

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

**LAND APPEAL NO. 43 OF 2021.**

*(Arising from Land Application No. 20 of 2019 of the District Land and  
Housing Tribunal for Nzega)*

**TWAHA KAYUNGILO KAYIKU.....1<sup>ST</sup> APPELLANT**

**RAJABU JUMANNE LISU.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**NATIONAL MICROFINANCE**

**BANK LTD..... 1<sup>ST</sup> RESPONDENT**

**DOLPHIN GENERAL BUSINESS**

**ENT. CO. LTD..... 2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

Date of Last Order 25/05/2023

Date of Judgment Delivery 25/05/2023

**MATUMA, J.**

The appellants herein; Twaha Kayungilo Kayiku and Rajabu Jumanne Lisu have lodged this appeal after being aggrieved by the judgment and decree of the District Land and Housing Tribunal for Nzega in Land Application No. 20 of 2019.

Briefly, the background of the case is that, Twaha Kayungilo Kayiku took a loan of Tsh. 25,000,000/= from the 1<sup>st</sup> respondent (National Microfinance Bank Ltd) on 09<sup>th</sup> October, 2018 which was to be

repaid on monthly instalments of Tshs. 2,327,844.34/= for a period of one year ending on the 9<sup>th</sup> October, 2019. The 2<sup>nd</sup> appellant stood as a guarantor by mortgaging his house on Block "N" located at Ushirika whose square meters are 540. That house is exhibited on the letter of offer with Reference no. LD/NZ/10073 dated 02/12/2010.

It is undisputed by both parties that the 1<sup>st</sup> appellant after having made payments for only five (5) months stopped to continue with the schedule of payments which instigated the 1<sup>st</sup> Respondent to treat the none payment as a breach of contract. She thus instructed the 2<sup>nd</sup> Respondent to collect the debt by auctioning the mortgaged property because the 1<sup>st</sup> Appellant did not heed to the demand, she sent him twice.

The 2<sup>nd</sup> Respondent issued a 14 days' notice to the appellants to make good the loan or else the house would be attached and sold. The Appellants having received the notice could not see any smooth lane than that which took them into the court premises. That was in the District Land and Housing Tribunal supra where they jointly instituted the current suit mainly seeking for extension of time within which to repay the loan on the ground that the 1<sup>st</sup> appellant who ought to repay the loan got business setbacks.

They also prayed for the trial tribunal to preclude the respondents from selling the 2<sup>nd</sup> appellant's house.

The trial Tribunal rejected the appellants' application and ordered the 1<sup>st</sup> appellant to repay the outstanding loan within one month from the date of the judgment failure of which the Respondents to proceed attaching the mortgaged property for recovery of the outstanding debt.

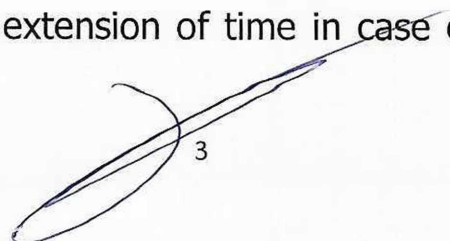
Dissatisfied with such decision, the appellants have preferred this appeal on four grounds mainly challenging the trial tribunal for having not granted them extension of time to repay the outstanding debt on the ground that they had sufficient cause for their failure to make good the loan. They are thus praying that this court restrains the respondent from selling the 2<sup>nd</sup> appellant's house and further extend them time within which to repay the said loan.

At the hearing of this appeal, the appellants appeared in person and did not actually make any substantive argument against the Respondents' move to realize the outstanding loan. They ended up repeating the prayer they made during trial that this court extends them time to repay the loan as they have good intent to repay it. The 1<sup>st</sup> appellant went on submitting that even yesterday he effected payment of one million which has reduced the loan into only eleven million plus.

They also argued that they have a farm measuring fifty (50) acres which they are on the process to find out the broker for selling it so that they can repay the whole outstanding debt.

Mr. Mackanjelo Ishengoma learned advocate represented the Respondents and he submitted generally that this appeal has no any sufficient cause because the appellants do not dispute the debt and that the same is not yet repaid fully up to date. He argued that extension of time for the repayment of the loan cannot be sought in court but to the Bank itself. He finally prayed that this appeal be dismissed with costs.

