

**IN THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF DAR ES SALAAM)
AT DAR ES SALAAM**

LAND CASE NO. 372 OF 2015

DEVOTA MATHEW MINJA PLAINTIFF

VERSUS

TITO SIMON HAULE 1ST DEFENDANT

TANZANIA POSTAL BANK (TPB) 2ND DEFENDANT

MSOLOPA INVESTMENTS COMPANY LTD..... 3RD DEFENDANT

JUDGEMENT

Hearing date on: 26/11/2021

Judgement date on: 28/01/2022

NGWEMBE J

This suit emanates from a bank transaction entered between the disputants involving an amount of TZS. 200,000,000/=. The 2nd defendant, that is, Tanzania Postal Bank (TPB) was the lending bank in that transaction. TPB has gone several changes after that transaction. Presently TPB is now called Tanzania Development Bank PLC. However, the latter inherited all assets and liabilities of the former TPB. More interestingly, the plaintiff Devota Mathew Minja is also known as Devota Minja Haule and Devota Haule, all referring to one and the same person who is a wife of

Tito Simon Haule. The two contracted their marriage under Christian ritual on 30/06/2002. Their marriage was blessed with two issues and jointly acquired some properties including two houses and a company baptized as Bhamiles Company Limited. The shareholding as per the tendered documents are the plaintiff Deveta Minja and Tito Simon Haule (husband and wife). In this suit the properties involved therein are the two houses located in plots No. 487/2 and 487/4 in Block J Kihonda area within Morogoro Municipality.

The two are still husband and wife and their marriage is still unshaken. However, in the cause of living, their two houses, built in the plot referred above, were mortgaged and put as securities for a loan of TZS. 200,000,000/= accessed from the 2nd defendant. Such loan was accessed by Bhamiles Company Limited from TPB.

Upon procuring such loan from TPB, neither Bhamiles Co. Ltd nor the Plaintiff nor the 1st defendant complied with the terms and conditions of that loan facility. Hence, feuds and tensions arose when TPB demanded refund of its money including threatening to auction those securities to realize its money.

The ordeal commenced when the 2nd defendant intended to realize its loan by selling those securities due to failure of the debtor to service that loan as per contract. In turn the plaintiff came up, fully armed to protect those securities by pointing all fingers to the 1st Defendant alleging to have forged her signature and passport photo. That she never involved in the

whole bank transactions. Serious alleged forgery of her signatures as rightly demonstrated in the contents of the plaint.

In turn the defendants likewise, came up fully armed against the plaintiff including her husband (1st Defendant) who engaged an advocate to challenge the plaint lodged by the plaintiff Devota Minja (wife of Tito Simon Haule). The bank also engaged an advocate who filed all necessary pleadings against the plaintiff.

Maybe it is high time to point out from the earliest possible time, that this case was instituted in this court on 26th November, 2015, but stayed unheard all along until 22nd November, 2021 when the hearing was at last closed and final written submissions were finally filed in court on 26/11/2021. Hence, judgement was set on notice. With serious note, the delay of six (6) years was actuated by the parties based on endless excuses. I think parties should be serious when they engage courts of law, for obvious reasons that justice delayed is equal to justice denied.

As a way to recap the trend of this case, when pleadings were completed, parties on 4th March, 2016 agreed on speed track one, that is, to be completed within ten (10) months. However, such time was never complied with until 26/11/2021.

Another serious issue which came to my attention during trial of this case, was the absence of final pretrial conference as per Order VIII D Rule 40. The Order provide mandatory requirements that, parties should agree on the issues in dispute prior to commencement of hearing. Seeing that



procedural irregularity, I invited parties to address the court on that issue and the way forward. Counsels, conceded on the lapse of such legal requirement and came up with a joint written prayer dated 8th November, 2021. They cited section 3A and 3B of Civil Procedure Code Cap 33 R.E. 2019 backing their prayer to proceed with trial, and came up with a jointly written draft issue.

In deep consideration of their prayer and bearing in mind on serious procedural irregularity, to the best, the whole proceedings ought to be nullified and an order for retrial may be issued after complying with Order VIII D Rule 40. However, considering more rationally, I found first the age of the suit do not allow any further adjournment. This suit has been in our courts for six (6) years unheard; any further delay means prolonging the delay to another year or years.

The second reason was based on nature of the suit itself. That involve bank money, which under normal circumstances should be given first priority. Third, the fault to conduct final pretrial conference was partly contributed by the court itself and the parties. Fourth, this issue came to my attention after closure of the plaintiff's case and closure of the 1st defendant's case, therefore, to nullify all those testimonies and start afresh may not be for the interest of justice. Lastly, all parties together with their counsels have consented to proceed with trial, while correcting that procedural irregularity, by accepting the proposed issues. Being guided by legal prudence and considering all these reasons, I found justice demand



to accept their prayer and proceed to correct that procedural irregularity by endorsing the proposed issues and order the suit to proceed with hearing.

