

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

LAND CASE NO. 31 OF 2020

NMB BANK PLC.....

PLAINTIFF

VERSUS

**MAYO (1999) COMPANY LIMITED..... FIRST
DEFENDANT**

**YASH INTERNATIONAL (T) LIMITED..... SECOND
DEFENDANT**

**A&M ENGINEERING LIMITED..... THIRD
DEFENDANT**

JUDGMENT

12th July & 31st August 2022

F. H. MAHIMBALI, J.

The plaintiff in this case prays for judgment and decree against the first, second and third defendants jointly and severally for the following reliefs, namely:

- i. A declaration that the first and second defendants have defaulted repayment of their respective loans and thus in breach of the loan agreement.

- ii. A declaration that the plaintiff is entitled to exercise its rights under the loan agreement by taking possession of the mortgaged property.
- iii. An order directing the plaintiff to serve the pre-requisite notice of the possession, Land Forms No.48 and 49 via the Daily Newspaper and the Citizen Newspaper to the defendants by way of substituted service through publication in the newspapers.
- iv. The third defendant to pave vacant possession of the suit property.
- v. General damages for the breach of the contract
- vi. Costs of the suit and
- vii. Any other reliefs this Honourable Court may deem fit and just to grant in the circumstances.

According to the facts and evidence of the case, the first and second defendants being sister companies, received bank loans from NMB Bank Plc amounting 4,500,000,000/=. The two companies had cross corporate guarantee. Whereas Mayo had obtained a term of loan of 550,000,000/=: YASH had obtained two loans: A term loan of 550,000,000/= and overdraft loan of

3,400,000,000/=. It appears that, in order to safeguard the said Bank loans by the first and second defendants, a total of six properties were used as securities (landed and non- landed properties). With the landed properties, the first was a structure/building in **Plot No. 45, Buguruni Industrial Area, Along Manderu road with CT No. 43260** by name of Mayo (1999) Company Ltd. The second was a house **in plot No. 562 Mindu Street Upanga with CT No. 186170/20/2** by name of Yash International (T) Limited. The third landed property was **plot No. 519/14 at Upanga Kisutu with CT No. 186006/37** by Yash International (T) Limited. That just after receiving the said bank loans, the first and second defendants defaulted repayment schedule as agreed and set between the Bank and them.

The NMB Bank PLC Ltd after had noticed the said defaults, made a follow up to the offices of the first and second defendants to discuss on the defaults but their physical offices were locked. When they looked for the directors' physical addresses could not reach them. As all means to reach and find the defendants proved futile, the plaintiff then commenced efforts to recover the advanced loans by realizing the landed securities. Out of the

three landed properties, two of them have been fully auctioned and its proceeds (380,000,000/=) have been credited to the Bank as partial discharge of the total amount loaned. However, one house in **Plot No. 45, Buguruni Industrial Area, Along Mandera road with CT No. 43260** by name of Mayo (1999) Company Ltd could not be sold by auction as it came to the knowledge of the plaintiff that the 3rd defendant is occupying the said premises. Thus the basis of this suit against the 3rd defendant that she should pave vacant possession because A&M Engineering Limited (third defendant) appears to have been operating business in the premises in which the NMB Bank was about to sell for realizing the loaned money to the 1st and 2nd defendants.

During the hearing of the case, Mr. Ndanu Emmanuel learned advocate represented the plaintiff whereas Mr. Godfrey Mpandikizi also learned advocate represented the 3rd defendant. For the first and second defendants, the suit proceeded ex parte against them as they defaulted appearance in Court despite all efforts to trace them to defend the claims laid against them.

As per contention in the case, the following issues were preferred as compass bearing of the case:

1. Whether the 1st and 2nd defendants have breached the terms of loan agreement.
2. Whether the plaintiff is entitled to the rights stated in the loan agreement.
3. Whether the third defendant has a legal right over the mortgaged property.
4. To what reliefs are the parties entitled to.

