
IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 66 OF 2013

INTERNATIONAL COMMERCIAL
BANK (TANZANIA)
LIMITED.....PLAINTIFF

VERSUS

HAPPY KAITIRA BURILO t/a
IRENE STATIONARY.....1ST DEFENDANT

EPHRAIM SAMWELI MAGULLA.....2ND DEFENDANT

JUDGEMENT

Mansoor, J:

Date of JUDGEMENT- 18TH MARCH 2016

The plaintiff bank filed a suit against the defendants jointly and severally for recovery of THz 505,377,987.11 as at 6th

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June 2013, being an amount outstanding, interest thereon at the rate of 12% per annual compounded on monthly basis, and costs of the suit.

The plaintiff granted a term loan to the first defendant on 05th March 2012 of THz 450,000,000. The term loan was for a period of 36 months from the date of its acceptance. The loan was secured by a legal mortgage on a property known as Plot no. 1829/25, Msasani Peninsula, Kinondoni, Dar es Salaam comprised in a Certificate of Title No. 113294, in the name of Ephraim Samwell Magulla "the Property". It is averred by the plaintiff in the plaint that the 1st defendant gave her spousal consent for this property to be mortgaged. The loan was to be repaid in 36 months without a moratorium period at equal instalments of THz 17,654,783.67 and an interests of 5% would be charged on any outstanding balance for delayed or defaulted payments.

The 2nd defendant is the guarantor.



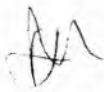
The plaintiff alleges further in its Amended Complaint that while the debt was still outstanding, the defendants fabricated or caused to be fabricated and executed, discharged of mortgage documents and consequently managed to facilitate the discharge of mortgage. That the defendants prepared or caused to be prepared and presented to the Land Registry a scanned copy of the security documents i.e. CT No. 113294, purporting to be the original Certificate of Title, and have it discharged from being mortgaged, that the 1st defendant executed a forged document purporting to be a discharge of mortgage by the plaintiff bank, and presented it to the Land Registry with the original title which she was keeping and consequently discharged the mortgage without repaying the outstanding loan amount. The 1st defendant is alleged to have made false statements to the Land Authorities to the effect that the loan was already discharged, and managed to have the title to the property discharged using forged documents without the plaintiff's knowledge.



Having discharged the property from the plaintiff's bank, the defendants have mortgaged the same property to Exim Bank.

The 1st defendant failed to repay the loan as agreed, and on 24th December 2012 a statutory default notice was sent to the 2nd defendant as the mortgagor. Despite the notices and several demands, the defendants did not pay the outstanding amount, hence the plaintiff filed this suit against the defendants for the following reliefs:

- i) A declaration that the discharge of mortgage purported to have been transacted in October 2013 is of no legal effect as the same was facilitated through fraudulent means at the instance of the defendants;
- ii) An order requiring the Registrar of Titles to rectify the Register by cancelling in the said Register the discharge of mortgage registered in October 2013 and any other subsequent entries relating thereto and restore to full force the mortgage registered in favour of the Plaintiff on 7th March 2013;



iii) A declaratory order that the Defendants have breached the terms and conditions of the facility letter dated 5th March 2013, the result of which THZ 505,377,987.11 is owed from the defendants at the time of filing the suit.

iv) interest on (iii) above at the rate of 12% per annum from the date of judgement to the date of payment in full,

In the alternative to prayers (a), (b), and (c)

v) As against both defendants- eviction, delivery of vacant possession and an order for sale of landed property registered as Certificate of Title No. 113294, located at Plot no. 1829/25 Msasani Peninsula, Kinondoni, Dar es Salaam

vi) costs of the suit;

vii) Any other reliefs this Court deems fit to grant.

The defendants having been granted leave to defend the suit, they filed their written statement of defense, and stated that



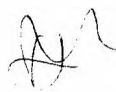
the entire loan amount was repaid, and the mortgage was properly discharged, and it was the bank officials who prepared and executed the Discharge of Mortgage Form. The Defendants avers that they never forged any documents for discharging the mortgage, and that they were handed over the original certificate of title back to them by the bank officials. They agree to have mortgaged the property to Exim Bank Tanzania Limited, after it was discharged.

The issues framed during final Pretrial conference were as follows:

1. whether the discharge of mortgage was fraudulent;
2. To what reliefs are the parties entitled.

In deciding issue No. 1, the plaintiff's case was led by evidence of John Ngassa, Head of Credit Department of the Plaintiff Bank. The following documents were tendered by this witness and exhibited in support of the plaintiff's case:

1. Term Loan Facility Letter dated 5th March 2012 (Exh P1);
2. Mortgage Deed (Exh P2);



3. Personal guarantee of Mr. Ephraim Samwell Magula (Exh P3);
4. Consent of a spouse, Happy Kaitira Burilo (Exh P4);
5. Newspaper (Exh P5);
6. Bank Statement for Loan Account No. 01/04/601416/05 for the transactions conducted between 14th March 2012 through to 1st June 2013 (Exh P6);
7. The Discharge of Mortgage Form (Exh P7);
8. Original Certificate of title No. 113294 in the name of Ephraim Samwell Magulla (Exh P8);

The evidence by the defendant was given by Happy Kaitira Burilo who tendered the Notice of Default dated 20th December 2012 (Exh D1), Discharge of Mortgage (Exh D2), loss Report dated 10th /05/2014 (Exh D3).