Having so decided, the agreed issues are:-

- 1. Whether the landed properties to which plot No. 487/2 and 487/4 Block J. Kihonda area are matrimonial properties jointly acquired by the plaintiff and 1st defendant during their marriage*
- 2. Whether the landed properties were legally mortgaged to the 2nd defendant;*
- 3. Whether the plaintiff was involved in signing a loan facilities document for grant of a loan;*
- 4. Whether the default notices were served to the plaintiff; and*
- 5. What reliefs are the parties entitled to.*

This case was blessed with six witnesses. The plaintiff's case was blessed with three prosecution witnesses, while the 1st defendant defended alone under the lead of his advocate and the remaining two defendants were defended by two witnesses. In total the prosecution had three witnesses and the defense had three witnesses, forming an aggregate of six (6) witnesses.

Brief recap of the testimonies of both witnesses are that, Devota Minja (PW1) testified quite clearly that the 1st defendant is her husband married on 30/06/2002. To prove her assertion, she tendered their marriage certificate which was admitted marked exhibit P1. Added that during their marriage, they managed to acquire two houses built on Plots No. 487/2 and 487/4 Block J Kihonda area in Morogoro Municipality.

Further testified that, sometimes in October, 2015 when she was in her daily activities, she heard their family houses were being auctioned by Msolopa Investment Company Ltd. When she arrived in their family houses, she found officers from Postal Bank and Msolopa Investments Co. Ltd Auctioning both houses.

An immediate action, she filed an application in the District Land and Housing Tribunal to stop auctioning her houses. Added that since the value of those two houses were above its jurisdiction, she was advised to file her application to the High Court. Also, she reported the matter to Police station who commenced their investigation immediate, at the same time she instituted a Land Case in the High Court of Tanzania at Dar es Salaam.

Concluded her testimonies by denying to have owned any company in her life time. Moreover, denied to know anything called Bhamiles Company Ltd. Also denied to know anything on how that company borrowed money from TPB. That she never took any bank loan. Thus, rested by praying the two houses should be returned to the family and all prayers in the plaint be granted as prayed.

In cross examination, she testified that, their marriage was blessed by two issues but continued to deny any involvement in the company called Bhamiles and she never signed any bank loan from TPB. Also denied to know anything if at all her husband owned any company called Bhamiles.


On cross examination by Mr. Mwego, PW1 admitted the titles of the two-family houses were in the name of Tito Simon Haule (Husband) and that she never filed caveat to the Commissioner for Lands against those titles.

Testified further that, Tito Simon Haule and Bhamiles Co. Ltd forged her signature to access loan from TPB, thus sued jointly for such offence they committed. Also denied to know a person called Catherine Mushi.

Further testified that in her life time she has only one signature. The signature in exhibit P1 and in the plaint are similar. That she is not a shareholder in Bhamiles Co. Ltd, as she does not know it.

In reexamination, she explained that, family properties meant properties found during existence of their marriage, including the two houses. The two certificates of titles used as mortgages to access bank loan were under custody of the 1st defendant. Rested by denying that Catherin Mushi is a stranger to her.

The 2nd prosecution witness (PW2) was G. 4086, DC Lifa Edward Malonja who is working in the office of Regional Crime Officer (RCO) at Morogoro. Testified that on 05/07/2018, PW1 opened a Criminal complaint before Police and Police issued IR 5426 of 2018 on forgery of documents. That she complained against her husband that he forged documents and took loan from TPB and that the whole transaction was illegal for they forged her signature.



In the cause of their investigations they took samples of signatures to the Forensic Bureau at the Head Office in Dar es Salaam in year 2020. That investigation is still on going.

On cross examination, he admitted that this suit commenced in year 2015, while Police investigation started in year 2018, equal to three (3) years after existence of this suit.

The last prosecution witness (PW3) is ASP Maria Tryphone Njenga, a police office and expert of handwriting, working in Laboratory of Forensic Bureau, at Document section.

That on 17/6/2020 she received a letter together with samples (documents) from the office of RCO Morogoro, requesting to examine the disputed signatures. That she proceeded to examine them and make comparisons of disputed signatures of A1- A11 which were marked X1 and compared with spacemen signature of B1-B7 and B8-B9 marked U1. The two were different and were not written by one person. The signatures of Devota Minja was different with the signatures in the disputed documents.

Also, she examined A1, A3 – A4, A6, A8 – A11 which were marked X2 together with C1-C7 and C8-C9 marked Y2. The same were observed to have been written by one person. Those were signatures of Tito Simon Haule.

Moreover, she testified that she examined the disputed signatures of A1- A11 which were marked X1, X2 compared with spacemen of D1-D7, D8-D9 which were marked Y3, they were also different, they were not written by one person. All those were documents of Ng'onge Fumbuka Maige.



Proceeded to examine the disputed signature of A1-A11 marked X1 and X2 compared with spacemen signature of E1-E7, then E8-E9 marked Y4. Observed that they were written by a different person.