Having heard the parties for and against this appeal, I agree with the learned trial chairman of the trial Tribunal that the loan contract did not provide a room for extension of time in case of setbacks in the 1<sup>st</sup>



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respondent's business. That is why the security for the loan was required and the 2<sup>nd</sup> appellant volunteered his house to stand as security for the loan. In that respect the contract must be fully honoured and executed accordingly. Or else the appellants should have pleaded frustration of contract and establish the same. In the instant matter there was no frustration of contract nor there is any evidence to establish it.

The averments of the appellants that the 1<sup>st</sup> Appellant's business faced difficulties because of the shift of the bus stand where he used to do his business cannot be accommodated in this case because; **one**, the said business place was not a pre-determined agreement in the loan contract, **two**, the 1<sup>st</sup> appellant did not account for why he did not also shift to follow the new business place (the place where the stand was shifted to) if at all his business was attached to the said stand.

In the case of ***Mohamed Idrisa Mohamed v. Hashim Ayoub Jaku (1993) TLR 280***, it was held;

*"Where a party to the contract has no good reason not to fulfill an agreement, he must be forced to perform his part, for an agreement must be adhered to and fulfilled"*

Also in the case of ***Herman K. Kirigini Versus Agriculture Inputs Trust Fund Stock Brokerage Agencies*** (Civil Case 243 of 2000) [2008] TZHC 239 (25 April 2008); the Court held that;

*"After a party has been in breach of the loan agreement and the other party being entitled to enforce the agreement, the party in breach cannot be entitled to an extension or rescheduling of the loan in the terms of the Agreement of which he is already in breach."*

The court cannot therefore extend the time for the appellant to repay the loan because this was a valid contract entered between the appellants and the 1<sup>st</sup> respondent which must be executed as mutually agreed. The Court has no jurisdiction to alter or reframe the conditions in the contract entered between the parties provided that the contract is valid in law. Any extension of time should have been sought from the 1<sup>st</sup> Respondent as rightly argued by Mr. Mackanjelo Ishengoma learned advocate.

In regard to the second prayer that the respondents be restrained from selling the mortgaged property, I find no any merit in it. Exhibit D1 (the loan agreement) show that there was spouse consent by the 2<sup>nd</sup> appellant's wife one Hawa Rashid Hussein. I entertain no doubts that the said spouse did not join the appellants to frustrate the entered agreement because she knew the contractual obligations and the consequential outcomes in case of breach.

In the case of ***National Bank of Commerce versus Dar es Salaam Education and Office Stationery [1995] TLR 272***, the Court of Appeal held that where a mortgagee exercises his power of sale under a mortgage deed the Court cannot interfere unless there was collusion with the sale of the property. See also; ***Buco Investment Holdings Limited versus CRDB Bank PLC & Others (Commercial Case 15 of 2016) [2019] TZHCComD 178 (20 February 2019)***

Again, in the cases of ***General Tire East Africa Limited V. HSBC Bank PLC (2006) TLR 60*** and ***Yusuph Mwita Marora V. 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. In the instant matter there are no triable issues. The

Appellants admits in material particulars that the 1<sup>st</sup> Appellant took the loan from the 1<sup>st</sup> Respondent, they mortgaged the 2<sup>nd</sup> Appellant's landed property to secure the loan, they defaulted the payment schedule, and to date they have not settled the outstanding balance even after the lapse of three years and eight month after the last due date in which the whole sum was expected to have been fully paid.

Even at the trial tribunal and in this court the only main remedy or relief sought by the appellants is extension of time for repayment of the loan. Extension of time should be agreed by the parties themselves and the court has no room to do so unless very peculiar circumstances are proved to warrant the intervention of the court. In the instance matter there are no such peculiar circumstances and thus there is no triable issues.

I take the stance which I took 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 in which I held 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. The 2<sup>nd</sup> Appellant mortgaged his house in the meaning that he was ready for his house to be sold by the 1<sup>st</sup> Respondent in case the 1<sup>st</sup> Appellant fails to repay back the loan as agreed in the loan facility. He is thus estopped to deny such honest belief by the 1<sup>st</sup> Respondent who issued the loan because of

the security given by the 2<sup>nd</sup> Appellant in terms of section 123 of the Evidence Act, Cap. 6 R.E 2019.

In that respect, I have no option but to find that this appeal has been brought without any sufficient cause. I therefore dismiss the same in its entirety with costs. Right of appeal explained.

It is so ordered.

  
**MATUMA**  
**JUDGE**

**25/05/2023**

**ORDER**

Judgement delivered in the presence of Mr. MackAnjelo Ishengoma advocate for the respondents, and the appellants present in person.



  
**MATUMA**  
**JUDGE**

**25/05/2023**