THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

LAND APPEAL NO. 73 OF 2021

(Originating from the District Land and Housing Tribunal for Mbeya Application No. 37 of 2019)

BROWN LWAGA MWASI ..... APPELLANT

VERSUS

NATIONAL MICRO FINANCE BANK PLC (NMB) ..... 1ST RESPONDENT

NSOMBO CO. LTD ..... 2ND RESPONDENT

JUDGMENT

Date of last order: 13/07/2022
Date of judgment: 12/09/2022

NGUNYALE, J.

The appellant BROWN LWAGA MWASI received a loan facility of 12,000,000/= from the first respondent on 23rd day of July 2018 mortgaging his house located at ZZK Street within Mbalizi township along Tunduma Road. He could not manage to repay the loan as they agreed with the 1st respondent, he defaulted payment of the same for what he alleged to be collapse of his business due to theft at his place of business. Following his default, the 1st respondent through the 2nd respondent served him with a notice of intention to sale the suit house which was

pledged as security of the loan advanced. Upon being served with notice the appellant preferred Application No. 37 of 2019 in the District Land and Housing Tribunal for Mbeya at Mbeya praying for intervention of the tribunal on the intention to sale the mortgaged house which he alleged to be a matrimonial home.

The Tribunal led full trial and at the end it found that the appellant had good reasons for his default to pay the loan so he deserved merciful relief. On the judgment dated 5th August 2021 the appellant was given six (6) months from the date of judgment to pay the outstanding loan of Tshs. 9,152,694.65/= and in default the house to be sold for the bank to recover the loan amount.

The above decision could not please the appellant, he preferred the present appeal premised in four grounds of appeal;-

1. *That the Tribunal erred both in law and fact by ordering the appellant to pay the remaining debt within six months which is quite short period of time compared to amount remained to pay the same loan which was supposed to be paid within one year.*
2. *That the trial Tribunal erred in law and fact by trying and deciding the matter and ordering reliefs that were not based on the issues framed and the reliefs claimed.*
3. *That the trial Tribunal Erred in law and fact by failure to take into account the circumstances that hindered the appellant to pay the remaining debt as per time in contract.*

4. *That the trial Tribunal erred in law and fact by failure to take into consideration that the appellant did not deliberately breach the contract.*

The appeal was called for hearing, the appellant appeared in person while the respondent was represented by Baraka Mbwilo learned Advocate, they both consented the matter to be disposed by written submissions.

On the first ground that the period of six months ordered by the Tribunal was very short the appellant submitted that he took the loan from the first respondent on agreement that he will pay the same for twelve instalments, that each month from the date 13th August 2018 to 13th July 2019. But due to problems that he encountered in his business whereby theft occurred in his business he could not meet such duration of 12 months. however, the trial Tribunal despite seeing the circumstance that he encountered such problems still it ordered to pay the remaining sum in a short period of six months. ordering such short period according to him was unfair and practically he cannot manage as the time set was not realistic. He prayed the Court as the first appellate Court to re-evaluate evidence in order to end with a correct finding. He cited the case of **Peter Vs. Sunday Post Limited** [1958] E. A 424 to bolster his argument.

In the second ground of appeal that the awards were not based on the issues framed and the reliefs claimed the appellant submitted that the trial Tribunal did not direct itself to the issue which were before it. According

to the appellant the main issues were whether failure to pay the outstanding balance by the appellant was deliberate and whether the respondent had a right to sale the mortgaged house. Those issues were not answered however the Tribunal just went ahead and ordered payment of the loan within six months otherwise the house will be sold. If the tribunal would have considered well the issues before it, it would have ended up to rule that the default to pay the loan was not deliberate but because of the misfortune of theft occurred.

He submitted further that the tribunal ought to direct its mind to the issues framed as it was decided in the case of **Kukal Properties Development Ltd vs. Maloo and Others** – (1990 – 1994) E. A 281 that a judge is obliged to decide on each and every issue framed. Failure to do so constitute a serious breach of procedure.