Lastly, she prepared an expert report dated 20/08/2020. Her expert findings were that, Devota Minja did not sign on the disputed documents. The report was tendered in court marked exhibit P2. In her opinion, Devota Minja (PW1) is not the author of any disputed document.

In cross examination, PW3 admitted to know Devota Minja from 28/09/2021. Added that her report was purely an expert one, based on section 205 (1) of Criminal Procedure Act and the Evidence Act.

The defense case commenced by Mr. Tito Simon Haule (DW1) and husband of the plaintiff Devota Mathew Minja or Devota Minja Haule or Devota Haule who's marriage was contracted on 30/6/2002. Testified that at the time of their marriage, he was doing business, while his wife was a journalist at Abood Media, later she worked with ITV. During their marriage, they owned no house or plot of land. However, during the subsistence of their marriage they managed to build two houses at Kihonda Modeco.

Admitted to own a company called Bhamiles, which he registered it on 21/01/2009. The company shareholders are Tito Simon Haule (600 shares) and Devota Mathew Minja (400 shares) and the Directors are himself and his wife. However, he confessed that his wife Devota Minja Haule was not aware on the existence of that company as he forged her signature and a



passport size picture. As such to date the plaintiff is unaware on the existence of that company.

Further testified that, the company took loan from TPB, while himself acted as a guarantor of the company. More so, he wrote a letter to the bank requesting for their company to have loan facility. The letter was admitted in court marked exhibit D1. Added that the whole process did not involve the plaintiff. The collaterals of such loan were certificates of title deed of two-family houses referred above.

Further testified that, the plaintiff became aware on the existence bank loan after defaulting to pay it. Subsequently, the bank issued demand notices, while he was at Mafinga in Mufindi District. Exonerated himself by pointing fingers to the company which took loan and defaulted to repay it.

In cross examination, he admitted that the plaintiff is still his wife. That one of the two houses, is staying therein with his family. That they were blessed with two daughters namely Mary (16 years) and Tamari (11 years). Added that the two houses were built in year 2003 and they started living therein, 2004 to date.

The two houses were built in a surveyed land, however the names appearing in the certificates of ownership are; Tito Simon Haule and another has two names that is, Tito Haule and Devota Minja

Admittedly, the 1st Defendant testified that all signatures of the plaintiff appearing in the company documents, including Memorandum and Articles of Association were forged by himself. That the plaintiff was not aware on

the existence of that company. As such, the company is still alive, but stopped doing business since 2015 to date.

The two houses which were placed as collaterals are yet to be sold by the bank. However, the registration certificates of the company bear two shareholders namely Tito Simon Haule and Devota Minja. More so, the company had a bank account at TPB. Thus, rested his testimony.

Mwalami Said Mwanjela (DW2) an employee, working as a loan officer of TPB, having gained experience of seven (7) years in the same loan office. Testified that, Tito Simon Haule and Devota Minja were known to him since August 2014 when they went to TPB at Morogoro branch looking for bank loan. The two introduced to him as husband and wife. The purpose of their loan was to enhance their business of hardware and that they own a company called Bhamiles Company Ltd.

Added that one of the requirements to obtain loan facility is to open an account of that company and write a letter to that effect attached with company board resolution. Testified that the two persons complied with all requirements. The bank also made search on registration of that company at BRELA, which search indicated that the company was alive and properly registered.

Moreover, he testified that the two shareholders, complied with all loan requirements including, opening an account for their company in TPB, produced business license, TIN Number, Board resolution; certificate of incorporation, Copies of Memorandum and Articles of Association; and Consent letter from Devota Minja as a wife. Above all, they wrote an

application letter for the loan which was jointly signed as shareholders on behalf of the company. He tendered in court a consent letter from Devota Minja, marked exhibit D2 and the application letter was already tendered in court as exhibit D1.

That he prayed to tender in court the Board resolution, which was admitted marked exhibit D3. That he proceeded to search for the true ownership of those two collaterals, he observed that one house was owned by Tito Haule, while another house was jointly owned by Tito Haule and Devota Minja. He proceeded to visit the business of Tito Simon Haule, who was dealing with hardware materials. Together with Tito Simon Haule visited the two residential houses located at Kihonda in Plot No. 487/2 and Plot No. 487/4 Block J. The consent deed of spouse was likewise, tendered in court and admitted marked exhibit D4. Upon satisfying all loan requirements, the Head Office of TPB approved a loan of TZS. 200 million only, instead of TZS.300 million as requested.

Proceeded to testify that, upon issuing that loan to the applicants, they managed to repay only TZS. 7 million, the rest was not paid to date. Hence, TPB issued first demand notice of 3 days, second demand notice of 14 days and final demand notice of 60 days, which were received by Devota Minja. Those demand notices were tendered and admitted in court marked as exhibit D5.

Despite all those demand notices, the debtors failed to heed to, thus invited Msolopa Investment Company Ltd to conduct public auction those collaterals, which triggered complaint and finally this suit.

