**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(MOROGORO DISTRICT REGISTRY)**

**AT MOROGORO**

**CIVIL APPEAL NO. 08 OF 2021**

*(Originating from the Resident Magistrate's Court of Morogoro at Morogoro, in Civil Case No. 15 of 2020 dated 20th day of September, 2021)*

**1) ALLY MIJINGA**
**2) ASHA MAKWAYA**
**3) HASSAN NZIGILWA**
**4) HASSAN MTUMAHAKI**
**5) BAKARI KIPANDE**
**6) SARAH MWAKILASA**
**7) SALEHE KATUMBALA**

**(T/A TUJIENDELEZE GROUP FARM) ..... APPELLANTS**

**VERSUS**

**CRDB BANK PLC ..... RESPONDENT**

## JUDGMENT

**16th March & 31st August, 2022**

**CHABA, J.**

In the Resident Magistrate's Court of Morogoro, at Morogoro (the trial court), the respondent through Civil Case No. 15 of 2020 successfully sued the appellants jointly and severally under the group styled by the name of Tujiendeleze Group Farm for breach of contract and for an award of Tshs. 81,296,351.32/= being an outstanding loan balance. Dissatisfied with the decision of the trial Court, the appellants preferred this appeal.

For brevity, I will refer the appellants as appellants and the respondent as the Bank. Briefly, the background of the appeal before me as gleaned from the parties' pleadings goes as follows: On 14th November, 2013 the Bank executed a Term Loan Agreement with the appellants jointly and severally as a group to the tune of Tshs. 98,809,610.00 (Tanzanian Shillings Ninety-Eight Million Eight Hundred Nine Thousand Six Hundred and Ten Only) at the interest rate of 20% per annum accruing daily on the outstanding balance and charged to the account annually payable within three years and in three equal instalments of Tshs. 46,907,419.00 starting from January, 2015 and was to end on the 28th February, 2017. The said term loan was for the purpose of facilitating agrobusiness aimed to purchase farm inputs such as pesticides and fertilizers in sugar cane production.

On 25th day of March, 2015 the Bank and the appellants jointly and severally agreed on restructuring of the term loan to Tshs. 108,593,270.55/= (Tanzanian Shillings One Hundred and Eight Million Five Hundred Ninety-Three Thousand Two Hundred and Seventy, Fifty-Five Cents Only). The Loan facility was secured by Deed of Security Arrangement over 61.7 acres of sugar cane farms located at Kidogobasi area, Ruhembe Ward, within Kilosa District owned by the appellants, specifically, as mortgage security.

Each of the appellant individually as security for the loan, agreed and consented to mortgage his/her farms found under the trade name of Tujiendeleze Group Farm and signed the Deed of Security Arrangement. The borrowers mortgaged their farms to be placed as securities for Bank

Loan as follows: Ally Mijinga mortgaged his farm measuring 1.50 acres to be placed as security for Bank loan, and until the institution of this suit he had an outstanding liability of Tshs. 2,746,382.44/=, Asha Makwaya mortgaged 7.0 acres, her and her outstanding loan was Tshs. 16,013,395.75/=, Hassan Nzigilwa placed 7.0 acres, and his outstanding liability according to the respondent was Tshs. 10,936,699.54/=, Hassan Mtumahaki placed as security his 7.0 acres with outstanding loan of Tshs. 11,179,608.31 and Bakari Kipande consented to give as security 12.0 acres farm, but until the dispute arose had a debt of Tshs. 16,946,788.71/= as outstanding loan., Saraha Mwakilasa gave 10.0 acres and had a debt of Tshs. 13,506,068.34/= while Salehe Katumbala consented to put as security of his 5.0 acres farm with an outstanding of Tshs. 9,978,614.78/=. All the farms measuring 62.9 acres are under Kitete Block Farm located at Kidogobasi area within Ruhembe Ward, in the District of Kilosa.

On her side, the bank / respondent averred in her plaint that according to their agreement, the appellants were required to pay their 1st instalment of the term loan by February, 2018, but they breached the term loan agreement and totally failed to pay the stated sum of monies, thereby making the bank to suffer loss. From there, the appellants began avoiding the respondent (the bank) in order to defeat her interests. Although on several occasions the bank tried and made the necessary efforts to remind the defendants to settle their debts, but her efforts ended in vain. The bank stated that the cause of action was established to be a breach of contractual term in the Loan Agreement which resulted in the outstanding balance of Tshs. 81,296,351.32/=.

Based on the above narrated facts, the bank/respondent instituted a civil case before the trial court seeking for the following reliefs:

i) Declaration that the appellants had breached a credit facility agreement by failing to discharge their duties and obligations in the agreement;

ii) That, the appellants jointly and severally be ordered to pay the CRDB Bank Tshs. 81,296,351.32/= at the rate of 20% from the date of pronouncement of the decision until full payment of the debt to the CRDB Bank being outstanding loan money;

iii) Alternatively, an order for sale of the collateral under Tujiendeleze Group Farm located at Kidogobasi area within Ruhembe Ward, in Kilosa District;

iv) Interest on the principal sum from the date of breach to the date of judgment at the rate of 20% per annum;

v) Interest on the decretal sum from the date of judgment to the date of full payment at the Court rate;

vi) Costs of the suit, and

vii) Any other reliefs(s) the Court may deem fit and just to grant.