The third and fourth grounds of appeal on the failure of the tribunal to consider the circumstances that hindered the appellant to pay the remaining debt as per time in contract the appellant submitted that it was not his intention to refrain to service the loan. It was his settled opinion that the trial tribunal did not consider the circumstance prevailed around the appellant as a result he failed to pay the loan. He is not in a position now to pay such loan within a short period of time.

In his conclusion he invited the Court to quash with costs the decision of the tribunal which according to him is erroneous and to order extension of time reasonably for him to pay the outstanding loan.

Mr. Mbwilo for the respondents submitted that the six months extended by the tribunal was just a mercy because they were not a right within the loan contract between the parties. They disputed the first ground of appeal simply on the reason that the appellant does not deserve to be extended time as by doing so the Court will be interfering the contract which was entered between the appellant and the respondent.

It was the view of the respondents' counsel that the contract between the appellant and the 1st respondent cannot be interfered by the Court as doing so will be assisting defaulters to escape contractual obligations. He cited the case of **Liza Nathan Mwankusye vs. CRDB Bank PLC**, Land Appeal No. 202 of 2020 where this Court Karayemaha, J. (as he then was) stated that; -

> *"The appellant must fulfil her contractual obligation to pay the loan as agreed. Since the agreement in this case is a contractual agreement between the appellant and the respondent, the court is not allowed to interfere with the contractual obligation of the parties." The court further stated that 'I am guided by these words of wisdom which were stated in the case of General Tyre E. A. LTD vs HSBC Bank PLC [2006] TLR 60. Similarly, in SME Impact CV & 2 Others v Agroserve Ltd, Civil Appeal No. 9 of 2018 (unreported) the court cautioned*

about the trend to use the courts by defaulters to hide from their obligation to repay the loan."

He also cited a recent case of **Hussein Lutambika Toy vs National Microfinance Bank & Another,** Land Appeal No. 28 of 2021 where it was stated in part; -

"Since the agreement in this case is a contractual agreement between the appellant and the respondent, the court is not allowed to interfere with the contractual obligation of the parties"

The lamentations of the appellant cannot form a reason which can exonerate the appellant from liability because there is no proof that the stolen goods were valued the amount taken as a loan. The appellant is just struggling to escape his contractual obligation unlawful.

The second ground of appeal that the Tribunal erred by trying and deciding matters which were not among the issues raised, the respondents counsel started his submission by referring at page 12 of the typed proceedings of the trial Tribunal that the issue framed were; -

1. *Whether the applicant deliberately defaulted to repay the loan.*
2. *Whether the respondent has to sell the suit premises.*
3. *To what reliefs are the parties entitled.*

Mr. Mbwilo submitted that in the judgment of the trial Tribunal, the Chairman discussed the first issue at page two and three of the judgment, and he concluded that the applicant now the appellant had proved that

the breach of the loan agreement was not on his deliberate default. The trial Tribunal addressed on the second issue in page three of the judgment and stated that the 1st respondent and her agents at the time being were not entitled to sell the suit premises. At the end, the Tribunal granted reliefs to the parties. It was the view of the respondent's Counsel that the appellant is trying to mislead the Court because all framed issues were answered by the Tribunal.

On the third and fourth grounds of appeal on laments of the appellant that circumstances that hindered him from paying the remaining debt to the 1st respondent and that the Tribunal did not consider that he did not deliberately breach the contract the appellant submitted that it was not true. At page two and three of the judgment, the Tribunal considered the circumstances which hindered the appellant from paying the debt that is why the Tribunal went further by interfering with the contractual agreement between the appellant and the first respondent and granted the appellant an additional period of six months form the date of judgment to pay the outstanding amount. Surprisingly, the appellant did not recognize or even see it as a favour. The respondents were of the view that the Tribunal had no jurisdiction to extend time but the respondent

did not appeal to avoid further litigations. In the end, the respondents prayed the Court to dismiss the appeal with costs.

