

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

LAND CASE NO.3 OF 2017
(Original case)

**1. NEW NYANGUGE GENERAL SUPPLIES
COMPANY LIMITED**

2. KIJA MABULA MAGEMBE

3. MARCO MAGOMBO

4. MAGEMBE KIJA

PLAINTIFFS

VERSUS

**1. NATIONAL MICROFINANCE
BANK PLC (BARIADI.**

2. LJ INTERNATIONAL LTD

3. VITRECS OIL MILL TANZANIA (2004) LTD

DEFENDANTS

JUDGMENT

06/12/2022

A. MATUMA, J:

The 1st plaintiff borrowed ***Tshs. 130,000,000/=*** from the 1st Defendant which was advanced to her in two instalments; ***Tshs. 69,600,000/=*** and then ***Tshs. 60,400,000/=*** which was to be repaid within 12 months.

The 2nd Plaintiff Kija Mabula Magembe who was one of the Directors (PW1) and owner of New Nyanguge General Supplies

Company Limited (1st plaintiff) mortgaged his landed properties on plots no. 9 Block "M" Bariadi Urban area, no. 442 Block "A" Bariadi Urban area and Plot no. 2 & 3 Block "L" Bariadi Urban Industrial area for the purposes of securing the loan to the 1st defendant (Exhibit D1).

The 1st Defendant engaged LJ International Limited (2nd defendant) who is their Debt Collector to collect the debt from the 1st and 2nd Plaintiffs after the failure to honour the Default Notice.

The 2nd defendant issued Demand notice to the 1st Plaintiff but the same was not honored. She thus made the notice of sale through Majira Newspaper and subsequently sold plot no. 2 & 3 (Supra) which was a godown and milling machine to the 3rd Defendant herein.

The 3rd and 4th Plaintiffs claims that at the time of the auction, they had their properties in the godown whereas the 3rd plaintiff claimed that he had his consignment measuring 18 tons equal to ***Tshs. 21,600,000/=*** while the 4th plaintiff claims that he had 4300 Kilograms of rice valued at ***Tshs 6,020,000/=*** in the godown. With this background, the plaintiffs decided to commence this suit after having been dissatisfied with the whole process of sale, the manner of sale and the damages resulted as a result of the said sale.

In their joint plaint, the plaintiffs avers that the 1st Defendant advanced the loan to the 1st plaintiff on two instalments instead of a single instalment as was agreed and thus frustrated her business, that upon the alleged default the 1st defendant issued the Default notice to Nyanguge General Supplies Company Limited instead of New Nyanguge General Supplies Company Limited and thus there was no notice of default recognized hence an illegal sale of the mortgaged properties.

They further alleges that in the cause of selling Plot no. 2 & 3 herein above-named various properties of the plaintiffs got lost in the hands of the defendants. The allegedly stolen and or lost properties are; 398 maize flour bags, 227 rice bags, 2 office tables, 8 office chairs, legal documents, Tshs. 2,413,000/=, 8 spare tyres valued Tshs. 4,800,000/=, engine spares worth Tshs. 5,050,000/=, 827 grams of gold worth Tshs. 62,025,000/=, other 360 rice bags worth 21,600,000/=, 4300 kgs of rice worth Tshs. 6,020,000/=.

In that regard the plaintiffs are calling this court to declare the sale of the godown on Plot no. 2 & 3 Block "L" Bariadi Industrial area illegal, to order the defendants to pay the plaintiffs specific damages to the tune of Tshs. 101,908,000/=, general damages to the tune of Tshs. 400,000,000/=, interests at court rate from the date of judgment to the

date of full payment, costs of the suit and any other relief as the court may deem fit and just to grant.

At the hearing of this case, the plaintiffs were represented by Mr. Dominicus Nkwera learned advocate while the defendants were represented by Mr. Makanjelo Ishengoma learned advocate. During the final pretrial conference, the parties agreed six issues for determination of this suit and this court framed such issues as shall be determined down here one after another.

