

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA**

AT ARUSHA

CIVIL CASE NO. 22 OF 2019

GABRIEL ATHANAS HONDI PLAINTIFF

VERSUS

NMB BANK PLC FIRST DEFENDANT

ADILI AUCTION MART SECOND DEFENDANT

JUDGMENT

31/1/2022 & 04/4/2022

ROBERT, J:-

The plaintiff, Gabriel Athanas Hondi, filed an action against the defendants jointly and severally seeking the following orders:-

- (i) *a declaration that a default notice dated 13th March, 2019 in respect of the term loan and overdraft facility granted to the plaintiff vide offer letter dated 16th February, 2018 and secured by the Plaintiff's landed properties registered with the following particulars to wit C.T. No.49211, L.O No. 285788 Plot No. 22 Block "U" Maisaka , Babati town, C.T 49210 L.O No. 285787 Plot No. 16, Block "U" Maisaka B, Babati Town, C.T. 35643, L.O. No. 285036, Plot No. 75, Block "Q" Osterbay Area, Babati Town and C.T. 26205 L.O No. 284483 Plot No 127 & 128, Block ZZ, Komoto area Babati Town and C.T No. 35645 L.O 285028, Plot No 298 Block "M" Osterbay Area Babati Town vide*

a mortgage deed registered on the 3^d May, 2016 is invalid and of no legal force.

- (ii) An order that the overdraft facility granted to the Plaintiff vide offer letter dated 16th February 2018 lapsed on the 17th February, 2019.*
- (iii) An order that the claimed amount of TZS 1,194,420,618 as an outstanding amount and an amount of TZS 119,442,061.80 as the second Defendant's Commission has no justification because the contract for an overdraft facility lapsed on the 17th February 2019 and the claimed amount is as of 29th May 2019.*
- (iv) An order that the interests accrued on the overdraft facility from the 17th February 2019 are null and void.*
- (v) An order restraining the Defendants, their officers or agents from selling or interfering with the Plaintiff's occupation of the landed properties registered with the following particulars*
 - a) C.T. 49211, L.O No. 285788 Plot No. 22, Block "U" Maisaka, Babati Town.*
 - b) C.T. 49210 L.O. No. 285787 Plot No. 16, Block "U" Maisaka B, Babati Town*
 - c) C.T. 35643, L.O No. 285036, Plot No. 75, Block "Q" Osterbay Area, Babati Town*
 - d) C.T. 26205 L.O No. 284483 Plot No. 127 & 128 Block ZZ, Komoto Area Babati Town*
 - e) C.T. No. 35645 L.O 285038, Plot No 298 Block "M" Osterbay Area Babati Town*
- (vi) An order directing the First Defendant to restructure the credit facilities granted to the plaintiff by converting the overdraft facility*

into term loan facility and accept the Plaintiff's deposits in servicing the credit facilities.

(vii) Costs of the suit.

The Plaintiff alleges that his claim arose from an overdraft and term loan facility signed between him and the first Defendant on 17th February, 2018 whereby the first Defendant availed to the plaintiff a total of TZS 1,000,000,000/= being the sum of a term loan of TZS 550,000,000/= and an overdraft facility of TZS 450,000,000/= for a period of 36 months and 12 months respectively.

On 16th March, 2019 the Plaintiff received a notice of default from the first defendant dated 13th March, 2019 claiming the outstanding amount from the Plaintiff to the tune of TZS 1,160,253,396/= and on 29th May, 2019, on instructions of the first Defendant, the second defendant served the plaintiff with 14 days' demand notice to effect payment of TZS 1,313,862,679.80 to the first Defendant failure of which would attract legal action including selling of the mortgaged properties without further notice to the plaintiff.

On 7th June, 2019 the Plaintiff lodged this suit challenging the default notice issued by the first defendant dated 13th March, 2019 on the grounds

that it is invalid and of no legal force as it is silent on the nature and extent of default by the plaintiff on term loan and overdraft facility contrary to section 127 of the Land Act. On the basis of the stated claims, the plaintiff prayed for the relief stated above.