Having summarised the submission made by both parties and perused the trial tribunal records. In the first ground of appeal **the main issue is whether the court has a duty to re-structure the payment of the outstanding debt by the borrower.** Before I enter into discussion regarding the first issue, there is the quotation from Q. C. Ross Cranston in his book entitled **Principles of Banking Law, 2nd Edition,** Published by Oxford University Press, UK ISBN: 9780199253319, October 2002, page 133. It is written:

> *"Central to the bank-customer relationship is contract. The bank-customer relationship is rarely reduced to the one document, however, but instead comprises a variety of written forms, supplemented by terms implied by law. Often, a standard-form contract will govern specific aspects of the bank customer relationship, whether it be the account, payment, borrowing, security (including guarantees), and securities and derivatives dealing. The banking contracts is slightly different from other legal contracts based on the unique relationship between the customer and the bank in payments, rescheduling, and so forth."*

The writer has tried to point out the key elements in bank customer relationship that the relationship is based on contract, which may be reduced into documents. Those documents may be executed over a period of time. And the bank and customer contractual relation ship is

slightly different from other contracts because of the unique relationship between them.

Coming to our case, the parties that is the 1st respondent (bank) and the appellant (customer/borrower) executed the loan agreement with their free will. The contract was admitted as exhibit in the trial tribunal which was signed by the loan officer for the NMB bank and customer. It allowed the bank under clause 5(d) to sell securities (mortgage/disputed house) when the borrower is in default. They exercised those rights to recover their outstanding debt. In view of the given unique nature of the bank-customer relationship and on the strength of the contracts which were dully entered between them, there was nothing wrong in what was done by the appellant bank. The provision of the law of the contract are very clear in this aspect, under s.37(1) of the Law of Contract provides;

> *"The parties to a contract must perform their respective promises, unless such performance is dispensed with or excused under the provisions of this Act or of any other law".*

Thus, the law demand parties to the contract to fulfil their obligations under the contract as rightly submitted by the respondent Counsel. Therefore, there was no breach of contract by the act which was done by the appellant bank.

The question for determination is whether the first defendant is estopped from recovering its outstanding debt. This Court is aware that, the rights and obligations of parties under the contract are governed by the terms of the agreement and the relevant laws governing the subject matter as stated in the case of **Liza Nathan Mwankusye (supra)**. The appellant has not established if there is a contractual term or legal provision which prohibits the first respondent from recovering outstanding debt accruing from the contractual term by selling securities. As a matter of principle, liability arising from a contractual agreement is expected to be settled within the contractual period. It would be wrong for a defaulting party to anticipate that he can benefit from his own failure to honour his obligations under the contract by expecting failure to repay the outstanding debt within prescribed time, this will prohibit the other party in a contract from recovering his lawful debt. It is my conviction that the first respondent is not estopped by any means to recover its outstanding debt as agreed in the loan agreement.

The important thing by the first respondent is to follow the legal requirement before the said securities/ mortgage is sold. The first thing to determine is whether the Notice of Default has been issued. According to the Notice of default (60 days' notice) it provides to what extent the

appellant has defaulted in payment of the credit facilities granted to him under the mortgage deed. Section 127 (3) of the Land Act, Cap. 113 (R.E. 2019) requires a Notice of default issued as a result of default in the payment of any interest secured by any mortgage to be in the form and content prescribed by the Minister in the Regulations and provides that a Notice which is not in the prescribed form is void. The Land (Mortgage Financing) Regulations, 2009 G.N. No. 355 of 2009 presents the form of Notice of default to be used, Subsection (2) of section 127 of the Land Act, Cap. 113 (R.E. 2019), makes it a requirement for the Notice of default to inform the recipient adequately about, the nature and extent of the default, that the mortgagee may proceed to exercise his remedies against the mortgaged land, actions that must be taken by the debtor to cure the default, and that, after the expiry of sixty days following receipt of the notice by the mortgagor, the entire amount of the claim will become due and payable and the mortgagee may exercise the right to sell the mortgaged land.

Whether this Court has jurisdiction to order the first respondent to restructure the terms or redraft the terms of agreement between the appellant and the first respondent. The Court is mindful of the fact that, when a contract is clear and unambiguous the role of the Court is to apply

the parties' contract as written and not to re-schedule it unless there is evidence to establish that the contract lacks essential of a valid contract as stipulated in section 10 of the Law of Contract Act Cap 345 R. E 2019.