It is not in dispute that the 1st defendant took a loan of THz 450,000,000 and the Loan Facility Letters were properly executed by the parties to this case. It is also not disputed that the 2nd Defendants mortgaged his property to secure the loan, and that the 1st defendant being the wife of the 2nd



defendant gave her consent for mortgaging their property situate at Msasani Peninsular, Dar es Salaam. The issue in controversy here is whether the entire loan amount was paid, and whether the mortgaged property was properly discharged or whether the 1st defendant played fraud not only with the Plaintiff's bank but also with the Registrar of Titles, and the Exim Bank also, because the documents relating to the title of the property produced by defendants before the Plaintiff Bank while creating Legal mortgage are found to be fake or counterfeit, concocted/fictitious and not original title deed.

It is no doubt that the 2nd defendant created a mortgage in respect of his property comprised in C.T No. 113294, Plot No. 1829/25 Msasani Peninsula Kinondoni Dar es Salaam. The lender, the Plaintiff's Bank alleges to have been duped/deceived/conned by mortgagor.

It is no doubt that the 2nd defendant is the real owner or the registered owner inasmuch as the 1st defendant being the wife of the 2nd defendant gave her consent to have the property mortgaged. It is clear on records that the Plaintiff's Bank

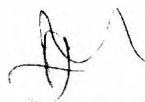
obtained title clearance from the Land registries at the time of availing of the loan facility, and got the mortgage registered with the Registrar of Titles, not realizing that what they have is not the original title deed.

It was brought to the notice of plaintiff's Bank that the title deed they are holding as security is already discharged by using a fake or forged discharge documents only when 1st defendant filed a defence. The defense of the 1st Defendant is that it was the bank officials namely Baseer Mohamed, Chief Executive Officer of the Bank, and Mr. Ajith Govinda, General Manager Credit of the Bank who executed the Discharge of Mortgage Document. This document however was not dated, it was presented in Court as a photocopy, in which no seal of the bank was shown. The 1st defendant also led her case to the effect that she paid the entire loan amount, after receiving the default notice on 24th December 2012. The Defendant however failed to prove her allegations that she had paid the entire loan amount, as she told the Court that her bank deposit slips are lost and could not be located. She produced a police report

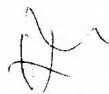


(Exh D3) which shows that all the bank deposit slips were stolen or lost. The police report was prepared on 13th May 2014, and signed by Officer Commanding Kariakoo District. This Police Report proves no payment at all.

The 1st defendant was not able to even bring a bank statement showing that she repaid the entire loan amount, and in her defense, which defense was filed since 22 September 2014, she did not attach either the bank slips or the police loss report. It has been proved by evidence by one Ngassa the Bank witness that the persons who were purported to have executed the Discharge of Mortgage Documents were not working at Dar es Salaam in 2013, as there were already transferred abroad. When cross examined Happy Kaitira Burilo who gave evidence for the defendants, could not tell as to who executed the Discharge of Mortgage Document, and why that documents was not sealed with the official seal of the Bank, and why the document was not dated. She could not even tell where the original was.

A handwritten signature in black ink, appearing to be a stylized 'M' or similar character, located at the bottom center of the page.

The records proves that it was brought to the notice of the Plaintiff Bank that the defendants have discharged the mortgage and created another mortgage with Exim Bank, when the defendants filed their written statement of defense attaching therein an undated copy of the Discharge of Mortgage Document purported to have been executed by the officers of the Bank. The Defendants could not bring in Court those officers of the plaintiff bank to verify their execution of the document, and their signatures. It is evident from the evidence led by the 1st defendant herself that the Discharge of Mortgage Document was a forged document, and that at the time of entering into a mortgage deed with the plaintiff bank, she and her husband gave out a forged title deed, and that the original title deed was with the defendants and the forged and concocted title deed was produced before plaintiff Bank. This was supported by documentary evidence produced by the 1st defendant, including her own written statement of defense and her witness statement, who clearly declared on oath that she was given back the title deed by the bank officials but failed to bring those bank officials for verification of their execution of



the Discharge of Mortgage Document, and the return of the original Title Deed to her by the bank officials.

The Plaintiff Bank made available the documents for court as exhibit namely, the Facility Letter, and the Mortgage deed to suggest that the 1st defendant who is original borrower and the 2nd defendant who is the guarantor and the mortgagor have created security interest in the property in question.