Against such claims, the appellants opposed through a joint written statement of defence and admitted some of the facts. The facts which are not disputed by the appellants are: **first;** that they secured a loan from the

bank/respondent (Tshs. 108,593,270.55/= at the rate of 20% per annum according the (WSD) for Agriculture activities at Kilombero District. The appellants also conceded that the said loan agreement was supposed to end in February, 2018. They further stated that they discharged their obligations by paying the whole amount of loan and instalments accordingly.

The appellants further, admitted some facts which are stated in paragraphs 6 and 7, 7.1, 7.2, 7.3 of the plaintiff's plaint which gave the specific outstanding amounts for each of the appellant and the fact that each of them surrendered his respective farm as security/collateral. They averred that they paid the sum of Tshs. 149,800,000/= with the interest of three (3) years and thus the respondent's claim was unfounded. In paragraphs 8, 9 and 10 the appellants argued that it is the respondent who breached the agreement.

Three issues were framed for determination before the trial court. The main controlling issues were as follows; **One;** whether there was a contract entered between the parties. **Two;** if the first issue is in affirmative, whether there was a breach of contract, **Three;** what reliefs are the parties entitled to.

At the trial, one witness namely, Mr. Barik Vahaye (PW1) a Loan officer employed by the Bank/Respondent, Kilombero Branch testified and tendered thirteen documentary exhibits as follows: Twelve Loan Application Letters, collectively admitted as Exhibit P1; Loan Facility Agreement dated 14th November, 2013 admitted as Exhibit P2; Deed of Security

Arrangement admitted as Exhibit P3; Letter applying for extension of time for loan repayment admitted as Exhibit P4; Loan (Adjustment) Agreements dated 21/04/2015 and 06/05/2017 admitted as Exhibits P5 and P6 respectively, Clients visit forms used to record a visit to the bank clients for the purpose of reminding them to service the loan and/or effect repayment of the debts dated 04/04/2014 and 20/01/2014 admitted as Exhibits P7 and P8 respectively, Guarantor agreement between Ruhembe Cane Growers Association (RCGA) and the CRDB Bank dated 21/11/2013 and 25/11/2013 admitted as Exhibits P9 and P10 respectively; Security Agreement in which the appellants surrendered their farms for security which were collectively admitted as Exhibit P11, Loan Outstanding Balance Statement dated 31/01/2019; Account statement dated 21/10/2016 collectively admitted as Exhibit P12 and seven default reminder letters dated 06/02/2019, collectively admitted as Exhibit P13.

On the opponent side, the appellants (defendants at trial) brought five defence witnesses namely; Hassan Mnzigilwa (DW1), Hassan Mtumakaki (DW2), Bakari Saidi Kipande (DW3) and Salehe Muhamedi Katumbala (DW4).

After the full trial, the trial court ruled in favour of the bank/respondent (the plaintiff at trial) and gave the following orders: **One;** the appellants (the defendants at trial) were in breach of the credit facility agreement upon failed to discharge their duties in accordance with the loan facility agreement, **Two;** The appellants were jointly and severally ordered to pay the bank/respondent the sum of Tshs. 81,296,351.32 at the rate of 20% to the date of filing the suit until full payment of the outstanding loan

money, **Three;** interest on the principal sum from the date of breach to the date of judgment at 25% rate per annum, **Four;** Costs be borne by the appellants.

Dissatisfied with the trial court's decision, the appellants preferred an appeal before this court armed with seven (7) grounds of appeal as follows:

1. That, the trial magistrate erred in law and fact by concluding that the appellants had contract with the respondent while there was no contract between the appellants and respondent, while exhibit P1 was not addressed to the respondent.

2. That, the trial magistrate misdirected himself by relying on exhibit P11 while the said exhibit was between the appellants and Tujiendeleze Group Farm and the respondent was not a party.

3. That, the respondent failed to prove the liability of each of the appellant individually for the alleged borrowed sum of monies whereas the appellants did not borrow any money from the respondent as concluded by the hon. trial senior resident magistrate.

4. That, the trial senior resident magistrate erred in law to entertain the suit arising out of guarantee contract which was time barred.

5. That, the trial senior resident magistrate erred in law and fact by relying on exhibit P1 while there was no nexus between the appellants and the respondent.

6. That, the trial senior resident magistrate erred in law and fact when he passed omnibus liability of Tsh. 81,296,351.32 against the appellants jointly while their liability was alleged to be distinct in which the alleged sum was disbursed equally to the appellants but differently and the appellants cannot share liabilities equally. As such, the respondent failed to prove the liability of each appellant.

