While I am in agreement with Mr. Gamaya that, the said mortgage deed ought to have been registered with the Registrar of Titles, the duty to so do as per the terms of paragraph 1.02 of the loan agreement rested on the 2nd plaintiff who is the mortgagor as the bank could only do so at the request

and costs of the Mortgagor. However there is no evidence that the 1st defendant was requested by the 2nd plaintiff to so do, though DW1 in his evidence explained that the instrument was registered. That being the position, it is the plaintiffs who are to carry the blame for failure to register it if any and not the defendants as Mr. Gamaya would want this court to believe. In view of that fact, any default on the plaintiff's part to register the same could not in any way affect the validity of the loan agreement, hence I dismiss the first reason.

As to the second reason, on the application of section 47 of the Stamp Duty Act, I agree with Mr. Gamaya that under the said provision no instrument chargeable with stamp duty but unstamped shall be admissible in Court as evidence unless the same is stamped. Section 47 of the Stamp Duty Act reads:

> *47.- (1) No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive the evidence or shall be acted upon, registered in evidence authenticated by any such person or by any public officer, unless such instrument is duly stamped:*

With the above position of the law the only glaring question exercising this Court's mind is whether the two documents are chargeable with stamp duty under the Stamp Duty Act as submitted by Mr. Gamaya. Mr. Gamaya submits that, under the provision of sections 2 read together with item 65 of the schedule to the Act, the two instruments fall under the categories documents required to be stamped. He also relies on the case of **First National Bank (T) Ltd** (supra). Section 2 of the Act provides for the definition of the term *"instrument"* to include:

> *"every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded in a paper or electronic form."*

Sections 5, 6, 7 and 8 under Part II of the Act provides for instruments chargeable by stamp duty but none of them mention specifically the two instruments under question to be amongst the chargeable documents, hence a resort to the schedule which as stated above has to be read together with the above cited provisions of the law. My perusal of the said schedule has unearthed that item N0. 6(2) of the schedule to the Act covers pledges made by way of security for the repayment of money advanced or to be advanced by way of loan in which the mortgage deed falls in. The same reads:

> *(2) The hypothecation, pawn or* ***pledge of movable property, where such deposit****, hypothecation, pawn or* ***pledge has been made by way of security for the repayment of money advanced or to be advanced by way of loan*** *or for an existing of future debt. (Emphasis added)*

As regard to the loan agreement, the same is not specifically referred in the schedule. However item No. 65 of the schedule to the Act, covers all instrument not provided for but when attested. Item No. 65 reads:

> *"ANY INSTRUMENT (if attested) not otherwise provided for."*

A glance of an eye to the said loan agreement has confirmed to me that the same was attested hence falling under the instrument referred in item No. 65. This Court also through my brother Nangela J, in **First National Bank (T) Ltd** (supra) when discussing as to whether loan agreement is chargeable with stamp duty, relying on item No. 65 to the schedule of the Act, concluded that it was, the conclusion which I embrace. In the upshot I am satisfied and therefore shoulder up with Mr. Gamaya's proposition that, the two instrument ought to have been stamped as per the requirement of section 47 of the Stamp Duty Act. There is no evidence tendered in Court by either side to prove that the same were stamped in compliance of the law, as that

fact was confirmed by DW1 when cross examined as to whether he had tendered and document to exhibit compliance of stamp duty and responded in negative. Now the follow up questions are who was responsible for stamping them and what the effect of non-compliance is. As regard to who was responsible for making sure that the same are stamped I am of the firm view that the answer is provided under section 41(g) of the Act. Section 41(g) is found under Part II (g) of the Act that provides for the persons liable for paying duty. Section 41(g) of the Act provides:

> *41. In the absence of an agreement to the contrary, the expense for stamp duty shall be borne by–*
> *(g)* ***in the case of a mortgage-deed, by the mortgagor****;*

From the above provision of the law it is obvious that in absence of any agreement between the parties that the mortgagee would be responsible for paying the stamp duty, I hold it was the mortgagor (2nd plaintiff) who was to pay the stamp duty and not the 1st defendant as claimed by Mr. Gamaya. With regard to the consequences for non-compliance of the law, the law is very clear under section 47 of the Stamp Duty Act, that such document shall not be admitted in Court as evidence. Now what should be done when the same is already wrongly admitted and rightly noted by the Court. Mr.

