

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF DAR ES SALAM**

AT DAR ES SALAAM

CIVIL CASE NO. 9 OF 2021

MARIAM JUMA KOMANYA 1ST PLAINTIFF

**REHEMA PEREZ (The Administratrix of
the Late JUMA BAKARI KOMANYA) 2ND PLAINTIFF**

**MOROGORO FARM AND TRANSPORT
LIMITED SERVICES (1985) LTD 3RD PLAINTIFF**

VERSUS

CRDB BANK PLC DEFENDANT

EX-PARTE JUDGMENT

20th December 2022 & 3rd February, 2023

KISANYA, J.:

Before this Court is a suit instituted by Mariam Juma Komanya, Rehema Perez (The Administratrix of the Late Juma Bakari Komanya) and Morogoro Farm and Transport Limited Service (1985) Ltd against the defendant, CRDC Bank PLC. The plaintiffs are seeking the judgment and decree in the following terms:

- a. That this Honourable Court be pleased to order the Defendant to discharge the title deed for the properties designated as Plot No. 187, Medium Density Morogoro, and C.T. No. 22234 and Plot No.*

123, Low Density Morogoro and issue respective titled deeds to the Plaintiff.

b. Costs of this suit be borne by the Defendant.

c. Any other relief(s) this Honourable Court deems fit and just to grant.

It is stated in the plaint that, in 1996, the 3rd plaintiff applied and was issued with a loan facility which was secured by the plaintiffs' properties designated as Plot No. 187, Medium Density Morogoro, and C.T. No. 22234 and Plot No. 123, Low Density Morogoro (henceforth "the mortgaged properties) and thus, the respective title deeds handed over to the defendant.

The plaintiffs allege that the defendant has refused to discharge the mortgaged properties. It further claimed that the plaintiffs are not indebted to the defendant and that defendant has never demanded any sum outstanding. On that account, the plaintiffs are of the view that it is no longer lawful for the defendant to retain the mortgaged properties in order to enforce the loan contract or file the suit. Therefore, this suit was filed after the defendant had failed to discharge the mortgage and return the title deeds or security documents to the plaintiff.

In response to the Plaintiff, the defendant filed a Written Statement of Defence. She admits to have issued the loan which was secured by the mortgaged properties stated by the plaintiffs. She further pointed out that the title deeds were mortgaged by one, Juma Bakari Komanya as guarantor to the loan granted to the 3rd defendant. It is further alleged that, as of December, 1996, the loan stood at TZS 161,529,631.05 and that despite several demands, the loan has not been fully repaid.

Basing on the facts averred in the pleadings, the following issues were agreed between the Court and parties during the final pre-trial conference:

- 1. Whether the 3rd plaintiff is still indebted to the Defendant.*
- 2. Whether the continued retention of the security documents is lawful.*
- 3. What reliefs are the parties entitled to.*

On the 4th day of October, 2022, this Court ordered the evidence in chief to be given by way of witness statement. In that regard, it was ordered that the hearing would proceed on 29th November, 2022 at 8.30 am and the plaintiffs were ordered to file the witness statement at

least seven days before the hearing date. The plaintiff complied with the Court's order by filing the witness statements of Rehema Perez and Mbwana R. Kihemba.

When the matter was called on for hearing, the plaintiffs were represented by Mr. Godwin Muganyizi, learned advocate, while the defendant defaulted to appear without notice. Consequently, the matter proceeded *ex-parte* under against the defendant.

In a bid to prove their case, the plaintiffs called two witnesses. The first witness was Mr. Mbwana Ramadhan Kihemba (PW1) who testified for the 3rd plaintiff. He stated on oath that, he worked as the Finance Manager of the 3rd plaintiff when the defendant advanced the money to the 3rd plaintiff. It was his further testimony that the money was advanced in a piece meal at a fixed limit. According to him, "the money could be limited after the defendant was satisfied that the foregoing luminance had been liquidated".

PW1 testified further that, by the year 1996, the defendant was claiming nothing. His testimony was based on the assertion that had the 3rd plaintiff been indebted to the defendant, the latter (defendant) would have realized its money from the collaterals, served the 3rd

plaintiff with a notice of default and availed both the ledger and bank statement to the 3rd plaintiff. PW1 further testified that the defendant is not justified in retaining the collaterals. He therefore prayed that the reliefs listed in the plaint be granted as prayed.