7. That, the bank statement, Exhibit P12 and other exhibits being electronic evidence were wrongly admitted and ought to have been expunged from the record. If the electronic evidence is expunged from the record there shall be no more evidence to support the respondent's case as to the disbursement of the loan to whom it was disbursed and repayment of the loan, a duty of which is imposed to the bank.

8. That, the trial senior resident magistrate failed to make good analysis of the evidence and exhibits tendered during the trial, hence arriving to erroneous decision.

At the hearing of this appeal, Messrs Thomas Rwebangila and George Ngemela, both learned advocates entered appearance for the appellants, whereas Mr. Nimrod Msemwa, learned advocate appeared for the respondent/CRDB Bank. The appeal was argued orally. In the course of arguing the appeal, the 4th ground was abandoned.

To kick the ball rolling, Mr. Ngemela, learned advocate commenced to argue grounds 2 and 5 altogether and submitted that the trial court erred when admitted and relied its judgment on Exhibits P.1 and P11 while

the said exhibits were not addressed to the respondent. He was of the view that the said exhibits had nothing to do with the appellants, it is on that error the trial court strayed in her decision.

Addressing the 1st ground, the learned counsel maintained that there was no contract between the appellants and respondent. The trial magistrate was in error when concluded that there was a contract between the parties. He pointed on Exhibit P1 and contended that the agreement was between the Appellants and Tujiendeleze Group Farm. He strongly suggests invocation of the doctrine of privity to contract and averred that the respondent was a stranger who can in no way sue on a contract that she is not a party to it.

Facing ground 8, the learned counsel did challenge the learned trial magistrate alleging that he failed to make good analysis of the evidence which led him to an erroneous decision. He then reasoned that had the trial magistrate analysed well the evidence particularly Exhibits P1, P2 and P11, would reach to a different decision. He invited this court as the first appellate court to re-evaluate the evidence on record and come out with her own conclusion. To reinforce his argument, the leaned counsel cited the cases of **Rashidi Adiki Ngwega vs. Ramadhani Hassani Kuteya and Another,** Civil Appeal No. 421 of 2020, **Hotel Sultan Palace Zanzibar vs. Daniel Laizer and Another,** Civil Appeal No 104 of 2004 and **Seif Mohamed Mavungu vs. Weindumi Lameck Sawe,** Civil Appeal No. 107 of 2013.

Mr. Rwebangila who took the floor to argue on the remaining grounds of appeal, he commenced to submits with the third ground by advancing a blame on the side of the bank/respondent to the effect that the bank was negligent when it granted a loan to an unregistered group known as Tujiendeleze Group Farm which was neither a limited company, a firm nor anything with corporate personality. He prayed and/or suggested this court to buy their reasoning that such an agreement entered by an unregistered group and the bank cannot bind the appellants who are individual persons. He added that the CRDB Bank would not be able to sue the appellants on the basis of Exhibits P3, P9, P10 while the appellants did not borrow even a single cent from the bank/respondent. Had it been so, he argues, the bank would have deposited the money into the appellants personal accounts.

To paint his argument, he cited the provision of section 37 (1) of the Law of Contract Act [Cap. 345 R. E, 2019] and the case of **Lulu Victor Kayombo vs. Oceanic Bay Limited and Another,** Consolidated Civil Appeal No. 2020. He argued that an individual may benefit from a contract entered by other parties, but such an act does not establish liability to the beneficiary, he concluded.

In effort to put merit on the 6th ground, which bears the complaint the trial magistrate passed an omnibus order/decree, he argued that the appellants are seven (7) but the trial court made an order for Tsh. 81,296,351.32 and distributed equally to them, while exhibit P12 and the evidence as whole showing that Tsh. 98,809,610 was issued to the group without proof on the amount disbursed to each appellant, respectively. He

went further in particulars of the Exhibit P12, saying all the monies in the statement were withdrawn by other persons not the appellants.

He proceeded that according to Exhibit P12 the debt was paid from 18th December, 2014 to 21st Sept 2016 by several persons including some of the appellants. The substantial amount was paid to Tujiendeleze Group Farm but no evidence was given to prove the amounts of each of the appellant got, what was paid and what was the balance. He went into particulars of all persons alleged to have benefited from the said loan, claiming that some were not members of the group and not parties to the proceedings but were paid by the respondent. He went on with repetition of arguments and cited some other precedents on the burden of proof arguing that the respondent had a duty to prove what she alleged.

On the 7th ground, the learned counsel submitted that Exhibit P12 was wrongly admitted contrary to section 18 (1) of the Electronic Transaction Act, 2015 read together with section 78 (1) (2) of The Evidence Act [Cap. 6 R. E, 2019] which required an affidavit of authentication by the bank officer, but in this case, there was none in respect of that statement (Exhibit P12). He cited along the case of **R.S.R (T) Ltd v. The Loans and Advances Realization Trust,** Civil Appeal No. 90 of 2002 (pg 10 - 11). He finally, prayed the appeal be allowed on the above submissions.