The plaintiffs' case had seven witnesses namely; ***Kija Mabula Magembe (PW1), Michael Thomas Magombo (PW2), Emmanuel Lyanga (PW3), Wibert Masanja Yegela (PW4), Magembe Kija (PW5), Sabina Wilson Numbu (PW6) and Agness Yohana (PW7).***

On their party the Defendants had two witnesses namely; ***Agrey Mtui (DW1) and Francis Marchiades (DW2).***

The evidences of each witness for both parties shall be referred in the due course when the issues are determined in this judgment.

I will start with the first issue which reads; ***whether the 1st plaintiff entered in a loan agreement with the 1st defendant.***

This issue needs not waste time for its discussion. It is undisputed fact that the 1st plaintiff entered into a loan agreement with the first defendant. This is evidenced by the evidence of both parties both oral and documentary.

PW1 who is the Director of the 1st plaintiff stated in evidence that the 1st plaintiff requested for the loan from the 1st defendant and the 1st defendant approved the loan of Tshs. 130,000,000/= which was later advanced to the 1st plaintiff in two instalments of Tshs. 69,600,000/= and Tshs. 60,400,000/= respectively.

That is seen in the evidence of PW1 Kija Mabula Magembe at page 29 and 30 of the typed proceedings;

*"In 2012 I applied for loan of 150 m. with NMB at Bariadi Branch. The Bank accepted the loan of 130 million. The New Nyanguge General Supplies was the loan beneficiary I acted as the Director. The loan was deposited in July, 2012. **It was Tshs. 69,600,000/= deposited in the account of New Nyanguge General Supplies. The remaining balance was deposited in New Nyanguge General Supplies in August, 2012, it was Tshs. 60,400,000/=.**"*

The evidence was in material particular mutatis mutandis to the evidence given by the loan officer of the 1st defendant Mr. Agrey Mtui who testified as DW1. This witness testified at page 68-70 that they advanced Tshs. 130,000,000/= to the first plaintiff and tendered in evidence the letter offer of the said loan together with the mortgage of the right of occupancy as exhibit D1.

With such evidence, the first issue is answered in the affirmative that the 1st plaintiff had a loan agreement with the 1st defendant.

The second issue is; ***whether the 2nd plaintiff guaranteed the 1st plaintiff to secure a loan with the 1st defendant.*** Like in the 1st issue, it is undisputed fact by both parties that the 2nd plaintiff Kija Mabula Magembe entered into a Mortgage agreement with the 1st defendant to secure the loan by the 1st plaintiff. The 2nd plaintiff himself testified as PW1 at page 29 of the typed proceedings that the 1st Defendant required security for the loan and he surrendered his three tittles;

"The bank required documentation for security. I surrendered three certificates of title"

PW1 then named the plots in respects of the certificates he mortgaged as named herein above plot no. 2 & 3 Block "L" Bariadi

Industrial area, plot no 9 Block "M" at Butiama Bariadi and plot no. 442 Block "A" at Sima Bariadi.

DW1 also testified to that effect and tendered the mortgage deed exhibit D1 Supra in which the 2nd Plaintiff dully signed mortgaging those properties for the benefits of the 1st plaintiff which in essence was himself as he himself declared that the account of New Nyanguge General Supplies was his own account through which the monies were deposited;

"Deposited in the account of New Nyanguge General Supplies.

The account is of Kija Mabula Magembe as Nyanguge General Supplies is a business name"

In that respect the second issues is as well determined in the affirmative to the effect that the second plaintiff guaranteed the loan by the 1st defendant to the 1st plaintiff.

The third issue is ***whether there was breach of the terms of the loan agreement.***

Under this issue there are claims from each that the other party breached the terms of the loan agreement. The 1st plaintiff alleges that the 1st defendant breached the loan agreement by advancing the loan in

two instalments as against to what they had agreed and that the defaulting notice was issued to the wrong person and thus there was no any legal justifiable notice which was issued to the 1st plaintiff.