The next witness was Rehema Perez (PW2). She testified that she was the administratrix of the estate of her husband, the late Juma Bakari Komanya. She also told the Court that the 1st plaintiff is her daughter. PW2 recalled that, in 1996, the 1st plaintiff and the late Juma Bakari Komanya mortgaged the title deeds in respect of Plot No. 187, Medium Density Morogoro, and C.T. No. 22234 and Plot No. 123, Low Density Morogoro to secure a loan facility which was advanced to the 3rd plaintiff. She further adduced that it is now 26 years and no notice of default or demand has ever been served to the 1st plaintiff and the late Juma Bakari Komanya. PW2 further testified to have on several occasion demanded the titled deeds of the mortgaged properties without success. She supported her testimony by producing a letter for requesting the titled deeds (Exhibit P1) which was received by the defendant on 5th July, 2014.

It was further testified by PW2 that, no suit has ever been filed against the plaintiffs and that there is no pending recovery process against them. That being the case, the plaintiff stated that the defendant is not justified in retaining the collateral to enforce anything under the loan contract which existed back in 1996 or file a suit against the 3rd Plaintiff.

Subsequent to closure of the plaintiffs' case, Mr. Muganyizi filed the written final submissions. I will consider his arguments in the course of determining the issues pertaining to this suit.

It is a fundamental legal principle set forth under section 110 of the Evidence Act, Cap. 6, R.E. 2022 that, a person who alleges has a burden of proof. As for the standard of proof, the law is settled that civil cases must be proved on the balance of probabilities. Thus, evidence which is more credible than the adverse party will be sustained and considered by the Court. The said principles have been affirmed in a number of cases, including the case of **Paulina Samson Ndawavya vs. Theresia Thomasi Madaha**, Civil Appeal No. 53 of 2017 (CAT-unreported) where it was underscored that:

"It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence act, Cap. 6 [R.E 2002]. It is equally elementary that since the dispute was in civil case, the standard of proof was on a balance of probabilities which simply means that the Court will sustain such evidence which is more credible than the other..."

In view of the foregoing, the legal burden to prove the case at hand lies on the Plaintiffs. It does not matter whether the case proceeded *ex-parte* against the defendant. As regards the evidential burden, it may shift from one party to the other, depending on the fact required to be proved.

Moving to the issues framed during the final pre-trial conference, the first issue is whether the 3rd plaintiff is still indebted to the Defendant. Reading from the plaint and written statement of defence, it clear that parties are in agreement that, sometimes in 1996, the 3rd plaintiff applied and was issued with, by the defendant, a loan facility. However, neither the plaintiffs nor the defendant mentioned the amount of loan which the defendant advanced to the 3rd plaintiffs in

1996. Further to this, the said amount was not stated in the oral testimonies of PW1 and PW2.

That notwithstanding, I have considered the fact that the 3rd plaintiff was not indebted to the defendant, was deposed by the plaintiffs. On the adversary part, the defendant claimed that the 3rd plaintiff was still indebted to her. That being the case, the plaintiffs were duty bound to prove on the balance of probabilities that the 3rd plaintiff paid the loan and thus, not indebted to the defendant. At the outset, I am of the view the plaintiffs did not prove their duty. For instance, while the plaint is to the effect that the loan was issued to the 3rd plaintiff in 1996, PW1 testified as follows:

"That by the year 1996, the Defendant was claiming nothing or else would have realized it (sic) money from the collateral security facility.

PW1 went further to testify that:

"That in event the 3^d plaintiff would be indebted to the Defendant, the Defendant would have availed both the ledger card and bank statement of the 3rd Plaintiff.

As it can be glanced from the above evidence, the third plaintiff through PW1 does not state how the loan was repaid. Since PW1 was the 3rd plaintiff's Finance Manager when the loan was advanced by the defendant, he was expected to give evidence on the amount of loan granted to the 3rd plaintiff, duration of loan and amount of loan repaid under terms of the loan facility agreement.