Mr. Nimrod Msemwa, learned advocate for the respondent replied in opposition to appeal. He prefaced his submission by observing that from the arguments advanced by the appellants' advocates, there is no dispute

that the appellants were members of Tujiendeleze Group Farm, that they jointly secured a loan from the respondent and further that they failed to repay the debts to the bank. Other facts are on the purpose of the loan.

He addressed grounds 2 and 5 by referred to (making reference to) Exhibits P11 and P1, a contract between the appellants and Tujiendeleze Group. It was his submission that, the evidence shows clearly that the appellants secured a loan from the bank / respondent. He referred this court to paragraph 3 of the appellant's WSD which shows that they admitted the claim. In addressing the first ground, he referred this court to the precedent in the case of **Agatha Mshothe vs. Edson Emmanuel and 10 Others,** Civil Appeal No. 121 of 2019 at page 25 where the Court of Appeal of Tanzania held among other things that where disposition is in writing, the same cannot be overridden by oral accounts and that since the appellants are bound by their pleadings, the trial court was correct in its decision.

Countering ground 8, Mr. Msemwa submitted that the trial court made a good analysis of the evidence before it and exhibits tendered. To cement this argument, he referred to the case of **National Bank of Commerce vs. Empire Ulanda Ltd and Dan O'Bambeiko [2005] TLR 15** where the Court held that the defendants who acknowledge the existence of agreement are estopped from denying liability thereof. Further referred to page 9 of the trial court's judgment where the WSD was referred by the trial magistrate.

Mr. Msemwa addressed the third ground by discrediting the submission made by Mr. Ngemela as new facts at the appellate stage. The appellants in their Written Statement of Defence admitted jointly. But if the learned advocate for the appellants intended to dispute the said joint liability, he was bound to raise the same at the trial, he argued. Prayed that this court should disregard this ground, as it was to be raised at the trial and not this stage of appeal.

Arguing in respect of the Sixth ground, Mr. Msemwa stated that it is also a new ground. But what the trial court issued was a joint liability. Thus, it is neither omnibus liability nor omnibus judgment. He referred this court at page 12 of the trial court judgment and supported the reasoning therein that the appellants disputed to have entered into an agreement with the respondent but the group, but since the appellant's admitted to have been members of the group, they were liable as the group entered on the members' behalf. He further contented and justified his reasoning by informing the court the reasons why other members who took the loans were not sued. He underlined that those members were not sued on the ground that they paid their dues timely.

He further applauded the trial courts reasoning along with the case of **The Registered Trustees of Islamic Propagation Centre (IPC) vs. The Registered Trustees of Thaaqib Islamic Centre (TIC), Land Case No. 23 of 2015 (Unreported)** and highlighted that our Apex Court when referring to the Scottish report, the Court observed that:

*"It would be pertinent to refer to the Scottish Law Reform Commission's Report on Unincorporated Associations of November 2009 (Scot Law Com No. 217). It went on to observe that, ..... we have no doubt that the above position mirrors the position in our country. So far as it relates to the instant case, the contractual responsibilities relating to an unincorporated association can be undertaken by individual office-bearers or, possibly individual association members, as it lacks capacity of its own to enter into contracts".*

From the above position of the law, Mr. Msemwa submitted that in the circumstance of this case, the appellants cannot at any rate hide themselves under the umbrella of Tujiendeleze Group Farm while the bank / respondent granted them a loan in good faith. He suggested that the appellants should be held liable and punished accordingly to protect the financial institutions.

As regard to the seventh ground, the appellants' counsel submitted that, the trial magistrate relied on Exhibit P12 to reach to his conclusion, but to the adverse. the respondent's counsel stood firm to the argument that and contended that the trial magistrate did not rely on Exhibit P12. He underlined that, no doubt that the appellants were represented by the advocate at trial. However, learned advocate, did not raise any issue on the admissibility of electronic evidence. Neither the advocate, nor the appellants cross examined on Exhibit P12. To him, failure to exercise such right, the appellants are estopped from raising this ground. He accentuated that this ground more or less new ground. To reinforce his contention, Mr. Msemwa sought wisdom of this court in the case of **Kyenkungu vs. John**

**Kyenkungu Ikweta International and NBC Ltd,** Civil Case No. 57 of 2001 HCT at Dsm (unreported) on the role of the Banks in the country's economy.

He concluded by highlighting that, since the present appeal has no merit, then the only remedy available to it, is to dismiss the same and uphold the decision and orders of the trial court and award costs to the respondent.