The bank as of now is demanding payment of principal sum and interest forming an aggregate of TZS.348,698,800/36. Rested by praying this suit be dismissed with costs and Devota Minja is responsible in the whole process of acquisition of the said loan. Alternatively, the bank may proceed to sale those two collaterals to recover its money.

The last defense witness was Catherine E. Mushi, (DW3) who identified as an advocate since December 17 of year 2010. That on 08/12/2014 she was an employee of Faraja Trust Fund as a lawyer. That in the cause of exercising her profession, two persons namely, Tito Simon Haule and Devota Minja visited her offices, while carrying documents. Those documents were related to a loan agreement of TZS. 200 million. Added that such amount was divided into three, one was TZS. 119 million for settlement of BOA Bank loan and TZS. 5million was to settle the debt from Finca Microfinance Bank and the remaining was for themselves.

Further, testified that, the two persons signed those loan documents before herself as an advocate and she attested their signatures by putting her signature and stamp of an advocate. DW3 proceeded to identify that the loan agreement she witnessed and prayed to tender it in court. The prayer was granted and same was admitted as exhibit D6.

Another document she attested was spouse consent which was signed by Devota Minja Haule in her presence. Since the two collaterals had different names, that is, one house had a name of Tito Simon Haule and another house had both names of Tito Simon Haule and Devota Minja, therefore,



the wife (Devota Minja) should consent by signing a consent document before an advocate.

Added that as an advocate, she read the contents of the consent document loudly in the presence of Devota Minja prior to her signature. That Devota Minja signed and she witnessed her signature by signing it and stamped therein. DW3 proceeded to identify exhibit D4, which had her signature and stamp.

Continued to testify that another document which they came with was mortgage deed between Bhamiles and TPB. Also, she read for them the contents of that mortgage deed and both signified their acceptance by signing it and she proceeded to attest their signatures and put her stamp. DW3 identified the mortgage deed and prayed to tender it as part of her testimonies. The prayer was granted and it was admitted as exhibit D7.

Continued to testify that, sometimes on November, 2015, Devota Minja called her and informed her that they have defaulted to repay the loan from TPB, thus advised them to go back to the bank and settle it. At that time, she recalled that they had an advocate called Nkobogo who also called her and they discussed on the best way of settling that debt. However, her advice was the same, that is, they have to go back to the bank and settle it.

Testified that, she knew both Tito Simon Haule and Devota Minja prior to signing their documents. Therefore, she was sure that, both parties knew their loan and she found their claims in this court lacking merits.



In cross-examination, she testified that the disputants signed before herself all loan documents, while the bank had already signed. Insisted that Devota Minja, Tito Simon Haule and herself are friends and they have been together for many years and in many events. So, she knows them and they are family friends, thus, attested their documents to persons who are known and family friends.

In answering some questions, she mentioned her roll of advocates as No. 1860 who started working in Faraja Trust Fund as volunteer in year 2007. Later was employed on June, 2010 as legal officer. When she attested their documents, she did not charge them because she did it on a friendly manner and that they are close friends and family friends. Added that even Devota Minja at one time, volunteered to work in Faraja Trust Fund.

Insisted that Devota Minja is well aware of the whole transactions of the loan with TPB, for she signified her acceptance by signing all necessary documents before herself, that is mortgage deed, loan agreement and spouse consent.

Testified further that, at one time she was called to Morogoro police station to testify on this matter. Devota Minja claimed forgery of her signature, in response DW3 informed police exactly what happened before herself.

Upon final testimony of both parties, this court granted an opportunity to the learned counsels to file their final arguments, which they complied with and this court extend its appreciation for industrious and good research. Considering their written submissions, both counsels recapped the testimonies of their witnesses; repeated on the agreed issues and put their

energy and time on two disputing issues to wit; the plaintiff's advocate strongly supported the averments of the plaintiff that she never signed any loan agreement between Bhamiles and TPB. That such denial is supported with the expert report tendered in court by PW3. Therefore, whatever was done by the 1st defendant was not known to the plaintiff.

In the contrary, the counsel for 2nd & 3rd Defendants strongly opposed the denial of PW1 and fully relied on the evidences of DW2 and DW3. That DW3 being an advocate, attested the signatures of both PW1 & DW1 who are husband and wife. At the end, each party tried to convince this court to buy in his side of arguments.

At the outset, I agree with the plaintiff's advocate that there are certain issues which are not disputable in this suit. Among them are; the plaintiff Devota Mathew Minja and Tito Simon Haule are husband and wife whose marriage is still subsisting from the date of marriage to date (see certificate of marriage exhibit P1). That their marriage was blessed with two issues and they jointly acquired some properties, including two houses located on plot No. 487/2 and 487/4 Block J Kihonda area, Morogoro Municipality. Again, it is undisputed fact that Bhamiles Co. Ltd obtained loan from TPB. Both sides have not disputed on this issue, thus, making it non-issue for determination by this court.