On the other hand, the first Defendant, through her Written Statement of Defence, disputed allegations of fact contained in the plaintiff's plaint and prayed for dismissal of the suit. The case proceeded ex-parte against the second Defendant who was served but failed to file his defence or enter appearance.

The following issues were framed and recorded for determination of this matter:-

1. Whether the Notice of Default issued on 16th March, 2019 is valid
2. Whether the First Defendant is entitled to recover the amount contained in the default notice.
3. Whether the first defendant is estopped by lapse of contractual tenure from recovering of proceeds accruing from the contractual tenure.

4. Whether this Court has jurisdiction to order the first defendant to restructure the terms or redraft the terms of agreement between the plaintiff and the first defendant
5. To what reliefs are the parties entitled

To establish his case, the Plaintiff called two witnesses who are the Plaintiff himself, Gabriel Athanas Hondi (PW1) and Hamis Shaban Jangama (PW2). On her part, the first defendant brought one witness, Omary Kalphan who testified as (DW1).

The plaintiff testified as PW1 and informed the Court that, on 16/2/2018 he took an overdraft loan of TZS 450,000,000/= and a term loan of TZS 550,000,000/= from the first Defendant. The loan was secured by the Plaintiff's landed properties registered with the following particulars:- C.T. No.49211, L.O No. 285788, Plot No. 22 Block "U" Maisaka , Babati town; C.T 49210 L.O No. 285787, Plot No. 16, Block "U" Maisaka B, Babati Town; C.T. 35643, L.O. No. 285036, Plot No. 75, Block "Q" Osterbay Area, Babati Town; and C.T. 26205 L.O No. 284483 Plot No 127 & 128, Block ZZ, Komoto area Babati Town and C.T No. 35645 L.O 285028, Plot No 298 Block "M" Osterbay Area Babati Town.

After receiving loan he continued with his businesses and opened NMB agency branch at Singida having been advised by the bank officials that they wanted agents at Singida and promised to give him a bigger loan if he opens a branch at Singida. Six months after opening the said branch he approached the bank to renew the loan as promised but he was told verbally to keep on waiting because the repayment was not good.

On 16/3/2019 the first Defendant gave him a Notice of default which admitted in Court as exhibit P1. After receiving the Notice he went to the first defendant the following day and talked to the branch Manager about the situation of his business which was not doing well after investing in Singida.

On 29/5/2019 he received a call from the first Defendant's office who required him to meet with Majembe Auction Mart who were following up on the loan repayment. He was given 14 days' Notice to repay the outstanding loan. The said Notice was admitted in evidence as exhibit P2.

He explained that, the outstanding amount in exhibit P2 differs with the one indicated in exhibit P1 whereby in exhibit P2 the outstanding amount until 29/5/2019 was TZS 1,313,862,679.80/= in exhibit P1 the

outstanding amount is TZS 1,160,253,396/=. He stated that the problem with the two Notices is to combine the outstanding amount in term loan and overdraft facility. He clarified that, the overdraft agreement ended on 17/2/2019, however, according to exhibit P1 and P2 the first Defendant claimed the outstanding amount until 16/3/2019 and 29/5/2019. He stated that the amount claimed from 17/2/2019 to 29/5/2019 is not legitimate.

He testified further that exhibit P1 is not legitimate because the amount indicated is the aggregate of term loan, overdraft facility, commissions and interests. He maintained that the Notice was supposed to specify the outstanding amount for each claim.

He also he informed the Court that, he was no longer dealing with the agency business for the first defendant because the 16 agency machines given to him by the first defendant were taken from him after the said Notices.

In cross-examination he testified that, the loan agreement was signed on 5/4/2018. According to that agreement, the term loan was for 24 months and he was supposed to pay TZS 43,677,803 each month. The

overdraft facility ended on 17/2/2019, by that date the outstanding amount was TZS 450,000/=.