In the present case, facts indicate that contracting parties agreed voluntarily on the terms and conditions specified in the loan agreement. In the circumstances, the Court does not have the right or jurisdiction to order for re-scheduling of the terms and conditions of the loan agreement. The order of the trial tribunal that the appellant has to repay the remaining debt within six months is not the requirement of the law as submitted by the respondent Counsel with a serious note. The trial tribunal has no such jurisdiction as correctly submitted by the respondents. Therefore, the first ground of appeal has no merit.

In the second ground of appeal that the DLHT erred in law and facts by trying and deciding matters and considering and granting reliefs that were not based on the issues framed and reliefs claimed. In the trial Tribunal there were three issues, the **first issue** was whether the applicant deliberately defaulted to repay the loan, **second issue** is whether the respondent has to sell the suit premises and the **third issue** is to what reliefs are the parties entitled. After perusal of the trial tribunal judgment at page 2 and 3 the trial chairman had considered the raised issues, and

ended to hold that the default was not deliberately by the appellant and the bank has no right to sell the disputed house for the time being. The trial Tribunal went further to grant the reliefs to the parties. Therefore, I concede with the respondents' counsel submissions that the raised issues in the trial tribunal were considered by the trial tribunal chairman. Thus, the second ground of appeal has no merit.

The determination of the third and fourth ground of appeal is simple as it is predicated on the response to the previous issues. The trial tribunal having determined that the default was not a deliberate default he ended to grant additional of six months to the appellant to repay the loan. Thus, I concede with the respondents' counsel submission, that the trial chairman took into consideration the circumstances which hinder the appellant to reservice the loan.

All in all, the trial court records show that the appellant received loan facilities on 23/7/2019 as per bank officer evidence. he repaid the granted loan only for three consecutive months from August to October 2019. Despite the fact that he was reminded by the bank twice by demand notice dated 28/12/2018 and that of 24/1/2019, the appellant did not fulfil the contractual agreement. Thus, the non-payment of monthly instalments warranting the bank to exercise its contractual rights of sale

of mortgaged house. This legal position was stated in the case of Court of Appeal at Zanzibar, in the case of **Abdalla Yusuf Omari V. People's Bank of Zanzibar and another** (2004) TLR 399, where it was held that;

> *"By failing to repay any of the instalments due until May 2002 when he was served with a demand notice the appellant was in breach of the loan repayment terms and the bank was entitled to exercise its power of sale of the mortgaged property...".*

In this case the first respondent is entitled to recover the amount contained in the demand notice, and she is not estopped by any means to recover the outstanding debt and relevant penalties per the loan agreement. The first respondent issued demand notice and *hati ya kuhawilisha* to the appellant they are enough to prove that he is entitled to claim the outstanding debt. The appellant did not bring any evidence to dispute the fact that he was in breach of loan agreement and the amount in demand notice was not correct. Therefore, this Court has no jurisdiction to order for re-scheduling of the terms of agreement between the appellant and the first respondent.

Therefore, this Court finds that, the first defendant is entitled to recover the amount contained in the demand notice. The borrower who is the appellant in this case may redeem his mortgaged property any time before such sale or transfer is complete to a third person. All in all, borrowers

should know that when they borrow money on the security of a mortgage, they are bound by the terms and conditions of the agreements they sign, and that defaults in repayment may cause the mortgagee to exercise his remedies which include selling the mortgaged property. They should, to the best of their ability try to repay the loans and put the money into the use upon which they intended so that they can get returns and be able to repay the loans. Therefore, the third and the fourth ground of appeal are not merited.

In the end result, the Court has been satisfied that the appellant is bound by the terms and condition of the loan contract between him and the 1st respondent, he cannot use the Court to escape from performing a contractual obligation. The appeal lacks merit, it is hereby dismissed with costs.

Dated at Mbeya this 12th September 2022.

D. P. Ngunyale
Judge

Judgment delivered this 12th day of September 2022 in presence of the appellant in person.

D. P. Ngunyale
Judge
12/09/2022