

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**CIVIL APPEAL NO. 27 OF 2022**

(C/F: Civil Case No. 15 of 2021 in the Resident Magistrate Court of Arusha at Arusha)

**DAFFI AXWESSO UMBE.....1<sup>ST</sup> APPELLANT**

**DAHAMAY GISAMO BAATA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**NATIONAL MICROFINANCE BANK PLC.....RESPONDENT**

**JUDGMENT**

**19/09/2023 & 30/11/2023**

**GWAE, J**

Before the Resident Magistrate Court of Arusha at Arusha (trial court) the respondent filed a summary suit against the appellants claiming the outstanding amount at the rate of Tshs. 27,705,703.03/= being a loan and any accrued interest that was advanced to the 1<sup>st</sup> appellant and guarantee by the 2<sup>nd</sup> appellant.

It was the allegation of the respondent that the appellants breached the terms of the loan agreement whereby the respondent issued a loan facility to the 1<sup>st</sup> appellant to the tune of Tshs. 30,000,000/= being the principal amount and the same was to be repaid with an interest of 24%. In securing the loan, the 2<sup>nd</sup> appellant guaranteed the said loan by placing

his landed property located at Baraa Ward, Sorenyi Street, Arumeru District in Arusha Region. It was further agreed that, the loan was to be repaid within 18 months. Therefore, the 1<sup>st</sup> appellant was to make equal installments of Tshs. 2,001,063.06/= per month for 18 months, starting from 8<sup>th</sup> February 2020 to 8<sup>th</sup> July 2021. Nevertheless, it was the contention of the respondent that the 1<sup>st</sup> appellant managed to make only four equal installments to the tune of Tshs. 8, 313,432 which was contrary to the agreed loan repayment schedule. The respondent went on to state that it was further agreed by the parties that, in case the borrower fails to service his loan for three months (90) days the lender has a right to claim the entire remaining amount including the interest and any other costs.

Therefore, following the default by the 1<sup>st</sup> appellant to service the loan, on 27<sup>th</sup> November 2020 the respondent served the 1<sup>st</sup> appellant with a statutory default notice requiring her to make repayment of the outstanding amount within sixty days from the date of receiving the default notice. However, the 1<sup>st</sup> appellant did not make any payment and since the mortgaged property is a dwelling housing, the respondent could not take possession and exercise the power of sale without the order of the court.

The respondent thus filed a suit in the trial court praying for judgment and decree against the appellants and among others, the respondent prayed for;

1. A declaratory order of the court to the extent that the appellants are in breach of the loan agreement and thus the respondent is entitled to exercise her power of sale to recover the outstanding amount to the tune of Tshs. 27,705,703.03/=
2. An order to allow the respondent to enter into possession of the mortgaged property situated at Baraa Ward, Sorenyi Street, Arumeru District within Arusha Region to exercise her power of sale peacefully.
3. An order of sale of the mortgaged property to recover the outstanding amount stated above.
4. Interest at the commercial rate of 21% from the date of the institution of the suit to the date of judgment.
5. Interest on decretal amount at a court rate of 7% from the date of judgment to the date full satisfaction of the decree.
6. Costs of the suit.
7. Any other relief the court deemed appropriate to grant.

Responding to the respondent's claim, the appellants in their joint written statement of defence disputed the amount claimed to them by the respondent and they contended that the respondent was duty bound to

prove the alleged outstanding balance. Similarly, the appellants disputed to have been issued with the requisite default notice. They thus prayed for the dismissal of the case.

The pleadings having been completed and mediation failed, hearing of the case proceeded. After hearing and evaluating evidence from both sides, the trial court was of the finding that the appellants breached the loan agreement and the respondent was therefore given the right to take possession and exercise her power of sale of the mortgaged property in order to recover the outstanding amount Tshs. 25,705,703.03/=. The appellants were also ordered to bear the costs.