Gamaya submits that, the two documents should not be accorded any weight in determination of this matter. I am at one with Mr. Gamaya's proposition as the Court cannot rely on evidence improperly adduced or tendered to base its decision. The Court of Appeal in the case of **Ismail Rashid Vs. Mariam Msali,** Civil Appeal No. 75 of 2015 (Unreported) reversed the first appellate court's decision for relying on the improperly tendered evidence before the trial court to reserve its decision. In doing so while making reference to the case of **Shemsa Khalifa and Two others Vs. Suleiman and Hamed Abdala,** Civil Appeal No. 82 of 2012, (CAT-unreported) the Court stated that:

> *"In the light of the aforesaid, it is clear to us that, the decision of the first appellate court which reversed the decision of the trial court and held in favour of the respondent was wholly influenced by the evidence not properly before the court …."*

Similarly in the most recent case of **Leonard Dominic Rubuye t/a Rubuye Agrochemical Supplies Vs. YARA Tanzania Limited**, Civil Appeal No. 219 of 2018 (CAT-unreported), on similar principle the Court observed thus:

> *"…**we are alive to the settled law that documents not tendered and admitted in court as exhibit cannot be***

> ***relied upon as evidence and cannot be the basis of the decision****. There are plethora of precedents to this effect. To mention few are;* ***Japan International Corporation Agency (JICA) Vs. Khaki Complex Limited*** *[2006] TRL 343,* ***Abdalla Abass Najim Vs. Amin Ali*** *[2006] 55;* ***Shemsa Khalifa and Two others Vs. Suleiman and Hamed Abdala,*** *Civil Appeal No. 82 of 2012, (unreported)" (Emphasis supplied)*

In this case since the two instruments loan agreement and mortgage deed (exh.PE1 collectively) found its way in the record as exhibits in contravention of the law I disregard them as prayed by Mr. Gamaya. Having so said and done, now in absence of documentary exhibit which according to section 100 of the Evidence Act cannot be displaced by oral evidence, what is remained as a proof in the plaintiffs' hands to answer the first issue that, the loan agreement is invalid. With due respect, I find none except oral evidence in which its determination is reserved at the moment, before moving to the last reason. As no weight is accorded to the two instruments as prayed by Mr. Gamaya, I hold there is no documentary evidence to prove that, the loan agreement is invalid for not being stamped as raised in the second reason.

Next for consideration is the last reason on invalidity of the two instruments for contravention of the provisions of section 38 and 39 of the Companies

Act and section 92(b) and (c) if the Land Registration Act. I think this reason need not detain this Court much. Having found when deliberating on the second reason that, the two documents were wrongly admitted and therefore should not be accorded any weight, I see no reason of discussing whether the loan agreement for being signed by the single officer of both parties instead of two or more was rendered invalid or not. I so view as that will be wastage of time for trying to base decision of the Court on the evidence improperly tendered in Court. In view of that fact I also find there is nothing brought forth by the plaintiffs to convince this Court that the loan agreement was/is invalid.

With the above findings the pending question as left unattended herein above is whether there is oral evidence to prove invalidity of the loan agreement in absence or disregard of documentary sought to be relied on by the plaintiffs. The answer to this question in my firm view is no. I will briefly tell why. As alluded to above PW1, in his evidence in court supported by that of DW1, did not dispute to have signed loan agreement and mortgage deed with the 1st defendant in 2016, on behalf of the 2nd plaintiff for overdraft of Tshs. 270,000,000/=, to be repaid on thus a proof of valid loan agreement between them. Thus the first issue is answered in affirmative that

there was a valid and binding agreement between the 2nd plaintiff and the 1st defendant.

I now move to consider the second framed issue as to whether the 2nd Plaintiff is in breach of the loan agreement. Again it is in the evidence of PW1 that, due to slowing down of 2nd plaintiff's business resulted from bad performance of construction industry she failed to repay her loan timely hence issue of notice of sale to realise the mortgage by the 2nd defendant employed by the 1st defendant for debt recover measures. It was PW1's further evidence corroborated by that of DW1 that, she approached the 1st defendant to negotiate on the repayment of the due loan and asked to pay part of it to the tune of Tshs. 200 million in which she managed to pay Tshs. 150 million only. And furthermore that, she withdrew her intention of paying the debt after it came to her knowledge through the lawyer that, the loan agreement was invalid on the reasons of not being properly signed. With all those uncontroverted fact, this Court is satisfied that the 2nd plaintiff breached the Contract as the loan collected in 2016 and required to be repaid in one year was yet to be paid in full by the time when this suit was instituted in 2019. The above notwithstanding, the plaintiff is also claiming that her debt was written off as per the bank statement (exh.PE4), hence there is no

any breach of contract. With due respect, I don't think that defence will bail her out. It is the law that, writing off of the non-performing loan from the client account does not relieve the debtor from repaying the loan as that does not mean to restrict the bank from claiming the debt to the borrower. Where a non-performing loan remains under such state for four consecutive quarters of the year, under the provisions of Regulation 9 of Banking and Financial Institutions (management of Risk Assets) Regulation, 2014 G.N. No. 287 of 22/08/2014 (the 2014 Regulations), the bank is duty bound to charge it off or write it off from the financial statement. This position was made clear in the case of **National Bank of Commerce Vs. The Commissioner General Tanzania Revenue Authority**, Civil Appeal No. 52 of 2018 (CAT-unreported) where the Court of Appeal stated:

> *"According to the BOT Regulations, once a loan is classified as a loss, it has to be taken out in the period which it appears as uncollectable. In other words, that loss has either to be charged off or written from the financial statements of the bank…"*

As to whether the charged off debt or non-performing loan relieves the debtor from discharging it, the Court of Appeal in the case of **National Bank of Commerce Limited Vs. Stephen Kyando t/a Asky Intertrade,** Civil

Appeal No 162 of 2019 (CAT-unreported) provides an answer. The Court said:

> *Further, we have painstakingly studied the entire 2014 Regulations and the BFIA,* ***but have not been able to trace a regulation or provision providing that a defaulting borrower, whose debt has been classified as loss like the respondent in this appeal, should benefit from the regulatory aspect of writing off his own non-performing asset****. Thus, we agree with Mr. Ngogo,* ***that the act of the appellant writing off the respondent's debt did not relieve or discharge the respondent from the obligation of liquidating his debt*** *and the appellant retained a legal right to enforce recovery of the written off debt from the defaulting respondent. Holding otherwise, which we cannot do, would be tantamount to condoning financial indiscipline by unscrupulous and dishonest borrowers who could deliberately, default in settlement of their financial liabilities with their lenders waiting for their debts to be classified into categories qualifying for writing them off, so that they can go scot-free without repaying the borrowed monies.* (Emphasis supplied).

Applying the above principle in this case in which the plaintiff seeks to lean on the defence that her loan was charged off, and given the fact she has produced no evidence to prove that her loan was fully discharged, I hold she

is still indebted to the 1st defendant and therefore remained in breach of loan agreement (exh.PE1). The second issue is also answered in affirmative.

Next for determination is the third issue as to whether the mortgage deed between the 1st plaintiff and the 1st defendant is binding. Again this issue need not detain this Court as its determination relies on oral evidence basing on the prayer by Mr. Gamaya, to accord no weight to the documentary evidence in exhibit PE1 collectively sought to be relied upon by the plaintiffs. It was PW1's oral evidence that, he is the one who signed the mortgage deed pledging their matrimonial home as security for the loan secured by the 2nd plaintiff. It was in his further evidence that, the 1st plaintiff who is also his wife consented to the said mortgage. I find this was in compliance with the provisions of section 114(1)(1) and (b) of the Land Act, [Cap 113 R.E 2019] that governs the procedures to be adopted when a borrower intends to mortgage the matrimonial home. That the mortgagor's spouse must assent to the said mortgage in writing. Section 114 of the land act provides that;

> *114.-(1) A mortgage of a matrimonial home including a customary mortgage of a matrimonial home shall be valid only if-*

(a) any document or form used in applying for such a mortgage is signed by, or there is evidence from the document that it has been assented to by the mortgagor and the spouses or spouses of the mortgagor living in that matrimonial home; or

(b) any document or form used to grant the mortgage is signed by or there is evidence that it has been assented to by the mortgagor and the spouse or spouses living in that matrimonial home.

In this case, there is no evidence to contradict PW1's evidence (the mortgagor) that his wife (1st Plaintiff) was duly informed and consented to the mortgage of their matrimonial house as a security for the loan secured by 2nd plaintiff, hence compliance of the law. On that premise, this court finds that, the mortgage deed is binding to the 1st plaintiff as there is nowhere she claimed to have been forced to sign or to have never signed the same, hence the third issue is answered in affirmative as well.

The last issue is as to what reliefs are the parties entitled to. Basing on the findings of the Court above, this Court is satisfied that the plaintiff have failed to prove their claims to the standard required by the law which is the balance of probabilities as stated in the case of **Beralia Karangirangi** (supra). In

the premises, the Court is left with no any other option than to dismiss this suit as I hereby do. The suit is therefore dismissed it its entirety with costs.

Ordered accordingly.

DATED at Dar es Salaam this 15th day of July, 2022.

E. E. KAKOLAKI

JUDGE

15/07/2022.

The Judgment has been delivered at Dar es Salaam today 15th day of July, 2022 in the presence of Mr. Francis Walter, advocate for the Plaintiffs, Mr. Epaphro Mwego, advocate for the Defendants and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI

JUDGE

15/07/2022.