In rejoinder, Mr. Rwebangila mainly reiterated what they submitted in chief. He maintained that there was no contract between parties and thus the trial court erred to rule that there was a breach of contract. He further reiterated to the point why others were not sued while all were members of the group. He contended that in the circumstance of this case, it impossible to separate the appellants' liabilities because the ones who entered into the said Loan Agreement was the group. He denied the fact that they raised a new issue because all documents admitted in evidence were part and parcel of trial court proceedings. Though he acknowledges the position in **Agatha Mshote's case,** but he highlighted that Exhibits P2, P3, P9, P10 and P12 have no link with the appellants, though he admitted that some of the appellants were parties to the Loan Agreement as portrayed by Exhibits P1 and P11.

He underlined that since all monies were paid through Exhibit P11, but the evidence is silent who paid what and how much. As regards to the case of **The Registered Trustees of Islamic Propagation Centre (IPC)'s case** (Supra), the appellants' counsel submitted that the Court

made her decision in favour of the appellants, although the Exhibits P2, P3 and P12 shows that the persons who entered such a contract lacked capacity. Moreover, the learned advocate accentuated that the agreement was *void ab initio* as the same it was entered between the parties without legal capacity. He said that **Kyenkungu**'s case imposed the duty to the customers and the banks altogether. He acknowledged the fact that the CRDB Bank advanced loans to the appellants but they failed to repay the debt. On this facet, he blamed CRDB Bank due to its contributory negligence. He rounded up by reiterating his prayer that this appeal has merit and it should be allowed.

After having considered the trial court record, record of appeal, grounds of appeal and oral submissions advanced by the learned advocates from both parties, I find it appropriate and much consistent to determine the first four grounds of appeals jointly (grounds 1, 2, 3, 5 and 8). These grounds can be reduced into one question whether the existence of contract between the parties and liability of each of the appellant was proved by the evidence and Exhibits P1 and P11 and whether the evidence was well analyzed. Finally, grounds 6 and 7 will be dealt with independently.

In determining the question whether there was a Loan Agreement / contract between the parties, I will point out the relevant testimonies and material documentary exhibits. However, it is worth noting that despite of being discredited by the learned advocate Mr. Rwebangila, but the judgment of the trial court precisely considered the evidence adduced by PW1. Moreover, the admission by the appellants in their joint Written

Statement of Defence (WSD) is crucial evidence as the law articulates that parties are bound by their own pleadings. Having highlighted the above facts, I now propose to start to with the paragraph three (3) of the amended written statement of defence filed by the appellants before the trial court on 24th day of September, 2020. It read, and I quote: -

> "That, the contents of paragraph 4 of the plaintiff's plaint are strongly denied and the plaintiff herein is put to strict proof thereof that (Sic). **However, the defendants herein secured a loan of Tshs. 108,593,270.55/= at the interest of 20% per annual from the plaintiff of which intended to carry out the Business, among the business is the agriculture activities at Kilombero District Morogoro Tanzania and the Defendants herein were supposed to repay the loan plus interest to the tune of Tsh. 46,062,640.4/= in total as indicated in the Loan Agreement.** Attached herein is the copy of the Loan Contract dated 25th day of March, 2015 and its variation as Annex GF1 which form part of this defence."

Now, reverting to the plaintiff's averment in paragraphs 4 and 5 of the plaint, the CRDB Bank stated that on 14th day of November, 2013 the plaintiff executed a term loan agreement with the defendants / appellants jointly and severally as a group to the tune of Tsh. 98,809,610.00/= at interest rate of 20% per annum accrued daily on the outstanding balance and charged to the account annually payable in three (3) equal yearly instalments of Tshs. 46,907,419.00/= starting from January, 2015. However, on 25th day of March, 2015 the two parties jointly and severally

agreed to grant restructuring of the term loan to the tune of Tshs 108,593,270.550/= which varied the existing loan agreement dated 14th day of November, 2013 whereas the facility was set to expire on 28th day of February, 2018.

From the plaint and written statement of defence, it is clear that the appellants admitted to have secured a loan from the bank/respondent. As I have grasped from the parties' pleadings, what the appellants are trying to dispute and distance from the reality is that, all are claiming that are not the ones who breached the loan agreement (contract), meaning their duties to repay the debts. Looking at paragraphs 4 and 5 of their amended written statement of defence, the appellants contends that they discharged their obligation upon paid the whole amounts of loan accordingly, and there is no any instalment which the appellants have failed to pay. According to their WSD, they paid Tsh. 149,800,000/= with the interest of 3 % as agreed from January, 2015 to 28th day of February, 2018. This is contrary to what the learned advocates Thomas Rwebangila and George Ngemela tried to argue by insisting that the appellants did not enter into a loan agreement with the respondent. With due respect to the learned appellants' advocates, their contentions are misleading. Order VI, Rule 7 of The Civil Procedure Code [Cap. 33 R. E, 2019] binds the appellants to their own pleadings. The law prohibits parties to depart and/or departure from their own pleadings in the following words: -

> "No pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same".