Whether the 1st and 2nd defendants have breached the terms of loan agreement, in his testimony **Mr. ERICK ALOYCE SHINDA** as PW1 stated that he is a banker with NMB - Senior Relationship Manager, Recoveries since January, 2018. Amongst his duties, are to deal with defaulting clients who were given loans. Upon receiving the list of respective clients (defaulters), he normally makes communication with them with a view of discussing what situation faced clients for the defaulting payments as scheduled. He clarified that the two companies (1st and 2nd Defendants) were clients with the Plaintiff. They had obtained Bank Loans with NMB Bank PLC Ltd amounting

4,500,000,000/= (**Exhibits PE1, PE2 and PE3**). Whereas Mayo had obtained a term of loan of 550,000,000/=, YASH had obtained two loans: A term loan of 550,000,000/= and overdraft loan of 3,400,000,000/=. That in order to safe guard the said Bank loans by the first and second defendants, a total of six properties were used as securities (landed and non- landed properties). With the landed properties, the first was a structure/building in **Plot No. 45, Buguruni Industrial Area, Along Mandera road with CT No. 43260** by name of Mayo (1999) Company Ltd. The second was a house **in plot No. 562 Mindu Street Upanga with CT No. 186170/20/2** by name of Yash International (T) Limited. The third landed property was **plot No. 519/14 at Upanga Kisutu with CT No. 186006/37** by Yash International (T) Limited.

That just after receiving the said bank loans, the first and second defendants defaulted repayment schedule as agreed and set between the Bank and them. The NMB Bank PLC Ltd after had noticed the said defaults, made a follow up to the offices of the first and second defendants to discuss on the defaults but their physical offices were locked. When they looked for the directors' physical addresses could not reach them. As all means to reach

and find the defendants proved futile, the plaintiff then commenced efforts to recover the advanced loans by realizing the landed securities. Out of the three landed properties, two of them have been fully auctioned and its proceeds (380,000,000/=) have been credited to the Bank as partial discharge of the total amount loaned. However, one house in **Plot No. 45, Buguruni Industrial Area, Along Mandela road with CT No. 43260** by name of Mayo (1999) Company Ltd (PE4) could not be sold by auction as it came to the knowledge of the plaintiff that the 3rd defendant is occupying the said premises. Thus, the basis of this suit against the 3rd defendant that she should pave vacant possession because A&M Engineering Limited (third defendant) appears to have been operating business in the premises in which the NMB Bank was about to sell for realizing the loaned money to the 1st and 2nd defendants.

Unfortunately, there has been no defense by the 1st and 2nd defendants to counter or contradict the plaintiff's evidence. With this plaintiff's evidence, I am satisfied that the issue whether the 1st and 2nd defendants have breached the terms of loan agreement, is answered in affirmative. I say so basing on exhibits

PE1, PE2, PE3 and PE4. That there were loan applications by the 1st and 2nd defendants and that the same were dully granted by the Plaintiff.

The next issue for consideration is issue no.3, whether the third defendant has a legal right over the mortgaged property. In his testimony, PW1 testified that after the expiration of 60 days' notice as per law against the 1st and 2nd defendants and that there was no any payment effected, the said loan was then forwarded to Auctioneer with the mortgaged properties for purposes of sale so as Bank can recover the said loaned money. The auctioneer by name of NUTMEG was the one opted by the Bank. The said auctioneer then managed to sale two properties located at Mindu street Upanga and Kisutu.