However, the areas of controversy, apart from the agreed issues, are centered on first who are the owners/shareholders of Bhamiles company Limited, this issue is intended to tackle the validity/invalidity of the company itself. It is also intended to answer the question of whether



Devota Minja and Tito Simon Haule are the true shareholders/owners of the company or otherwise; second, whether the plaintiff was aware of the loan accessed by that company to TPB; third whether the loan documents were signed by both the plaintiff and the 1st defendant; lastly, whether the self-confession of the 1st defendant on forgery of the signatures of the plaintiff is material in respect to this suit. I hope upon answering these issues together with the four substantive issues agreed upon by the parties, I am sure this suit will be conclusively determined.

The four issues raised by this court *suo mottu*, emanates from the evidences adduced during trial. They are not new and are not legal issues, thus there was no need to invite the learned counsels to address the court on them.

Since the source of dispute emanated from the loan agreement between Bhamiles Co. Ltd and TPB, it is therefore important to clarify on the shareholding of that company. The shareholders of the company are material in the final determination of this suit. Its importance is born out of the apparent dispute between the plaintiff and 1st defendant (husband and wife), thus, calling for this court to consider it critically.

According to the testimonies of DW1, it is clear that he registered that company to BRELA and obtained certificate of incorporation on 21st January, 2009. The certificate of incorporation bears No. 69392. Moreover, the attached Memorandum and Articles of Association, which convinced the Registrar of Companies to incorporate it, comprised two names of shareholders that is, Tito Simon Haule and Devota Minja Haule. As per the

documents both signed against their names. Under normal circumstances, this is a fact which required no dispute between the shareholders.

Surprisingly, the plaintiff denied totally to know anything in respect to the said company and that her signature was forged by the 1st defendant. The evidence of DW1 likewise left this court puzzled as he testified as follows:-

"The Company directors and shareholders are myself and my wife (Plaintiff). However, my wife was not aware on the existence of that company and I did sign on her name. Even company shares were not issued or sold to the plaintiff. To date she is not aware on the existence of that company"

Continued to deny generally that the alleged bank loan was not known to her. Such denial is supported by PW1 who exonerated her wife as irresponsible and unaware of it. This piece of evidence is purely contrary to the documentary evidences. All documents tendered in this court signified that both signed therein in the presence of an advocate who witnessed their signatures.

There are several unanswered questions in this suit, one may ask when DW1 started lying against his wife? If the company was incorporated in year 2009, does it mean the plaintiff never knew anything in respect to that company until to date? How would the plaintiff deny to have not signed the loan agreement before DW3 who is her close friend and family friend? Is it possible under normal circumstances to hide against wife, the title deed of landed properties from 2004 to date? It is on record that those title deeds were put as collaterals for the loan accessed by the Plaintiff and

DW1 from BOA Bank, is it true that the plaintiff was totally unaware of it? These are some questions which lacks clear answers from the evidences adduced in court.

I am well aware of the principles governing documentary evidences as against oral evidences. Usually, the documentary evidence should either stand or fall without seeking assistance from oral testimonies. This principle is well-developed in our jurisdiction. Certainly, the contents of the document should be taken as the best evidence, unless contradicted by another documentary evidence. Section 100 (1) of the Evidence Act Cap 6 R.E. 2019, is quoted hereunder for ease of reference:-

"When the term of a contract, grant, or any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant, or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which a secondary evidence is admissible under the provision of this Act"

This section is *impari materia* with Indian Law of Evidence as was amplified by **Sarkar on Evidence; (15th Edition) at page 1269: -**

"It is a cardinal rule of evidence, not one of technicality, but of substance, which it is dangerous to depart from, that where written documents exist, they shall be produced as being the



best evidence of their own contents. Whenever written instruments are appointed, either by the requirement of law, or by the contract of the parties, to be the repositories and memorials of truth, any other evidence is excluded from being used, either as substitute for such instrument, or to contradict or alter them".

In the same vein the Court of Appeal in the case of **Univeler Tanzania Ltd Vs. Benedict Mkasa t/a Bema Enterprises, Civil Appeal No. 41 of 2009** held:-

"Strictly speaking under our laws, once parties have freely agreed on their contractual clauses, it would not be open for the courts to change those clauses which parties have agreed between themselves"

Similar position was repeated by the same Court in **Civil Appeal No. 22 of 2017 between Miriam E. Maro Vs. Bank of Tanzania**. I fully subscribe to that guidance from the Court of Appeal, which in essence, binds all subordinate courts including this court.

Certainly, the documents tendered in this court shall remain as the best evidence in respect to this suit. Obvious they may make the suit stand or fall.

Considering critically on the evidence of DW1 which corroborated the testimonies of the plaintiff. PW1 denied outright to know anything on the existence of their company; loan agreement from TPB; and mortgage deed of their two houses. More so, she pointed all fingers to her husband that



he committed forgery of her signature; passport size picture; and any other document related to the registration of the company, loan agreement and mortgage deed. Such denial was supported with expert report on hand writing from PW3 which was made on 20th August, 2020.