Dissatisfied with the decision of the trial court, the appellants have filed this appeal with four (4) grounds namely;

1. That, the honourable trial court gravely erred by not affording the appellants the right to be heard by failure to accord them the right to cross examine the respondent's witnesses.
2. The honourable trial court fell into grave error by entertaining a matter that it did not possess the requisite pecuniary jurisdiction.
3. The honourable trial court grossly erred by adjudging that at the time of issuing of the demand and default notices the whole loaned amount had accrued instead of a default amount alone

4. That the honourable court erred by entertaining a mortgage dispute as a summary suit.

When the matter was called on for hearing, the appellants appeared in person unrepresented, on the other hand the respondent was under the representation of advocate **Godfrey Melkizedeck Sado**. The appeal was ordered to be argued by way of written submissions.

Submitting on the **first ground of appeal** the appellant stated that, in the proceedings of the trial court together with its judgment there is no indication that, the appellants were accorded the right to cross-examine the respondent. It was his submission that the said omission denied the appellant an opportunity to verify the veracity of the respondent's witnesses in particularly on the outstanding balance. The appellants supported their submission with the decision of the Court of Appeal of Tanzania in the case of **Hai District Council vs Kilempu Kinoka Laizer & 15 others**, Civil Appeal No. 110 of 2018 (Unreported).

Responding to the appellants' submission in respect of the first ground, the respondent stated that, the appellants are telling lies to this court as reading the proceedings of the trial tribunal at page 19 and 20 the appellants were accorded the right to cross-examination and they

exploited the said right by asking several questions to the respondent's witness.

This ground of appeal does not need to take much of my time as I have carefully revisited the proceedings of the trial court and the following were observed:- **Firstly**, that, the respondent in proving her case summoned one witness, Ester Frank Salia (PW1) the loan officer, who testified on behalf of the plaintiff. **Secondly**, that, after respondent's witness had completed giving her testimony the appellants were accorded the right to cross-examine him and **thirdly**, that, when the defence case began and the appellants testified, the respondent was also given her right through her learned counsel Ms. Suzan Michael to cross-examine each appellant.

Basing on the principle of sanctity of court records it is the firm view of this court that where the authenticity of the recorded evidence is in question, it is the court's record that is deemed to be accurate and unimpeachable. See the case of **Flano Alphonse Masalu @ Singu & 4others vs The Republic**, Criminal Appeal No. 366 of 2018 (Reported Tanzlii). From the above analysis, it is my finding that the appellants' 1<sup>st</sup> ground of appeal is devoid of merit.

That said, I now turn to the **second ground of appeal** where the appellants are seriously challenging the pecuniary jurisdiction of the trial court. Submitting in support of this ground of appeal, the appellants stated that according section 41 (1) Magistrates' Courts Act Cap 11 R.E 2019, the pecuniary jurisdiction of the Resident Magistrate Court was equal to that of the District Court which is Tshs. 100,000,000/= and 200, 000, 000/= for recovery of immovable property. Therefore, according to them, considering the amount claimed the matter ought to have been filed in the Primary Court.

Resisting this ground, the respondent submitted that the matter was commercial in nature and therefore it is governed by section 40 (3) of the Magistrates' Courts Act Cap 11 R.E 2019. He thus argued that, the trial court had pecuniary jurisdiction to entertain the matter.

Section 40 (3) of the Magistrates' Courts Acts provides as follows;

*"(3) Notwithstanding subsection (2), the jurisdiction of the District Court shall, in relation to commercial cases, be limited-*

*(a) in proceedings for the recovery of possession of immovable property, to proceedings in which the value of the property does not exceed one hundred million shillings;  
and*

*(b) in the proceedings where the subject matter is capable of being estimated at money value, to proceedings in which the value of the subject matter does not exceed seventy million shillings.*

The above provision of law speaks for itself and I need not say more, much as I am aware that the amount claimed falls under the jurisdiction of Primary Courts under section 18 (a) of the Magistrates' Courts Act, but this suit being on commercial transaction, the trial court had the pecuniary jurisdiction. Therefore, this ground of appeal is also bound to fail as I hereby do.

On the **third ground of appeal**, the appellants submitted that the appellants were bound to the extent of the defaulted repayment and not the whole amount. The respondent on the other hand submitted that throughout the entire proceedings of the trial court there is nowhere stated that the trial Magistrate gave its decision that at the time of issuing a demand notice the whole amount of loan accrued. According to the respondent, the appellants were supposed to pay the entire remaining amount.

