IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM SUB REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 140 OF 2019

(From Civil Case No. 24 of 2017 before Kinondoni District Court)

JULIUS BIIKA LUTAINURWA .....1ST APPELLANT

JOHNMARY JULIUS LUTAINURWA.....2ND APPELLANT

VERSUS

CITY MORTGAGE .....RESPONDENT

JUDGMENT

10/8/2022 & 16/9/2022

MASABO, J.:-

By a loan agreement executed on 18/02/2016, the appellants herein obtained a loan worth Tshs. 42,000,000/= from the Respondent. The loan attracted a monthly interest of 5% of the principal sum per month and was payable by 31/03/2017. The appellant defaulted hence a suit at the trial court. The respondent claimed from them a sum of Tshs. 101,713,000/= comprising of the outstanding principal sum plus interests to 31/03/2017. She also prayed for an interest on the sum above to a rate of 5% per months from 1/04/2017 to the date of judgment. The appellants admitted the indebtedness to a tune of Tshs. 30,000,000/= but refuted the rest of the claim. After conclusion of trial a judgment was entered in the respondent's favour for payment of Tshs. 43,650,000/= being the outstanding loan, a monthly interest of 5% from 1/04/2018 to the date of judgment on

24/03/2020, Tshs. 1,000,000/= as collection costs, 7% on the decretal sum from the date of judgment to final settlement and costs.

Aggrieved, the appellants have come to this Court armed with the following 5 grounds of appeal. *First,* the Court erred in failure to consider that the respondent was not licensed to conduct banking business. *Second,* the Court failed to consider that the respondent was operating illegally by charging interests and taking securities/collaterals. *Third,* the speed track of the suit had expired. *Fourth,* the amount allegedly paid by the appellants was not considered. *Fifth,* the suit was not proved.

Hearing of the appeal proceeded in writing. Both parties were represented. Appellant were represented by Mr. Samuel Shadrack Ntabaliba and the respondent by Mr. Harry Mwakalasya, all learned Counsels. I have considered the lower court records and the submissions by the learned counsel. I do not intend to reproduce the submissions as I will do so in the course of determining the grounds of appeal.

Starting with the third issue on speed track, it has been submitted by Mr. Shadrack that the trial of the suit proceeded after the expiry of speed track. In his recollection, when suit came for first pretrial conference on 18th May 2018, it was scheduled to proceed under speed track one meaning that it was to be disposed of within ten months which was to expire on 14th March 2019. This time lapsed before the conclusion of trial and no extension of time or rescheduling order was sought/granted. In his view, the suit ought

to have been struck out with costs. Mr. Mwakalasya did not dispute the lapse of speed track. However, he cited the decision of the Court of Appeal in **National Bureau of Statistics Vs. the National Bank of Commerce and Eva Shoo**, Civil Appeal No. 113 of 2018 and submitted that, striking out of the suit is not an appropriate remedy for a suit that outlives its scheduled speed track is not to strike out the suit but imposition of costs on the defaulting party.

Having scrutinized the record, I have observed that the elusive reply by Mr. Mwakalasya is not coincidental as the lower court record speaks loudly in support of Mr. Shadrack's observation that, the speed track lapsed before the final disposal of the suit. It shows that, on 1st April 2019 the court extended the speed track for six months effective from this date meaning that, in view of the extension the speed track expired on 30th October 2019. As there is no record of further extension of the speed track there can be no doubt that the suit which was disposed on of 24th March 2020 outlived its speed track.

Regarding the consequences, this issue will not detain me as it has been extensively litigated in this court and the Court of Appeal and the position is now settled that the rules on speed track were introduced to expedite hearing and determination of suits and ultimately ensure speed administration of justice. They are neither cast on iron nor were they introduced into our legislation for embellishment. Like other procedural laws, they are only handmaids and not the mistress. They are lubricant, not a

resistant in the administration of justice (see **Mrs. Asha Ramadhan Laseko Vs. Ramadhani AM Laseko**, Civil Case No 40 of 1996 (HC); **Africa Medical Research Foundation Vs. Stephen Emmanuel & others**, Land Case No. 17 of 2011 (HC), and **Educational Books Publishers Ltd Vs. Hasham Kassam & Sons Ltd& Issa Ltd Unionaire Ltd & Bank M Tanzania Ltd,** Commercial Case No.5 of 2011 (HC) (all unreported). Affirming this position in **Nazira Kamru Vs. MIC Tanzania Limited**, Civil Appeal No. 111 of 2015 the Court of Appeal stated that:

> "With due respect, as we have stated earlier, there are two important limbs in the interpretation of Rule 4 of Order VIIIA. While it begins with a direction that there can be no departure from or amendment of scheduling order, but as Mr. Magoiga has correctly submitted, there is an equally important limb of weighing the interests of justice. Trial courts should not read automatism in Rule 4 to the legal consequence that once the speed track expire the life of everything that followed, including the evidence, becomes inconsequential. We think parties must be heard before trial courts impose any drastic legal consequences which are likely to affect the substantive rights of parties.

The Court further interrogated this issue in **National Bureau of Statistics Vs. the National Bank of Commerce and Eva Shoo**, (supra). Having cited with approval the decision of this court in **Mrs. Asha Ramadhan Laseko Vs Ramadhani AM Laseko**, (supra) it held that, much as it is desirable that the parties should strictly adhere to the speed track so that the suits should be disposed of within the assigned speed track, a suit cannot

be struck out or dismissed simply because the speed track has lapsed. The Court insisted that, the law infers the imposition of punishment of costs and other consequences that does not extinguish parties' rights.

On the strength of these authorities, the third ground of appeal cannot be sustained. I may also add here that, a speed track being a case management tool is not a monopoly of one party to the suit. Its strict adherence is the duty vested not only on the plaintiff. The defendant and the trial court are similarly duty bound to ensure that the scheduled speed track is strictly adhered to. If for whatever reasons the suit has outlived the scheduled speed track and the defendant has made no application for its departure or extension and the court has not raised it *suo motto*, it is upon the defendant to alert the court at the earliest opportunity. As the appellants herein abdicated that duty and sat back as spectators, they have none but themselves to blame.

On the first, second and fifth grounds of appeal which I prefer to consolidate as they are related the appellants are challenging the validity of the loan agreement between them and the respondent. Their main point as submitted by Mr. Shadrack is that, the respondent was operating banking business contrary to the provision of section 6(1) of the Banking and Financial Institutions Act, 2006 which restrict the operation of banking businesses to licensed institutions. Therefore, as the respondent was not a licensed banking institution, its business of lending of money and accepting collaterals was offensive of the law and the agreements entered thereto are invalid. For

the respondent, Mr. Mwakalasya did not make any attempt to substantively respond to this point. His reply submission in respect of this ground was merely on procedural issues whereby he submitted that this point should not be entertained as it ought to have been raised at trial stage. The fact that it has been raised at this late stage shows that it is an afterthought.

In my scrutiny of the record, I have observed that the respondent conceded through PW1 that it was not a registered money lender. Hence the evasive reply by Mr. Mwakalasya. On the status of the agreement concluded by the unlicensed money lender I have sought guidance from **Simon Kichele Chacha Vs Aveline M. Kilawe**, Civil Appeal No.160 of 2018 CAT at Mwanza (unreported) where just like in the present case the appellant invited the court to nullify the contract between him and the appellant on account that the respondent was not a registered money lender and had no banking license. Placing reliance on the sanctity of contract the Court emphatically stated that;

> It is settled law that parties are bound by the agreements they freely entered into and this is the cardinal principle of the law of contract. That is, there should be a sanctity of the contract as lucidly stated in **Abualy Alibhai Azizi v. Bhatia Brothers Ltd** [2000] T.L.R 288 at page 289 thus:
>
> *'The principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud (actual or constructive) or misrepresentation, and no principle of public policy prohibiting enforcement"*

> With the same spirit of the principle of sanctity of contract and being mindful with the clauses of the Exhibit PI, we are reluctant to accept the appellant's excuse for non-performance of the agreement which he freely entered with sound mind. On our part, we are satisfied that the contract entered between the appellant and the respondent had all attributes of a valid contract. It was not prohibited by the public policy and it is on record that the appellant was not complaining about his consent to the agreement being obtained by coercion, undue influence, fraud or misrepresentation in order to make it voidable in terms of the provisions of section 19 (1) of the Law of Contract Act, Cap. 345 R.E 2002. We therefore wish to emphasis here that since the appellant at the time he concluded Exhibit PI with the respondent was a free agent and he was of sound mind, he must adhere and fulfill the terms and conditions of it.