The contents of the expert handwriting report exonerated her that the signatures appearing on several documents related to the Memorandum and articles of association of their company; loan agreement and mortgage deed together with spouse consent deed were not signed by the plaintiff. Meaning the same were forged by DW1. In fact, DW1 confessed to have forged her signatures in all documents including the documents used to register their company.

Observed critically that the plaintiff, instituted this suit on 26th November, 2015, but complained to police in respect to the alleged forgery of her signature on 5th July, 2018. Under normal circumstances, three years after existence of the suit ought to have been heard and conclusively determined. Such delay to report forgery to police may be viewed as an afterthought.

Considering deeply on the documents subject to this suit, all were signed by the makers before an Advocate Notary Public and Commissioner for Oaths. However, in this suit, neither PW1 nor DW1 testified, before whom they signed those documents? Even their advocates did not lead them on such crucial piece of evidence. For instance, the Memorandum and Articles of Association indicates that the two shareholders signed before Paulo Karlo Kalomo an Advocate Notary Public and Commissioner for Oaths on



27th October, 2008. Their company was registered by the Registrar of Companies on 21st January, 2009. A smart advocate would invite that advocate, if is easily available to appear in court and testify accordingly.

Other documents which were tendered in court, like exhibit D7 which is a Mortgage of a Right of Occupancy indicates that parties put their signatures in the presence of advocate Catherine E. Mushi. Likewise, exhibit D6, which is a loan agreement dated 8th December, 2014 PW1 and DW1 put their signatures before the same advocate Catherine E. Mushi. The same was done in exhibit D4 which is a consent by spouse to create a legal mortgage over landed properties in favour of TPB. Such consent has a passport size picture of PW1 and she signed in the presence of Catherine E. Mushi on 8th December, 2014.

Despite all that documentary evidences, yet neither the plaintiff nor DW1 found necessary to invite advocate Catherine Mushi to testify for them. Worse still, DW1 did not disclose before whose advocate he signed those documents and forged his wife's signature? In any event the evidences of the plaintiff and of DW1 creates more doubt if they are credible and reliable.

Perusing more on the admitted documents, two application letters for the loan to TPB were written by both DW1 and PW1. (see exhibits D1 & D2) whereby exhibit D1 is a letter written by DW1 on behalf of the company dated 30/8/2014. Its contents were to apply for a loan of TZS. 300 million, while D2 was written on the same date by PW1 expressing categorically that, she consented her husband to take loan of the same amount for



security of their two houses. In any event and an honest witness would not forget to call advocate Catherine E. Mushi, either to support or dispute the signature of the plaintiff.

In the contrary, Catherine E. Mushi appeared in court as defense witness of TPB (DW3), whose evidence left no doubt that she was truthful, reliable with credible evidences. That she disclosed unqualified testimonies that the family of DW1 that is, Tito Simony Haule and Devota Mathew Minja are family friends, they knew each other long time and that at one time they worked together with Devota Minja at Faraja Trust Fund. That they never at any time quarreled or had misunderstanding. Thus, this court has no reason to doubt her credibility and reliability of her evidences.

The most calling for critical consideration is the evidence of PW3 Maria Tryphnone Njenga ASP, an expert on forensic hand writing bureau whose report concluded that the handwriting of PW1 and her signatures in various documents were different from the samples and signatures taken during investigation. Such report of expert, despite the fact that it was made in year 2020 while the case was in this court since 2015, yet such report, usually informs the court on an area where the trial judge may not be conversant with and will always remain an opinion not binding to the court.

Rightly, the learned advocate for the plaintiff cited the case of **R. Vs. Cameroon [2003] T.L.R 84** whereby the court held that, evidence of an expert is likely to carry more weight than that of an ordinary witness, higher standards of accuracy and objectivity are required from him. I have no reason to doubt on that reasoning, however the evidence of DW3 was

not of an ordinary witness, rather testified as an advocate and officer of the court well conversant on the rules of evidence and her duty as an advocate to the court.

Her testimony corroborated the testimonies of DW2 who met the plaintiff and DW1 for the first time, when they went to TPB for the loan facility of their company. He was the one who gave them all loan documentations for the applicants to sign them before an advocate.

The expert report presented by PW3 taxed my mind. Therefore, I was compelled to revisit several authorities within and outside our jurisdiction with a view to gather various precedents before I may arrive safely to the conclusion. The Supreme Court of India in the case of **Mt. Titli Vs. Alfred Robert Jones, MANU/UP/0107/1933: AIR 1934 All 273**, held that it is not the province of the expert to act as Judge or Jury. The real function of the expert is to put before the Court all the materials, together with reasons which induce to come to the conclusion, so that the Court, although not an expert, may form its own judgment by its own observation of those materials.

The Court proceeded to hold:-

"An expert is not a witness of fact and his evidence is really of an advisory character. The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent judgment by the application of these criteria to the facts proved by the evidence of the case. The scientific opinion



evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and material furnished which form the basis of his conclusions."