On the other hand, the 1st defendant alleged that the 1st plaintiff breached the loan agreement by not repaying the loan under the agreed instalments within one year.

Starting with the allegations of the first plaintiff for the breach of the loan agreement, I find that there is no tangible evidence adduced by the 1st plaintiff to establish that the 1st Defendant breached the contract.

Having gone through the Banking offer letter exhibit D1, I did not find and condition to the effect that all the **Tshs. 130,000,000/=** shall be advanced at one instalment by the 1st Defendant to the 1st plaintiff. It only shows that the agreed loan amount that was to be advanced was Tshs. 130,000,000/= without disclosing whether such amount was to be advanced at one instalment or several instalments. It thus remain mere words of the 1st plaintiff that they agreed the whole sum to be advanced a one instalment.

It is the law that when an agreement is made in writing oral evidence purporting to establish the terms and conditions of the contract is not accepted. See section 100 (1) and 101 of the Evidence Act, Cap. 6

R.E 2019. The written contract dully signed by the parties shall be prima facie evidence on the terms and conditions to such contract. Oral evidence purporting to state otherwise is not accepted.

Even though during cross examination by Mr. Ishengoma learned advocate both Directors of the 1st plaintiff's Company PW1 and PW7 admitted that they used both the deposited money at the two instalments; PW1 for instance at page 35 of the typed proceedings he admitted;

"The 1st instalment was Tshs. 69,600,000/=. I started using the money. I also received Tshs. 60,400,000/= I used this money also"

PW7 also at page 64 during Cross examination by advocate Ishengoma admitted; *"We used the whole sum of the advanced loan"*.

Under the circumstances, even if there would have been any proof that the agreed loan was to be advanced whole at once, the act of the 1st plaintiff to use the advanced first instalment and subsequently the second instalment is in law an implied waiving of the agreed term within the sprit of section 123 of the Evidence Act supra.

Otherwise, the 1st plaintiff should have rejected the advanced first instalment and end the contract or until the whole sum is deposited.

Even though the period between the two instalments was very short. According to the Customer account statements exhibit P2, the 1st instalment was advanced on 03/07/2012 and the second installment was deposited on 01/08/2012. PW1 also confirmed as such in his oral evidence.

There is no any explanation as to how the stated interval of the two installments affected the 1st plaintiff in her business plan. I therefore find that the claims of the 1st plaintiff in relation to the two installments as afterthoughts and accordingly reject them.

About the Default notice to be issued in the names of a wrong person, my finding is that the same was not among the requisites in the loan agreement but on the mortgage agreement. It cannot therefore be used to interpret the duties and obligations of the parties to the loan agreement. I thus reject the same and shall deal with it when discussing the other issue relating to sale of the mortgaged properties.

On the other hand, I find that there was a breach of the loan agreements but it was the 1st plaintiff who breached the same.

This because according to the evidence on record the advanced loan was to be repaid within a period of one year under equal monthly instalment of **Tshs. 11,918,399/08**. Both parties in their respective evidence are at per that the full loan was to be repaid by July, 2013 but up to the time of the sale of the mortgaged property, the 1st plaintiff had not paid fully the loan.

Up to 2016 the 1st plaintiff had not repaid the loan fully. PW1 just like other plaintiffs' witnesses do not dispute that they defaulted repaying the loan. Thus, for instance PW1 at page 33 of the proceedings testified; ***"The remaining balance unpaid is Tshs. 70,000,000/="*** During Cross examination he repeated;

*"I started payment when the bank debited my account. The balance of almost **Tshs. 70,000,000/=** was not paid after eviction".*

PW4 Wilbert Masanja Yegela who was the Supervisor of the 1st plaintiff and who identified himself as custodian of operational documents of the 1st Plaintiff's business admitted at page 39 that they did not pay fully the debt;

*"I had knowledge that the company took a loan we used to pay weekly and **Tshs. 70,000,000/= almost unpaid. It was a 12 months loan. We had to pay by 2013**".*

Since PW1 and PW7 the directors of the 1st plaintiff and PW4 the company Supervisor did not claim to have obtained any extension of the loan period from the 1st defendant, it obvious, the 1st plaintiff breached the loan agreement by not repaying the same as agreed in the loan facility letter.