On strength of this authority, since the loan agreement which was admitted as Exhibit PE3 has all the attributes of the valid agreement and since the appellants admitted their indebtedness to the respondent and have raised no complaints to incapacity, coercion, undue influence, fraud or misrepresentation or any other ground that would render the agreement invalid, the appellant's excuse is bare and devoid of any merit. The 1st, 2nd and 5th ground of appeal consequently fail.

Advancing to the fourth ground of appeal, the appellants major complaint in this ground is that, the court ignored the sum they had already paid. It was briefly submitted that the appellants had already paid the mount due to the

them and the outstanding loan was Tshs 30,000,000/= which they admitted. For the respondent, it was argued that the loan ledger card admitted as Exhibit P1, sufficiently proved the appellants' indebtedness. It was therefore upon the appellants to dispute this evidence by providing credible evidence to the contrary but they opted not to. Hence, they can not blame the court.

It is a cherished principle of law that the burden of proof in a civil case lies on the party who alleges anything in his favour and the standard required is proof on the balance of probabilities **(see** sections 110 and 111 of the Evidence Act**,** Cap 6 RE 2019 **and Jasson Samson Rweikiza Vs. Novatus Rwechungura Nkwama**, Civil Appeal No. 305 of 2020, CAT (unreported)). Since the respondent in the present case was the one alleging that the appellants are indebted to her, she had the onus to prove not only that they are indented but the extent of their indebtedness. As the appellants admitted through paragraph 2 of their joint written statement of defence that they were indeed indebted to the extent of Tshs 30,000,000/=, the plaintiff's duty to prove the indebtedness was discharged and he was left with the duty to prove that the indebtedness was above Tshs 30,000,000/= In other words, it was upon him to prove how he arrived at the figure claimed.

From the record, his evidence in proof of this point comprised of the testimony of PW1, the loan agreement and the loan ledge. From the loan agreement and the evidence of PW1 it was uncontroverted that the loan advanced to the appellants was Tshs 42,000,000 which attracted a monthly

interest of 5% per month meaning that the total sum for repayment at the expiry of the loan duration of 12 months was Tshs 67,200,000/=.

According to PW1, the appellants paid 9,300,000/= only. Implicitly, the outstanding balance comprising the principal amount and the intestate was Tshs 57,900,000. PW1 proceeded further that, per their calculation, up to the time of filing the suit, the outstanding amount has skyrocketed to Tshs 101,713,000/=. It was clarified that this amount comprises of the balance of Tshs 57,900,00/=0 plus an interest of the 5% per moth with effect from 2017 to the date of judgment. Also, it includes for 'late payment'. On its part, the loan ledge card, Exhibit PE1, which shows the claims ed sum of 101, 713,000 revealed that, this sum is derived from the principal outstanding sum of 36, 900,000; the accrued interest of Tshs 21,000,000/= and penalties to a tune of Tshs 42,813,000. As the appellants rendered no proof of what they have paid, it was correctly deemed by the trial court that the outstanding balance of the principal sum and its interest were proved.

Regarding the penalties of Tshs 42,000,000/=, it would appear to have been arbitrarily imposed by the respondent. The glaring disparity in the monthly chargeable penalties entertains a serious doubt on how the sums appearing in the respective column was arrived at. It would appear as if they were plunked from the air. This said, the fourth ground of appeal succeeds to the extent that the appellants indebtedness as of 31/3/2017 was Tshs 57,900,0000 derived from the principal outstanding sum of 36, 900,000/=; and the accrued interest of Tshs 21,000,000/=.

In the foregoing, the appeal partially succeeds. The judgment and decree of the trial court are adjusted to the following extent:

1. The respondent is entitled Tshs 57,900,000/ comprising of the principal outstanding loan of 36,900,000/= and an interest of Tshs 21,000,000/=.
2. A further monthly interest of 5% chargeable on above the outstanding sum above from 1st April 2017 to the trial court's judgment;
3. An interest on the decretal amount in (1) and (2) to the tune of 7% per annum from the date of the trial courts judgment to final settlement.
4. Costs of the appeal to be shared.

It is so ordered.

DATED at DAR ES SALAAM this 16th day of September, 2022.

9/30/2022

X

Signed by: J.L.MASABO

J.L. MASABO

JUDGE