From the above provision of the law, parties are estopped from arguing contrary to what they clearly and expressly pleaded in their amended written statement of defence, not only at this appellate stage (jurisdiction), but also at the trial court as well. Parties must adhere to the principles governing pleadings. I am fortified by the input set in the case of **James Funke Gwagilo vs. The Attorney General [2004] TLR. 161** where our Apex Court when dealing with the issue of pleadings ruled inter-alia that:

> "The function of pleadings is to give notice of the case which has to be met. A party must therefore so state his case that his opponent will not be taken by surprise. It is also to define with precision the matters on which the parties differ and the points on which they agree, thereby identify with clarity the issues on which the Court will be called upon to adjudicate to determine the matters in dispute. If a party wishes to plead inconsistent facts, the practice is to allege them in the alternative and he is entitled to amend his pleadings for that purpose."

Apart from that, Exhibit P4, included an application letter addressed to the respondent dated 20/08/2013 where the appellants among other members were applying for the loan. The main body of the letter was drawn and it read this way: -

> "Sisi kikundi kilichotajwa hapo juu, Tunaomba mkopo wa kuchimbua mashamba yetu ya miwa. Idadi yetu ya wakulima na

idadi yetu ya mashamba yetu ni kama jedwali inavyoonyesha hapo chini".

All the appellants were listed, the size of each appellant's farm and the proposed loan amounts are clearly indicated. Exhibit P3 (deed of Security arrangement) was accepted and signed by all of the appellants and others who are not party to this case. Exhibit P2 also reflect the letter for extension of time by the appellants along with the minutes of their meeting. In all the correspondence, the appellants were positively aware of the loan. This is also reflected in the respondent's plaint. There was a lot of material evidence before the trial court to establish the existence of a contract between the appellants and the bank/respondent. The argument that, Exhibit P1 was not addressed to the bank/respondent would have no sense. On this facet, I rule that Exhibit P1 was in the same transaction and it was connected to all other exhibits in this case.

By referring to the evidence along with their exhibits, it is clear that there was a clear contract between the parties and through that contract the appellants secured a loan, and liability for each of the appellant was as well stated in the hearing. I will demonstrate in details the liabilities in the coming grounds of appeal. On this cluster of grounds, I hold that the complaints in grounds 1, 2, 3 and 5 have no merits, and the same are dismissed altogether.

On the sixth ground, the appellants contends that the trial court passed omnibus liability of Tsh. 81,296,351.32 against the appellants jointly while their liability was alleged to be distinct. They argued that if the

alleged sum of monies were disbursed differently, the appellants cannot share liabilities equally. For this they maintained that the respondent/plaintiff failed to establish liability for each party. On his party, the respondent's advocate relied on the fact that the appellants were liable as a group, hence the court was justified to make a joint order.

On perusal and scrutiny of the trial court proceedings, I found that the plaint specified each of the appellants' liability. As alluded to above, Ally Mijinga had an outstanding liability of Tshs. 2,746,382.44/=, Asha Makwaya Tshs. 16,013,395.75/=, Hassan Nzigilwa Tshs. 10,936,699.54/=, Hassan Mtumahaki Tshs. 11,179,608.31/=, Bakari Kipande had a debt of Tshs. 16,946,788.71/=, whereas, Sarah Mwakilasa had the debt of Tshs. 13,506,068.34/= and Salehe Katumbala Tshs. 9,978,614.78/=. The total of which would bring about Tshs. 81,307,557,87/=. This is well reflected in Exhibit P12 supported by PW1's testimony. In their defence before the trial court, all appellants denied to have secured any loan from the bank. This is ridiculous because in their written statement of defence they claimed to have paid the whole amounts and thus owed nothing by the bank/respondent. In such circumstance, and in as much as pleadings are concerned, the appellants were anticipated to establish by narrating cogent evidence how much each of them paid the debts. But none of them ventured even to explain rebutting what the bank/respondent established as their liability. In view of the above, it was correct for the trial court to have held that there was a breach of contract, something which I subscribe to.

As to whether or not the trial court erred in entering decree for Tshs. 81,296,351.31/=, my response is in the negative. I say so because, the trial magistrate having considered the evidence on record and when the liability of the appellants was established, he reverted back to the reliefs sought by the respondent who sued the appellants jointly and severally. He therefore granted what the respondent prayed for in the plaint. For ease of reference, paragraph (b) of the reliefs read: -

> "The appellants **jointly and severally** be ordered to pay the CRDB Bank Tshs. 81,296,351.32/- at the rate of 20% from the date of pronouncement of the decision until full payment of the debt to the CRDB Bank being outstanding loan money".

In **Yusufu Nyabunya Nyatururya vs. Mega Speed Liners Limited,** Civil Appeal No. 85 of 2019, CAT at Zanzibar, the Court was faced with the question whether it was proper to exclude some of the respondents in a joint and severally liability, and it referred to the relief clause which was designed as ***"the defendants and each of them be ordered to pay the plaintiff..."***. During determination of the matter, the Court proceeded to rule as follows: -

> "The appellant left the chance open to the trial Judge that, depending on the evidence which would be placed before him, **he had the option of either holding the defendants jointly liable, or, each of them individually liable".** (Underline is mine).