I therefore conclude the 3rd issue in the affirmative to the effect that there was a breach of loan agreement by the 1st plaintiff. The 1st Defendant did not breach any term thereof.

On the fourth issue as to ***whether the auction and sale of the 2nd plaintiff's mortgaged property by the 1st and 2nd Defendant was lawful***, the answer is yes, it was lawful.

In the first instance there is no dispute that the second plaintiff mortgaged his landed properties as previously stated herein among them the godown (milling Machine) on Plot no. 2 & 3 Block "L" at Bariadi Industrial area.

It is in evidence from both parties that such properties were mortgaged to secure the loan for the 1st plaintiff. PW1 who is the 2nd Plaintiff testified to that effect at page 29 of the typed proceedings. The same was repeated by DW1. The evidence of PW1 and DW1 is corroborated by documentary evidence exhibit D1 which is the mortgage agreement dully signed by the second plaintiff and the 1st Defendant.

Now, the second plaintiff having mortgaged his landed properties as stated above, the law allows the mortgagee to auction and sale the mortgaged property upon default of the mortgagor (borrower) to repay the loan.

In the case of ***General Tire East Africa Limited versus HSBC PLC (2006) TLR 60 and Yusuph mwita Marora versus NMB Bank and another, Land case no. 9 of 2017*** it was held that, the mortgagee is entitled to enforce the security where there is no triable issues.

I also had held in the case of ***Ndabaka Lodge Company Limited versus TIB Development Bank Limited and 2 others, Land case no. 7 of 2019, High Court*** at Shinyanga that, selling the mortgaged property by the mortgagee is legally justified because the property is mortgaged for the purpose of being sold by the mortgagee

or her agents for realization of the loan in question in case of any default to repay such loan.

In the instant matter as I have determined in the previous issue, the 1st Plaintiff defaulted to repay the loan as agreed and the second Plaintiff who was the mortgagor did not make good the loan as guaranteed. Therefore, the 1st Defendant through the 2nd Defendant was legally justified to sale the second plaintiff's mortgaged property.

PW1 purported to explain why the auction was illegal at page 34 of the proceedings in that;

"The auction was illegal because there is no notice fixed to the auctioned godown and other places. There was no public address of the said auction in plot no. 2 & 3".

This witness and PW7 further argued in evidence that the **default notice** was issued to the wrong company which is not the 1st plaintiff. The default notice was directed to **Nyanguge General Supplies Company Limited** but the plaintiff is **New Nyanguge General Supplies Company Limited**.

Therefore, the difference there is only the word **"New"** which is missing in the default notice. PW1 admitted in evidence that he received

such notice and dully signed it. The question is; why did he receive the notice which does not belong to him or to his company. He ought to have rejected it instantly so that to enable the 1st Defendant to rectify the defect or anomaly.

Although the difference of such a single word in law may bring difference of personality but I have had in several occasions held that depending on the circumstances of each case under the oxygen principle, we may define the anomaly by considering whether the purposes and intent of the contentious matter under scrutiny was ultimately reached.

In the instant matter, **for all purposes an intent** the default notice meant to refer the 1st plaintiff and that is why it was served to its director PW1 and the said director received it. As I have quoted earlier PW1 stated in evidence that the first plaintiff is merely a business name but in essence the first plaintiff is himself, Kija Mabula Magembe.