Considering that the loan facility agreement was not tendered in evidence, the terms and conditions of the loan facility advanced to the plaintiff are known. In the absence of the evidence on the terms and conditions of the loan agreement, this Court is not in a position of holding whether the time within which to pay the loan had expired. Further to this, the terms and conditions under which the plaintiff was required to realize the money from the collateral are not known.

On her part, PW2 did not tell the Court as to whether the 3rd plaintiff repaid the loan. She only testified that the 1st plaintiff and the late Juma Bakari Komanya ~~mortgaged that the properties stated afore to secure the loan facility issued to the 3rd respondent.~~ However, the 1st plaintiff was not called to testify. Yet, the Court was not told as to the whereabouts of the 1st plaintiff and the reasons of failing to enter the

witness box. Furthermore, the mortgage agreements were not tendered in evidence. Considering further that evidence as to the terms of loan agreement and mortgage is wanting, this Court finds no basis of holding that the 3rd defendant is not indebted to the defendant simply because the defendant has not taken the recovery measures such as issuing the notice of default or demand notice or instituting a suit as stated by PW1 and PW2.

I have further considered Exhibit P1, in which the 2nd plaintiff requested the defendant to discharge the mortgage. The said letter (Exhibit P1) suggests that the 3rd defendant won Civil Case No. 289 of 1997. However, Apart from failure to mention the name of Court which heard and determined Civil Case No. 289 of 1997, the plaintiff tendered in evidence copy of the said ruling. In the result, it is not clear as to whether the issue under consideration was resolved in the case referred to in Exhibit P2. That aside, Exhibit P1 does not prove that the loan advanced to the 3rd plaintiff was repaid by the plaintiffs.

On the foregoing, this Court is of the view that the plaintiffs have failed to prove, on the balance of probabilities, that the 3rd plaintiff

repaid the loan. Consequently, the first issue cannot be answered in the plaintiffs' favour.

As for the second issue, the Court is called upon to decide whether the continued retention of the security documents is lawful. It is common ground the properties designated as Plot No. 187, Medium Density Morogoro, and C.T. No. 22234 and Plot No. 123, Low Density Morogoro were mortgaged to secure the loan which the defendant advanced to the 3rd plaintiff. Evidence to such effect is also reflected in the evidence of PW2. She stated as follows:

"3. That sometime in the year 1996, the 1st plaintiff and the late Juma Bakari Komanya did mortgage their title deeds to secure a loan facility that was issued to the 3rd Plaintiff's company.

4. That the description of the above collateral are designated Plots No. 187, Medium Density Morogoro, and C.T. No. 22234 and Plot No. 123, Low Density Morogoro, respectively."

Now, according to section 121 of the Land Act, Cap. 113, R.E. 2019, a mortgage is discharged by the mortgagee (bank) at the request and costs of the mortgagor but after the mortgagor has paid all moneys

and performed all other conditions and obligations secured by the mortgage.

In the present case, Exhibit P1 shows that the 2nd plaintiff asked the defendant to discharge the mortgage. The said request was premised on the decision of the court in Civil Case No. 289 of 1997 between the 3rd plaintiff and defendant. Owing to the fact that the copy of ruling or judgment referred to in Exhibit P1 was not tendered in evidence, it is not known whether the defendant was ordered to discharge the mortgage.

At this juncture, having resolved herein that the plaintiffs have not proved to have repaid the loan, this Court finds no cogent ground of holding that the continued retention of the security documents is unlawful.

Last for determination is the reliefs to which parties are entitled to. The plaintiff asked the Court to order the defendant to discharge the mortgage and pay costs of the suit and general damages. This Court was further asked to grant any other relief it considers fit and just to grant. Basing on the above decision on the first and second issues, the Court holds the firm view that the reliefs for the order as to discharge of

mortgage and payment of general damages lack legal basis. Thus, both reliefs are dismissed.

As regards the relief which the Court deems fit and just to grant, this Court has considered that the pleadings and evidence suggest that the defendant has not availed the plaintiff with the status of the loan advanced to the 3rd plaintiff. In that regard, I find it just to order the defendant to avail the plaintiff with the necessary particulars or information of the loan and the current status of the mortgaged properties. Given the foregoing circumstances, each party shall bear its own costs.

It is so ordered.

DATED at DAR ES SALAAM this 3rd day of February, 2023.



S.E. KISANYA
JUDGE