In our case, the respondent sued for appellants' liability jointly and severally. She established her case from specific to general as hinted above. Each of the appellant was well aware of the extent of his or her liability in the decree and therefore, despite of the fact that the Court committed no error to have pronounced the whole amount, it did not prejudice any of the appellant. In the result, I would dismiss this particular theory advanced by the appellant's advocates as the same hold no water and it hold no sensible point as well.

Regarding ground seven, I have considered the contention between the parties. The appellants' advocates were of the firm view that the respondent did not adhere to the law. They claimed that she was required to swear an affidavit regarding the authenticity of the contents in respect of Exhibit P12 which was a print out from electronic data. They averred that the trial court erred in law when it relied on such evidence which in their view, deserves to be expunged from the court record. But in rebuttal, the learned advocate for the bank/respondent, Mr. Msemwa submitted that the trial court decision did not place reliance on Exhibit P12, and the appellants as well did not object its admission.

My response to the above ground of appeal, is that upon a close and serious reading of the reference made by the appellants' advocates concerning the statutes referred by the appellants to this court, the provisions of the law under section 18 (1) (2) (3) of the Electronic Transactions Act, 2015; now [Cap. 446 R. E, 2022] provides for criteria's for admissibility of electronic data message. Among the parameters is authenticity and reliability. The above provision, as argued by the

appellant's advocates goes along with section 78 of The Evidence Act, [Cap. 6 R. E, 2019] now [R. E, 2022) which provides for the following: -

> "Section 78 (1) - A copy of an entry in a banker's book shall not be received in evidence under this Act unless it is first proved that the book was at the time of the making of the entry one of the ordinary books of the bank and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank.
>
> (2) Such proof under subsection (1) may be given by a partner or officer of the bank and may be given orally or by an affidavit sworn before any commissioner for oaths or a person authorised to take affidavits."

I would agree with the appellants on the substantive provisions of the statutes above. But I think in my view that, the learned advocate Mr. Rwebangila took it much stricter when he argued that it was necessary to give an affidavit to prove authenticity before tendering Exhibit P12. The law, well interpreted, is clear that the statement that, an entry in the book was made in ordinary course of business may be given orally or by an affidavit, as articulated under section 78 (2) of the Evidence Act. Reverting to the evidence adduced by PW1 while tendering in evidence Exhibit P12, the witness testified that: -

> "Loan repayment is governed by the bank system and feedback on the payment progress is given through statement. The system is known as "outstanding on balance statement". If I see the

statement printed, I will identify by loanee name and the unpaid loan amount"

Having in mind of what it was decided in **R.S.R (T) Ltd and Another vs. The Loans Advances Realization Trust** (Supra), the above was congruent and of the same effect as stated in the provisions of the law cited above. I am aware that the trial magistrate did not cause the authentication statement be made in a much stricter mode close to the letters. But a reasonable interpretation of the above would mean that the outstanding on loan balance statement was being generated in the ordinary course of business. On top of that, correctly as submitted by Mr. Msemwa, the appellant's advocates did not object or cross examine on P12. Again. This ground is dismissed for having no merit at all.

On the last ground, the appellants' advocates complained that the trial court failed to properly analyze the evidence before it and hence reached to an erroneous decision. But the respondent's advocate had the opposite stance. The appellants invited this court to analyze the evidence and make or come up with its own finding. Most of the evidence have been discussed in the preceding grounds. In making my analysis, I will therefore point out the relevant and significant parts only.

I am alive to the principle of law which states that the first appellate court is bound to re-evaluate the whole evidence and when appropriate, come to its own findings. Also knowing that the trial court was in a better position to handle all matters of fact(s), the duty bestowed to this court is this court is to analyze the evidence for both sides in accordance with the

law. This approach earns strength from the decisions of our Apex Court. For instance, in **Damson Ndaweka vs. Ally Saidi Mtera,** Civil Appeal No. 5 of 1999 (unreported) is one of them. In this case the Court of Appeal of Tanzania held inter-alia: -

> "The High Court, as the first appellate court was bound to analyse the evidence for both sides with a view to satisfy itself that the finding of the trial court was justified on the evidence".

This ground folds the whole case pertaining to the evidence. It is trite law that a party who brings the suit must prove what he claims. The standard of proof is on balance of probability. This is in terms of sections 110 and 111 of The Law of Evidence Act [Cap. 6 R. E, 2019]. In my scrutiny of the evidence on this facet, I will be guided by the afore-stated provisions of the law.