He agreed that exhibit P1 is prepared in a prescribed Land Form No. 54A issued under the Land Act and the first paragraph shows that the Notice was dated 29/3/2018. According to paragraph 3 of the Notice, he owed the bank TZS 1,160,253,396/= by 11/3/2019. He was given 60 days to repay the loan. He received the notice of default on 16/3/2019 from the auctioneers.

Further to that, Hamis Shaban Jangama (PW2) testified that, he was working for the plaintiff as an accountant. He informed the Court that, prior to the filing of this case, the plaintiff received a Notice of default from the first defendant. After receiving the notice he engaged a lawyer and sat with the first defendant. The notice stated that the Plaintiff failed to pay the debt without specifying how much was outstanding for overdraft loan and how much was outstanding for term loan. It also didn't specify when the default occurred. He testified that, he didn't remember the amount involved in each category of the loans but one was TZS 450,000,000/= and the other was TZS 550,000,000/=.

In cross-examination, he testified that he knew that the Notice is provided in a prescribed form which is Land Form No. 54A. He had never seen such a notice before. From what he knows, a notice like this is supposed to give all descriptions specifying the details of loan.

He stated further that, the notice of default is made under section 127 of the Land Act. It informed the borrower in a loan taken through offer letter dated 29/3/2018 to discharge his obligation by paying the outstanding debt and rectifying the default within sixty days. He testified further that, he knew that the plaintiff owed the first defendant TZS 1,000,000,000/=until 13/3/2019. He testified that since the Plaintiff received the default notice the outstanding amount has not been paid.

On his part, the defendant brought one witness, Omary Kalphan (DW1) who is the relationship officer of the bank. He testified that, the plaintiff signed mortgage deed with the bank and placed several properties as security. The properties are mentioned in schedule 2 of the mortgage deed which was admitted in evidence as exhibit D1.

In February, 2018 the plaintiff was given a loan of TZS 1,000,000,000/= which included the term loan of TZS 550,000,000/=and

an overdraft of TZS 450,000,000/=. Later on the plaintiff informed the first defendant that he needed a bigger loan than the one offered. Thus, the first defendant increased the loan amount from TZS 1,000,000,000/= to 1,300,000,000/=. The increment was added in term loan from TZS 550,000,000/= to TZS 850,000,000/= but overdraft remained the same. The changes to the loan were introduced by offer letter which was admitted in evidence as exhibit D2. He testified further that, the offer letter contained two types of loans, one is overdraft of TZS 450,000,000/= and term loan of TZS 850,000,000/= which makes a total of TZS 1,300,000,000/=.

He recounted that, according to the offer letter, the term loan was for 24 months from March, 2018 to March, 2020 whereas the overdraft was for 12 months from March, 2018 to February, 2019.

For the term loan, the plaintiff was required to repay TZS 43,677,803/= every month for 24 months and for the overdraft, the bank allowed the customer to use the money according to his needs up to TZS 450,000,000/=. According to the offer letter, the loan was to be used as working capital for electronic money business.

He testified further that, payment of the term loan went well from May, 2018 to October, 2018. From November, 2018 onwards the Plaintiff failed to pay any amount. The loan schedule history was admitted in evidence as exhibit D3 to show the history of payment for the term loan.

As for the overdraft loan, he testified that the plaintiff didn't pay any amount. The Plaintiff's bank statement showing details of overdraft loan was admitted in evidence as exhibit D4. He testified that, according to the bank statement, by 1/7/2019 the plaintiff owed the first defendant TZS 482,652,087.5 and by 5/3/2019 he owed the first defendant TZS 449,999,491.07

The plaintiff having failed to repay the outstanding amount in the said loans, first, they reminded him about his delayed payment. Secondly, he was shown alternative ways of repaying the loan and thirdly, they informed him of the repercussions in case he failed to repay.

Alternative ways included, selling the other properties of the customer which he said he had and restructuring of the debt without violating the requirements. All alternatives did not work out. After that recovery

procedures followed, the first defendant issued notice of default (form No. 54 A). The Notice of default was admitted in evidence as exhibit D5.