Determination of this ground of appeal took me back to the loan agreement between the parties. Pursuant to the parties' agreement it was consensually agreed by the parties that upon default by the borrower the



lender shall take the following steps and I wish to quote as reflected in the parties' loan agreement on the second part (b) and (c);

*"(b) Endapo mkopaji atapitiliza kutolipa mkopo kwa awamu mbili, yaani miezi miwili (siku sitini) na halipi mkopo hadi awamu ya tatu ikawadia, basi kiasi chote cha deni kitakachokua kimesalia kitachukuliwa kuwa deni linalodaiwa. Benki itakuwa na hiari ya kuchukua hatua stahili za kurejesha deni hilo ikiwa ni pamoja na deni la msingi, riba na gharama nyinginezo.*

*(c) Kiasi chochote cha mkopo, kitakachobaki bila kulipwa mara baada ya muda wa mkopo kuisha, kitaendelea kutozwa riba kiasi cha 24% kwa mwaka hadi hapo deni litakapolipwa."*

From the parties' agreement together with what was evidenced in the trial court with regard to the amount that has been repaid by the appellants, it is apparently clear that, the respondent's claim against the appellant was on the remaining balance which is Tshs 27,705,703.03/=, which is the whole sum of money after the default. However, that is what both parties agreed. The appellants cannot thereafter wards complain since they are bound by their agreement that they freely entered into. (See **Miriam Maro vs. Bank of Tanzania**, Civil Appeal No. 22 of 2017 (unreported-CAT) and case of **Yara Tanzania Limited vs. Catherine**

**Assenga**, Revision No. 88 of 2020, Labour Court at DSM.). Equally, I find no merit in this ground of appeal.

In their **last ground of appeal**, the appellants argued that it was improper for the trial court to entertain a mortgage dispute as a summary suit. They supported their argument with the decision of the Court of Appel of Tanzania in the case of **Jomo Kenyatta Traders Limited & Sothers vs National Bank of Commerce Limited**, Civil Appeal No. 48 of 2016 (Reported Tanzlii).

Replying to this ground, the respondent was of the view that, the appellants misdirected themselves as the Civil Procedure Code Cap 33 R.E 2019 as Order XXXV Rule 1 allows a mortgage suit to be brought as a summary suit. Therefore, it was her stand that the trial court was correct to entertain the matter as it did. The respondent also distinguished the cited case of the appellants to the case at hand.

Order XXXV Rule 1 (c) of the CPC gives circumstances where the order may apply and one of them is on the suits arising out of mortgages. For easy of clarity, the said order is hereby reproduced;

*"ORDER XXXV*

1. *This Order shall, where the plaintiff desires to proceed in accordance with the Order, apply to-*

*(a) N/A*

*(b) N/A*

*(c) suits arising out of mortgages, whether legal or equitable, for- (i) payment of monies secured by mortgage;*

*(ii) Delivery of possession of the mortgaged property to the mortgagee by the mortgagor or by any other person in or alleged to be in possession of the mortgaged property;*

*(iii) Redemption; or*

*(iv) Retransfer or discharge;”*

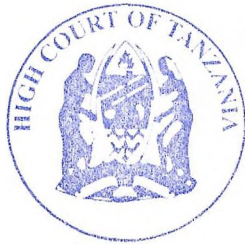
From the above quoted part of the provision of law, it is the finding of this court that the respondent was justified to file his case as a summary suit. I have also read the decision cited by the appellant, I think it is distinguishable from this case as in the said case the Court of Appeal held inter alia that, the appellants were not accorded an opportunity to defend their case. On the contrary, in the matter at hand, the appellants applied and obtained leave to defend their case. I have also taken into account the principle of overriding objective where the paramount consideration is on substantive justice. I therefore find that the parties' rights were determined accordingly as neither of them was prejudiced. In that regard, this ground also lacks merit.

In the foregoing reasons, the appeal before this court is without merit. In that regard, I find no reason to disturb the orders made by the

trial court. The appellants shall bear the costs of this appeal and those at the trial court.

It is so ordered.

**DATED at DAR ES SALAAM** this 30<sup>th</sup> November 2023



  
**MOHAMED R. GWAE**  
**JUDGE**