In similar vein and reasoning the court in the case of **Sudhindra Nath Vs. The King, MANU/WB/0052/1952: AIR (39) 1952 Cal 422**, held:-

"We are now left with the evidence of identification by the hand-writing expert. With regard to this class of evidence, it is a rule of law that it is extremely unsafe to base a conviction upon the opinion of hand-writing experts. Without substantial corroboration; because it is well known that a comparison of hand-writing as a mode of proof is always hazardous & inconclusive, unless it is corroborated by other evidence."

To the best, these two cases proves that expert evidence always shall remain an expert opinion not binding to the judge.

In our jurisdiction, there are numerous authoritative decisions on expert evidence. For instance, in **Criminal Appeal No. 343 of 2017 between Yusuph Molo Vs. R**, Justices of Appeal insisted that:-

"expert opinion is not binding to the court in arriving to its decision, but is rather persuasive. Added that a medical report or the evidence of a doctor may help to show that there was sexual intercourse, but it does not prove that there was rape."



In similar context the Court of Appeal in the case of **DPP Vs. Shida Manyama@ Selemani Mabuba** the Court made reference to the decision of the Supreme Court of India in **Fakhrudin Vs. State of Madhya Pradesh, AIR 1967 SC 1326** where it was stated:-

"Either case the court must satisfy itself by such means as are open that the opinion may be acted upon. One such means open to the court is to apply its own observation to the admitted or proved writings and to compare them with the disputed one, not to become an handwriting expert but to verify the premises of the expert in one case and to appraise the value of the opinion in the other case. This comparison depends on the analysis of the characteristics in the admitted or proved writings and the finding of the same characteristics in a large measure in the disputed writing. In this way the opinion of the deponent whether expert or other is subjected to scrutiny and although relevant to start with becomes probative. Where an expert's opinion is given, the court must see for itself and with the assistance of the expert, come to its own conclusion whether it can safely be held that the two writings are by the same person. This is not to say that the court must play the role of an expert but to say that the court may accept that fact proved only when it has satisfied itself on its own observation that it is safe to accept the opinion whether of the expert or other witnesses."

In the same case of **DPP Vs. Shida Manyama@ Selemani Mabuba**, the Court of Appeal yet made reference to the decision of the Supreme Court



of India in **Malay Kumar Ganguly Vs. Dr. Sukumar Mukherjee and Another, AIR 2010 SCC 1007**, where it was held:-

"The scientific opinion evidence, if intelligible, convincing and tested becomes a factor for consideration along with other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusion and the data and material furnished which form the basis of his conclusions."

Further, the Court of Appeal proceeded to observe in the case of **Edward Nzabuga Vs. R, Criminal Appeal No. 136 of 2008** as follows:-

"The issue here is whether only medical evidence is acceptable or admissible in proving penetration or physical injuries of the vagina or body of the victim respectively. I'm afraid that courts of law have been gripped with some sort of phobia to expert opinions in particular medical evidence which they hold to be superior to the opinions or evidence of ordinary people, some of whom have got experience on what they are talking about. It smacks of academic arrogance to doubt the evidence of a woman, an adult, like the sixty two year old PW1 Nahemi Sanga in the case at hand when she says that the appellant's penis penetrated into her vagina, simply because a medical report, of a doctor who was not only present at the scene and did not experience the thrust of the penis of the rapist, but depending only on the presence of spermatozoa and bruises in the vagina of the victim to reach his opinion. An expert's opinion is admissible to furnish the court with scientific information which is

likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary"

Applying that sound observation of the Supreme Court of India which was acknowledged and adopted by the Court of Appeal in our jurisdiction, and considering the guidance of the Court of Appeal on the cited cases, I am compelled to state that at most the handwriting expert report tendered in this court shall remain as opinion, the conclusion must come from the trial judge.

In light of the above, I am certain in my mind that, the Expert Report and evidence of PW3 shall remain as expert opinion neither binding to this court nor superior over the evidences of other eye witnesses.

Having so said, I now turn to discuss and respond on the four issues which this court supplemented to the issues agreed up on by both parties. According to the available evidences and failure of the plaintiff and DW1 to call advocate Paulo Karlo Kalomo who attested the Memorandum and Articles of Association, which gave birth to Bhamiles Company Limited, this court has no reason to doubt that the company was properly and rightly incorporated and registered in year 2009. Thus, the plaintiff is a shareholder and was/is aware on the existence of their company. Therefore, both PW1 and DW1 are the true shareholders and owners of Bhamiles Company Ltd.

Having answered in affirmative the first issue, the second issue of whether the plaintiff was aware of the loan accessed by the company to TPB is



may conclude the second issue by insisting that the plaintiff was well-aware on the loan taken by their company to TPB.

The third issue of whether the loan documents were signed by both the plaintiff and the 1st defendant, the answer therein is similar to the second issue, thus answered in affirmative. The available evidences leave no iota of doubt that the plaintiff knew every process of acquisition of loan from TPB. Therefore, this court has nothing to doubt on that necked truth.