The property at Mandela Road had challenges (third defendant) as they met A& M Engineering Limited (third defendant), alleging that he is a legal tenant and thus refused to grant entrance to auctioneer and any one from accessing it. He clarified that the loan agreement is clear that where the mortgagor/client fails to repay the loan, the mortgagee has all rights of sale of the security properties. The Bank had no

information regarding the availability of any tenant in the said security properties. By the way, the loan terms as per mortgage deed, the mortgagor has an obligation to notify the bank and get its approval/consent before the mortgagor intends to lease the said mortgaged property. Since there ought to be notice and consent to and from the Bank, the existing contract between the 3rd defendant and defendant 1 and 2, the NMB Bank does not recognize it. PW1, contended that as per this obvious fact, the presence of the 3rd defendant in the mortgaged property as per existing terms of contract between the Plaintiff (NMB Bank PLC Ltd and the 1st and 2nd Defendants - PE4 exhibit-clause 3.01 (g)) is trespasser to the property with intention to impede the intended vacancy possession.

The presence of the third defendant in the mortgaged property that has a long term lease with the first defendant as per his pleading (his list of additional document to be relied upon), has not been established and secondly could not defeat the Bank binding contract with the 1st Defendant. I say so because the Bank's contract is dated 28th May 2017 whereas the latter (1st defendant with the 3rd defendant is dated 27th November 2017). It

appears the 3rd defendant (if really entered that purported contract), then didn't do diligent search to satisfy herself if the said property he was leasing for a long term was free from any encumbrances. Otherwise it has been unfortunate that the 3rd defendant also didn't give their defense testimony. This is because, on the date scheduled for hearing of the defense case, none of the officials of the 3rd defendant made appearance for his/her evidence. Under order **VIII Rule 21 (b) of the CPC** read together with **Order IX Rule 1 of the CPC**, the defense of the third defendant was as well ordered struck out.

Relying on the testimony of PW1, Considering the value of exhibit PE4, there has been no established legal right by the 3rd defendant over the mortgaged property to defeat the plaintiff's rights in exercising her legal option as per law. In that way, the third issue is answered in negation that the 3rd defendant has a registered legal right over the mortgaged property.

Having responded the third issue against the third defendant, the second issue "*whether the plaintiff bank is entitled to the rights stated in the loan agreement*", it goes without demure that as the 1st and 2nd defendants defaulted loan

repayment to the mortgagee-bank, the Mortgagee Bank being money lender, the law (Land Act) under section 125, 126, 127, 128 and 129 gives the money lender with legal rights to take appropriate actions including right of sale, leasing and possession of the mortgaged property as per law. The issue is thus answered in affirmative that upon breach of the mortgaged deed, the money lender is mandated by law to take appropriate legal actions..

As to what reliefs are the parties entitled to (issue no. 4). Having traversed issues no. 1, 2 and 3 and responded accordingly, pursuant to section **126 of the Land Act, Cap 113, R.E 2019**, I have the following orders to make in consideration of the plaintiff's claims: Firstly, that the third defendant is ordered to vacate peacefully or in default be forcibly evicted from the mortgaged property for purposes of enabling the plaintiff to exercise her right of the said mortgaged property as per law. Secondly, the Bank (NMB Bank PLC, LTD) is hereby permitted by this Court to advertise and sale the said property in **Plot No. 45, Buguruni Industrial Area, along Mandela Road with CT No. 43260** by name of Mayo (1999) Company Ltd (PE4) as per law

following the 1st defendant's default to honour the terms of the mortgaged property for the advanced loans.

Thirdly, the Bank is hereby permitted to possess the said property in the event its sale is impossible or unprofitable. Fourthly, the 1st, 2nd and 3rd defendants are jointly ordered to pay the plaintiff general damages at the tune of Tsh. 500,000,000.

Fifthly, costs of this suit be borne by all the defendants.

That said, the plaintiff's claims succeed to the extent ordered above.

DATED at DAR ES SALAAM this 31st day of August, 2022.



F.H. Mahimbali

Judge

Court: Judgment delivered this 31st day of August, 2022 in the absence of both parties while being in live video link connected from Musoma High Court to High Court Land Division.

The Deputy Registrar of the High Court Land Division is dully instructed to notify the parties timely.

Right to appeal dully explained.

A handwritten signature in blue ink, appearing to read 'F.H. Mahimbali', with a long horizontal stroke extending to the right.

F.H. Mahimbali

Judge