In the default Notice, they informed the plaintiff that he defaulted the agreement signed on 29/3/2018 based on that, he was required to pay all the outstanding amount by 11/3/2019 which was TZS 1,160, 253,396 /= within 60 days. However, interest continued to accrue. They further notified the customer that in the event he failed to honor the notice the first defendant may exercise her right to sale the mortgaged properties, appoint a receiver, lease the property or enter possession.

The default notice was intended to notify the customer to repay the loan within 60 days failure of which the bank had the right to sell the security. The plaintiff received the notice on 16/3/2019 but didn't repay the loan.

The default notice was for a term loan of TZS 850,000,000 and overdraft of TZS 450,000,000/=. It stated that for the two loans the plaintiff had outstanding amount of TZS 1,160, 253,396/=. After the lapse of 60 days the bank submitted the customer to the auctioneer who is appointed to work with the bank. The customer was submitted to Adili

Auction Mart. Adili issued a demand note to the customer as required by the law.

Having received the demand notice the customer didn't do anything to repay the loan instead he filed a suit against the defendants.

During cross-examination he stated that, although exhibit D1 is written that it is issued in respect of the Credit Facilities of extended to Simon Peter Binde by NMB in respect of TZS 991,000,000/=. The name Simon Peter Binde is a typing error while the amount of TZS 991,000,000/= is the forced sale value of the collateral (five properties placed as security). However, apart from the said typing error, the rest of the details are accurate and they are related to the first defendant.

There is a relationship between forced sale value and the mortgage. The valuation report shows both the market value and forced sale value. He stated that, the law requires them to mortgage the property based on the forced sale value. TZS 991,000,000/= was the forced sale value of the customer's collateral. TZS 991,000,000/= is not indicated in the offer letter.

Having abridged the evidence adduced by parties in this matter, I will pose here and deliberate on the issues raised for determination of this matter.

The first issue seek to determine whether the Notice of Default issued on 16th March, 2019 is valid. According to the Notice of default (exhibit P1), the Plaintiff 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 prescribes 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.

In the present case PW1 and PW2 indicated that, the problem with the Notice of default is that it combined the outstanding amount in term loan and overdraft facility without specifying the outstanding amount for each claim. PW2 added that the Notice of default didn't indicate when the default occurred.

Having examined the Notice of default issued by the first defendant on 13th March, 2019 the Court is satisfied that the Notice is issued in Land Form No. 54A which is the form prescribed under the schedule to the Land (Mortgage Financing) Regulations, 2009. Further to this, the contents of the Notice reflects the requirements of the law under section 127(2) of the Land Act, Cap. 113 (R.E.2019). On the nature and extent of the default, it indicates that the plaintiff has defaulted to honour his obligations under the mortgaged deed namely, to assure the payment of the credit facilities granted to him via the offer letter dated 29 March, 2018 by failing to pay the amount in excess, arrears and the interest thereon totaling TZS 1,160,253,396/= as of 11th March, 2019. It also provides that, in the event the plaintiff do not rectify the default within 60 days the first defendant

may exercise her right to sell the mortgaged properties, appoint a receiver, lease the property or enter possession.

The plaintiff's allegations that the notice of default does not specify outstanding amount in term loan and overdraft facility is not a legal requirement which can invalidate the Notice of default. The Plaintiff did not bring any evidence to establish that the default notice is in breach of any legal requirement. It should be noted that the entire amount of the claim comprising of the term loan and overdraft facility arises from the same letter of offer dated 29 March, 2018. Thus, the first defendant's indication of the entire amount of claim which is due and payable under the agreement is reflective of the requirement under section 127(2)(d) of the Land Act, Cap. 113 (R.E.2019). In the circumstances this court finds the Notice of default dated 13th March, 2019 to be valid.

The second issue seek to determine whether the first defendant is entitled to recover the amount contained in the default notice. According to the default notice (exhibit P1), the plaintiff defaulted to pay the amount in excess, arrears and interest thereon totaling TZS 1,160,253,396/= as of 11th March, 2019 and interest is accruing on daily basis.