It is undisputed that all the appellants through their joint written statement of defence, admitted that they secured a loan from the bank / respondent, but disputed and/or denied to have involved to breach the contract. On her party, the bank/respondent did establish that the appellants paid only part of the debt. In my view, the appellants adduced nothing material to disprove this fact. It is evident that in their testimonies, the appellants even contradicted their own written statement of defence. While in their written statement of defence admitted to have secured a loan and claiming that they repaid it in full, in their oral testimonies they denied to have secured the loan at all, but admitted the fact that they

secured a loan under the umbrella of so called Tujiendeleze Group Farm which they claimed to have paid the debt in full. Apart from that, PW1 who testified and gave the whole account on how the appellants applied for the said loan, he tendered Exhibit P1, which are the letters for application for loan, Loan Agreements and deed of security arrangement (herein Exhibits P2 and P4). It is proved that after securing the loan, appellants defaulted. So, they applied for an extension of time (letters applying for extension was admitted as Exhibit P4) and the same was granted, hence they signed other agreements after extension(s) of time (As shown in an Exhibits P5 and P6). Further, Exhibits P7 and P8 respectively, are the forms showing that the appellants were visited by the responsible officer from the bank who reminded them to make good the breach. Again, Exhibit P9 is a guarantor agreement which involved the parties and Ruhembe Cane Growers Association (RCGA). Another guarantor agreement was signed by Tujiendeleze Group Leaders with the bank (Exhibit P10). Exhibit P11 concerns with the additional properties surrendered by the appellants to the group as security for the loan.

Apart from that, Exhibit P12 (Outstanding Loan Statement) described specifically on each of the appellants liability; the loan secured, the amounts paid and the outstanding balance. Another piece of evidence here was reminding letters on the defaults to the appellants, herein Exhibit P13.

This thread of evidence adduced by the respondent before the trial court, gives an account and a clear flow of events which to my considered opinion, establishes a clear cause of action against the appellants. Without

having any other evidence to the contrary, in my opinion, the trial court was justified to believe it and accord weight on it.

Further, I subscribe to the decision reached by our Apex Court in the case of **Agatha Mshote vs. Edson Emmanuel & 10 Others,** Civil Appeal No. 121 of 2019; CAT (Unreported) and section 100 (1) of The Evidence Act [Cap. 6 R. E, 2019] that where agreements are reduced into writing, it cannot be controverted or overridden by oral account.

I would therefore adopt the reasoning of the Court of Appeal of Tanzania in the case of **National Bank of Commerce vs. Empire Ulanda Ltd & Dan O'Bambe Iko [2005] TLR, 15** and **Simon Kichele Chacha vs. Aveline M. Kilawe,** Civil Appeal No. 160 of 2018 CAT at Mwanza that where parties have freely entered into binding agreements, neither courts nor parties to the agreement should interpolate anything to interfere with the terms and conditions therein. To add, the said agreements so entered must be performed unless there is a serious contravention to the public policy.

The arguments advanced by the appellants' advocates that the agreement was *void ab initio* for having been entered into by the group which was unregistered and had no corporate personality, to be frank, this contention do not hold water and by prudence is not expected to be argued by learned brothers. It needs only elementary law of contract to distinguish valid and void agreements. I will shake hands with the trial magistrate in his reasoning on the status of agreements entered by unregistered groups. The case of **Registered Trustees of Islamic**

**Propagation Centre vs. Registered Trustees of Thaaqib, Islamic Centre** (Supra) referred by the trial court, established a very perfect expound of the law relevant in the case under scrutiny. At page 23, The Court of Appeal held inter-alia that: -

> "The contractual responsibilities relating to an unincorporated association can be undertaken by individual office-bearers or, possibly individual association members, as it lacks capacity of its own to enter into contracts."

Parties are bound by the agreement they freely entered into and this is the cardinal principle of the law of contract, parallel to the principle of sanctity of contract, the doctrine under which parties are obliged to honor the agreements in a holistic submission. Even the court shall remain reluctant to admit excuses for non-performance where there is no incapacity, fraud (actual or constructive) or misrepresentation and where no principle of public policy prohibits enforcement.

As correctly observed by the learned advocate for the bank / respondent when concluding his submission, I am in applause with the decision reached in **Aida Kyenkungu vs. John Kyenkungu, Equator International and NBC Limited,** Civil Case No. 57 of 2001 HCT, DSM (Unreported); where this Court emphasised on the role of banks to the growth of the country's economy and how borrowers should adhere to the loan agreements and repay their liabilities and suffer not the banks to collapse.

Confronted with a similar situation in **Abdallah Nakanoga and 7 Others t/a Mafanikio Group Farm vs. CRDB Bank,** Civil Appeal No. 14 of 2021, I subscribed to the holding in the case of **Aida Kyenkungu's case** and once again I would like to stress and insist that financial service providers should be beware and strictly adhere to the *know your client policy* to avoid fraudsters in disguise of borrowers.

In the final analysis, and to the extent of my findings, I find no reason to fault the findings and decision reached by the trial court. Accordingly, this appeal is hereby dismissed with costs. Judgment, Decree and Orders made by the trial court remains undisturbed and I uphold as well. **It is so ordered.**

**DATED** at **MOROGORO** this 31st day of August, 2022.

THE HIGH COURT OF TANZANIA

**M. J. CHABA**

**JUDGE**

**31/08/2022**