The last issue is on self-confession under oath of the 1st defendant, that he committed forgery against the plaintiff's signature and picture. Such confession on forgery is a criminal in nature and in content. I leave it to the law enforcers including the Office of the National Prosecution Services and Police Force to take serious action against him. Otherwise, in this suit such confession has no value, because the available evidences do not support such averments. Accordingly, such confession is immaterial in this suit.

Having so said, I would conclude this suit, however, I am guided by several precedents that, trial courts should decide cases based on the issues agreed upon by both parties. Henceforth, I find compelled to consider them just briefly in line with the above discussion.

In essence, the first agreed issue of whether the landed properties to wit; plot No. 487/2 and 487/4 Block J. Kihonda area in Morogoro Municipality are matrimonial properties, jointly acquired by the plaintiff and 1st defendant during their marriage is not disputed. There is no evidence adduced during trial which contradicted that fact. Hence, is answered in affirmative.



The second issue of whether the landed properties were legally mortgaged to the 2nd defendant, likewise is answered in affirmative. There is no dispute on the fact that the 1st defendant and the plaintiff are shareholders of Bhamiles Co. Ltd and that their company took loan from TPB. The evidence adduced in this court left no doubt that, the plaintiff signed in all loan documents including spouse consent to create a legal mortgage over the landed properties in favour of TPB.

For clarity, the evidences of DW2 was corroborated by the evidences of DW3 which testimonies left no doubt that both shareholders, (PW1 and DW1) agreed and together decided to use their company to access loan of TZS. 200 million from TPB. DW3 an advocate had no reason at all to lie against the plaintiff and DW1, that together they signed the loan documents before herself and she attested their signatures without any payments due to closeness and friendship they had. I find such evidence is unqualified and undoubted, hence reliable and credible.

Since any claim in civil nature depend on credibility of the witness and reliability of the testimonies adduced in court, I find the evidences of the plaintiff as was corroborated with the testimonies of DW1 were premeditated with intent to mislead the court. Accordingly, this court find the two witnesses are not truthful, credible and reliable.

Legally, the loan documents after being signed by both parties, turned to be a binding contract. The contractors being matured persons, consented to be bound by the terms and conditions of their contract. It is a settled rule of law that, parties are bound by their agreements they freely entered

into. Such contract has a sanctity in nature as lucidly stated in the case of **Abualy Alibhai Azizi Vs. Bhatia Brothers Ltd [2000] T.L.R 288** at page 289 that: -

"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) of 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 undisputed existence of loan agreement between the company and TPB, I am reluctant to accept the averments of the plaintiff and 1st defendant that the plaintiff was unaware of what was happening to her company, and that DW1 lied against her wife. In conclusion, the second issue is answered in affirmative.

The answer in the second issue is the same answer to the third issue of whether the plaintiff was involved in signing a loan facilities document for grant of a loan. In fact, she did not only know the existence of that loan, but she was the brain behind the whole processes and steps towards accessing that loan facility and she signified her acceptance by signing in all loan documents. To deny such necked fact requires strong evidence which are not forthcoming.

On the issuance of demand notices, I find the documentary evidences as per exhibits D3, D4 & D5 speaks louder and there are no contrary evidence against them. I find no reason to doubt their authenticity and



reliability of those exhibits. Those notices were rightly issued and properly delivered to the respective plaintiff and 1st defendant.

I have revisited section 132 (1) of the Land Act, Cap 133, which states that, a mortgagee may after expiry of sixty (60) days from the date of receipt of a notice under section 127 of the land Act, sell the mortgaged property. Also I have viewed the decision of **General Tyre East Africa Ltd Vs. HSBC Bank PLC (2006) TLR 60**, where the Court held:-

"Banks/Lenders and their customers/borrowers must fulfil and enforce their respective contractual obligation. The Counsel, concluded that, the trial magistrate correctly found that the Appellant was issued with notice and that the sale of the mortgaged property complied with the procedure"

I am, settled in my mind that, TPB rightly complied with the requirement of law in issuing those notices and both the plaintiff and 1st defendant decided to default their statutory duties to settle such debt and deny acceptance of those demand notices.

The last issue is on reliefs of the parties. Without laboring much on this issue bearing in mind the above conclusion, I accordingly refuse to grant any relief to the plaintiff. Henceforth, this suit is nothing than unprecedented delaying tactics either to settle the debt or let TPB realize the collaterals placed as securities for the loan.

In totality, this suit is dismissed with costs.

Order accordingly.



P.J. Ngwembe

Judge

28/01/2022

This judgement is read over to the parties this 28th January, 2022 in the presence of Mis. Rahel Salumbo for Rajabu Mrindoko advocate for Plaintiff and Mr. Richard Giray advocate for the 1st Defendant and Mr. Epapho Mwego advocate for the 2nd & 3rd Defendants.

Right to appeal explained



P.J. Ngwembe

Judge

28/01/2022