DW1 testified that, in February, 2018 the plaintiff was given a loan of TZS 1,000,000,000/= which included the term loan of TZS 550,000,000/= and an overdraft of TZS 450,000,000/=. Later on the first defendant increased the loan amount from TZS 1,000,000,000/= to 1,300,000,000/=. The increment was added in term loan from TZS 550,000,000/= to TZS 850,000,000/= but overdraft remained the same as evidenced in the offer letter, exhibit D2. The term loan was for 24 months from March, 2018 to March, 2020 whereas the overdraft was for 12 months from March, 2018 to February, 2019. The plaintiff effected payment of term loan for four months only, that is from May, 2018 to October, 2018. DW2's testimony is supported by the loan schedule history, exhibit D3.

According to the letter of offer (exhibit D2), the plaintiff was required to repay TZS 43,677,803/= every month for 24 months for the term loan. Thus, in respect of the term loan the Plaintiff paid TZS 174,711,212/= only out of TZS 850,000,000/= by the time the first defendant issued the Notice of default (exhibit P1). There was no any evidence to indicate that the plaintiff paid more than that.

As for the overdraft loan, DW1 testified that the plaintiff didn't pay any amount as evidenced in the Plaintiff's bank statement (exhibit D4). There is no evidence to indicate that by 16th March, 2019 when the Plaintiff received the notice of default he had repaid any amount in respect of the overdraft of TZS 450,000,000/=.

Therefore, according to the evidence adduced, by the time of receipt of the notice of default the plaintiff had paid a total of TZS 174,711,212/= out of the principal amount of TZS 1,300,000,000/= indicated in exhibit D2 which means he was in breach of the loan repayment terms at the time of receiving the notice of default. Further to that, exhibit D2 makes it clear that in an event of default, all amounts due under the facility together with any interest accrued thereon from time to time shall be repaid by the borrower. The Plaintiff did not bring any evidence to dispute the fact that he was in breach of loan repayment terms or establish that the amount contained in the default notice was not accurate. Therefore, this Court finds that, the first defendant is entitled to recover the amount contained in the default notice.

Coming to the third issue, the question for determination is whether the first defendant is estopped by lapse of contractual tenure from

recovering of proceeds accruing from the contractual tenure. 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. The Plaintiff has not established if there is a contractual term or legal provision which prohibits the first defendant from recovering the proceeds accruing from the contractual term. As a matter of principle, while 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 that lapse of contractual tenure will prohibit the other party in a contract from recovering his lawful proceeds which accrued from the contractual tenure. Thus, this court finds and holds that the first defendant is not estopped by lapse of contractual tenure from recovering the proceeds accruing from the contractual tenure.

The fourth issue seek to determine whether this Court has jurisdiction to order the first defendant to restructure the terms or redraft the terms of agreement between the plaintiff and the first defendant. This 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 rewrite it

unless there is evidence to establish that the contract was not made by the free consent of parties competent to contract, there is no lawful consideration or it is not made with a lawful object and therefore it is expressly declared to be void. In the present matter, facts indicate that contracting parties agreed voluntarily on the terms and conditions specified in the letter of offer (exhibit D2). In the circumstances, the court does not have the right or jurisdiction to order for rewriting of the terms and conditions of the contract.

The determination of the last issue is simple as it is predicated on the response to the previous issues. This Court having determined that the Notice of Default issued on 16th March, 2019 is valid, the First Defendant is entitled to recover the amount contained in the default notice and she is not estopped by lapse of contractual tenure to recover the proceeds accruing from the contractual tenure and further that this Court has no jurisdiction to order for rewriting of the terms of agreement between the plaintiff and the first defendant, I do in consequence find and hold that, the Plaintiff's case is lacking in merit and the same is hereby dismissed with costs.

It is so ordered.

K.N. Robert

K.N.ROBERT
JUDGE
04/4/2022