Now by acknowledging the default notice by the second defendant, despite the defect or anomaly thereof of missing the word "**New**" he had all reasonable grounds to believe that the notice referred to his company. Thus the purposes and intent of the default Notice was ultimately reached despite the anomaly. Even though the auction of the

mortgaged property was not done due to such default notice. The default notice was followed by Demand Notice by the 2nd Defendant which cited the 1st plaintiff properly. Therefore the 2nd Defendant being an agent of the 1st Defendant made good the default notice by issuing the demand notice.

The claim that there was no public notice for the sale are not true as we have in evidence exhibit D3 the Majira Newspaper dated 7th June, 2014 which made it clear that the property would be sold if within the stated period, the loan is not fully paid. DW2 also testified that apart from the Newspaper he passed in the street advertising the intended auction;

"Tulipita na gari mtaani tunatangaza mnada siku moja kabla na siku iliyofuata tukafanya mnada"

That was after the expiry of the notice in the Newspaper. I therefore, reject the evidence of PW6 because it is not the law that everybody must be involve in the auction and or that everybody must hear the advertisement for the action.

I therefore conclude the 4th issue that the auction and sale of the 2nd plaintiff's mortgaged property by the 1st and 2nd Defendants was lawful.

The 5th issue is ***whether the plaintiffs are entitled to damages prayed for.*** With the herein analysis of the 1st, 2nd, 3rd and 4th issues, the 1st and 2nd Plaintiffs are not entitled to any damage. They are the wrong doers and should not benefit from their own wrongs.

The rest of the plaintiffs are also entitled to nothing because they did not prove their claims on the balance of probabilities.

There was no evidence proving the presence of the alleged properties at the time of eviction. The plaintiffs did not produce documentary evidence showing the stock up to the day and time of eviction particularly when they themselves testified that the goods at the godown were documented by PW4.

PW4 was the only staff and supervisor of the 1st plaintiff's Company who was present at the time of eviction. According to his evidence he was ordered to get out. In his evidence he did not explain what were the properties in the godown and milling machine and whether the Defendants took them. He only stated that at the time of eviction there was Marco Mathayo's paddy which they milled but do not recall the tonnage.

He also stated that there were documents and chairs. He did not say there were cash monies', ***127 sacks of rice, Unga Sembe viroba***

398, two tables, 8 chairs, 8 spear tires, engine spear parts and gold as claimed by the second plaintiff PW1 who was not even present during the eviction process in accordance to his own evidence.

Since it was PW4 the Supervisor of the Plaintiffs' company who was present at the time of eviction, and he did not establish the presence of all those claimed properties, the evidence of the rest Plaintiff's witness carries no value in relation to what was available in the auctioned property at the time of the eviction. Their respective evidence is either hearsays or speculations.

I am aware that DW1 admitted that at the time of eviction there were some sacks of paddy but their respective owners who were different people took them out. I have no good reason for not believing this witness.

I have as well-found contradictions within the plaintiff's evidence. While PW4 claimed to have been remaining with the receipts both original and photocopies which got lost in the hands of the defendants at the time of eviction, some other witness purported to possess photocopies of the receipts and there were an attempt to tender some receipts in evidence.

If at all the 3rd and 4th Plaintiffs had their properties in the godown they should trace them from the 1st Plaintiff because the first Plaintiff has failed to prove that those properties were taken by the defendants.

It should as well be considered that there was an advertisement for sale of the property and thus whoever had his own property in the premise should have taken it away, leaving the same up to the time of the auction is disobedience to the lawful auction and whoever disobeys does so at his or her own risks. The fifth issue is thus answered in the negative. The last issue is ***what are the reliefs the parties are entitled to.***

With the herein above findings in the five issues the Plaintiffs are entitled to no reliefs and the defendants are entitled to have the suit dismissed.

I therefore dismissed this suit with costs. Whoever aggrieved has the right to appeal to the court of appeal of Tanzania.

It is so ordered.



**A. MATUMA
JUDGE
06/12/2022**