In the facts and circumstances of the case as narrated above, there is no question as to the legality and validity of creation of mortgage by defendants in favor of the plaintiff Bank inasmuch as the fact that there are serious allegations leveled to the effect that the documents relating to the title of the property, produced by defendant before the plaintiff bank while creating the legal mortgage are found to be bogus, concocted and not an original title deed.

It is evident that the plaintiff Bank created mortgage based on forged documents. Under such circumstances, it cannot be said that there was valid and legal security interest created

upon the property so as to entitle the Bank to invoke the recovery measures against the property. I shall however not hold that way as this would be sanctioning the fraudulent actions done by the defendants. If this is allowed then every person, having borrowed a loan from the Bank or any other financial institution, can get away by issuing concocted and fake documents that they are not the 'borrowers' or the mortgagors and the financial institution will not be the 'secured creditor' and, therefore, no action can be taken in the matter and let the defendants and for that reason all such persons be allowed to live happily. Having regard to the rival contentions of the respective parties and the record of the case, it is apparent that the facts are quite eloquent.

In this case the borrower i.e. the 1st defendant clearly failed to establish that she has discharged her liability to pay the loan in full within the period specified in the Letter of Facility and since there was a legal mortgage created between the plaintiff bank and the defendants, the plaintiff bank becomes secured creditor and is entitled to take recourse to recover its security.



Therefore the plaintiff is entitled to the relief prayed in its amended plaint.

In the present case the crux of the contention which deserves consideration is that, if there is no valid and legal security interest created by defendants in favor of Plaintiff Bank, at the time of creating a mortgage because of defective title being handed over to the Bank, then, under such circumstances, it would not be within the powers of the Bank as a secured creditor to enforce such a security interest and proceed take recovery measures. However it is evident that the defendants have committed fraud and has duped the Bank by producing defective title deeds and that too, to the extent of producing a forged title deed and a forged discharge of mortgage document said to have been issued by the plaintiff bank officials. This case of the plaintiff's bank cannot be just brushed aside easily and it would also not be in the larger interest of justice to say that there was no mortgage in the first place. If there is no valid security interest created in favor of the bank, then there is no valid mortgage, and if there is no valid mortgage, then



the defendants could not have taken trouble to discharge a mortgage which was not valid in the first place, by forging yet another document to have their title discharged.

The Bank have produce the documents to suggest that the borrowers have created secured interest in the property in question. The Bank produced the documents to convince the Court that a valid security interest has been created.


The mortgage deed was executed properly, the plaintiff bank checked the genuine of the title deed with the Land Registry Office, they managed to have the mortgaged registered with the same Land Registries and therefore these by themselves constitute a valid legal mortgage creating the security interest in favor of the Bank. I cannot also ignore the documentary evidence led by the bank more particularly the evidence of PW1, wherein, he has said in so many words that the signatures of the two officers of the Bank who were purported to have signed the Discharge of Mortgage Document have been forged, and perhaps this would lead the Court to believe that the so called Discharge of Mortgage Document, having been



not dated not sealed, and produced as a photocopy by the defendants, which has been relied upon by the defendant, is also a false document, because it contains forged signature of the officers of the bank, the officers were not called upon by the defendants to verify their signature, the document has no seal and it is not dated,.

I also take notice of the fact that over and above plaintiff Bank, the defendants obtained loan from Exim Bank Tanzania Limited by creating legal mortgage on the same property by producing again, probably forged title deeds and discharge of mortgage documents, but since that is not the case before me, I shall not make any determination on the mortgage created by the defendants in favor of Exim Bank Tanzania Limited.

In light of the foregoing discussion, I answer issue no 1 that the discharge of mortgage was fraudulent, and that the plaintiff is entitled to all the prayers as prayed in the amended plaint, to wit:



- i) A declaration that the discharge of mortgage purported to have been transacted in October 2013 is of no legal effect as the same was facilitated through fraudulent means at the instance of the defendants;
- ii) An order requiring the Registrar of Titles to rectify the Register by cancelling in the said Register the discharge of mortgage registered in October 2013 and any other subsequent entries relating thereto and restore to full force the mortgage registered in favor of the Plaintiff on 7th March 213;
- iii) A declaratory order that the Defendants have breached the terms and conditions of the facility letter dated 5th Marcg 2013, the result of which THz 505,377,987.11 is owed from the defendants at the time of filing the suit.
- iv) interest on (iii) above at the at the rate of 12% per annum from the date of judgement to the date of payment in full,

In the alternative to prayers (a), (b), and (c)



v) As against both defendants- eviction, delivery of vacant possession and an order for sale of landed property registered as Certificate of Title No. 113294, located at Plot no. 1829/25 Msasani Peninsula, Kinondoni, and Dar es Salaam

vi) costs of the suit;

The suit succeed with costs.

DATED at DAR ES SALAAM this 18TH day of MARCH, 2016



MANSOOR

JUDGE

18TH MARCH 2016

