

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM**

COMMERCIAL CASE NO. 92 OF 2016

ATHANASIA T. MASSINDE.....1ST PLAINTIFF
ABETI COMPANY LTD.....2ND PLAINTIFF

VERSUS

NATIONAL BANK OF COMMERCE LTD.....DEFENDANT

Date of Last Submissions: 21.03.2019
Date of Judgement: 12.04.2019

JUDGMENT

V.L. MAKANI, J

This suit is by ATHANASIA T. MASSINDE and ABETI COMPANY LIMITED. The plaintiffs are praying for the following reliefs that:

- (a) *The honourable court be pleased to order the Defendant to discharge the mortgage of the property immediately.*
- (b) *That this honourable court be pleased to order the Defendant to pay special damages to the Plaintiffs at the tune of Tshs. 389,150,000/= being loss suffered by the Plaintiffs due to non-discharge of mortgage property.*
- (c) *That the honourable court be pleased to order the Defendant to pay the Plaintiffs general damages for breach of contract and inconvenience caused to her at the rate the Honourable court may deem fit to grant.*

- (d) *Interest on (b) above at the rate of 24% from the date of filing this suit to the date of judgment.*
- (e) *Interest at the courts rate from the date of judgment till final payment.*
- (f) *Costs of this suit be paid by the Defendant.*
- (g) *Any other relief the honourable court may deem fit to grant.*

The Plaintiffs in this case were represented by Mr. Jeremia Mtobesya of Juris Peritis and the Defendant was represented by Dr. Onesmo Kyauke of Locus Attorneys.

In proving their case the plaintiffs filed Witness Statements of the 1st Plaintiff (PW1), Christopher Nestory Bhuka (PW2), Victoria Revocati (PW3), Daudi Charles Mlau (PW4) and Abdallah Abdullatif Muhsin. However, the last witness of Abdalla Abdullatif Muhsin failed to enter appearance and no substantial reasons were accorded by the learned Advocate Mr. Mtobesya hence the Witness Statement was struck out by the court by virtue of Rule 52(2) of the High Court Commercial Division Procedure Rules, GN 250 of 2012 (the **Rules**).

Before hearing commenced issues were framed as follows:

- 1. Whether the 1st Plaintiff did apply for and was advanced a loan facility by the Defendant.*
- 2. Whether the 1st Plaintiff mortgaged property in Plot No. 565 Block DD, Unyakhae area Singida Municipality i.n.o. Atahanasia Tabu Ngeleja as collateral for the loan facility advanced to her by the Defendant.*

- 3. Whether the property that was used as collateral by the 1st Plaintiff to secure a loan from the Defendant was subsequently transferred to the 2nd Plaintiff by way of assignment.*
- 4. Whether upon paying full amount plus interest in servicing the loan facility, the Defendant was justified to refuse to release the 1st plaintiff's collateral.*
- 5. If the 4th issue is answered in the negative, whether the Plaintiffs suffered any damages.*
- 6. What reliefs are the parties entitled to.*

In her Witness Statement, the 1st Plaintiff Athanasia T. Massinde who testified as PW1 repeated almost all that was stated in the plaint and the reliefs therein. In brief it was her testimony that she was the founder of Abeti pre-Primary, Primary and Secondary Schools and the Managing Director of the 2nd Plaintiff. She said on 20/06/2009 she was granted a term loan of TZS 150,000,000/= by the Defendant. The purpose of the loan was construction of one dining hall and one dormitory to accommodate students. The security offered was secured by a Legal Mortgage over Plot No. 565 Block 'DD' Unyankhae Area Singida Municipality in the name of Athanasia Tabu Ngeleja. PW1 alleges that on 13/07/2015 she fulfilled her contractual obligations of repayment of the loan facility, but the Defendant refused to discharge the mortgage and return to her the Title Deed of the mortgaged property. PW1 further claimed that she incurred loss by non-discharge of the mortgage property as she intended to use the Title Deed to secure another loan for school development and purchase of school buses instead of hiring. She said in 2010 she

established Abeti Company Limited (the 2nd Defendant) and assigned to the said company all assets, liabilities undertakings and goodwill of Abeti Primary School.

PW2 Christopher Nestory Bhuka the Manager of the 2nd Plaintiff. He stated that on 27/05/2016 he served the Defendant a demand notice but they ignored to discharge the mortgaged property. He said the school had expanded in terms of buildings and performance and hence there was a desire by the Plaintiffs acquire a loan from other banks to purchase school buses in order to do away with hiring and to cater for other school development. He said by the defendant's failure to release the title deed the plaintiffs continued to incur costs to hire school buses and if the Title Deed were released on time they would have received a loan elsewhere. He said the plaintiffs also incurred expenses in legal fees for drafting contracts to the tune of TZS 14,940,000/= and TZS 4,410,000/=.

PW3 was Advocate Victoria Revocati. In her Witness Statement she said that she was the one who drafted the bus hiring contracts and she issued receipts of payment to the plaintiffs. On cross-examination PW3 admitted that the receipts did not bear the name of the firm she is working for and she was not very clear as to how some of the receipts reflected that they were issued before she was enrolled as an advocate.

PW4 was the owner of minibus Coaster with registration number T.341 BRV that was one among the buses hired by the plaintiffs to

ferry students to and from school. He said the monthly agreed price was according to the contracts that were signed between him and the 2nd Plaintiff. He said on cross-examination that he was paid on a cash basis and he said he never raised any invoices and he was not issued with receipts.

The defendant had only one witness namely Edward Xavery Nguya, the Manager, Collections Support. Dr Onesmo said the witness is no longer an employee of the Bank and so he was not available. Mr. Mtobesya for the Plaintiff objected to the replacement of the said witnesses in terms of Rule 52(2) of the Rules. The court also rejected Dr. Onesmo's prayer to replace the witness and so the witness statement was struck out in terms of Rule 52(2) of the Rules. and Mr. Mtobesya proceeded to file his closing submissions. However, it should be noted that in its pleadings the Defendant generally denied the claims by the Plaintiffs and categorically stated that she was not in a position to release the Title Deed as there was a pending matter in court concerning the same subject matter instituted by one Athanasia T. Massinde t/a Abeti Primary School (paragraph 5 of the Written Statement of Defence).

In his closing submissions, Mr. Mtobesya tackled the issues in the order they were raised. As for the first issue he argued that the PW1 (the 1st plaintiff) was advanced a loan facility (Exhibit P2) by the defendant and she was trading as Abeti Primary School. As for the second issue Mr. Mtobesya also answered in the affirmative that the loan facility was secured by the property on Plot No. 565 Block DD

Unyankhae area in Singida Municipality in the name of Athanasia Tabu Ngeleja.

These two issues have no controversy and I will answer them in the affirmative that a loan facility by the defendant amounting to TZS 150,000,000/= was issued to the 1st plaintiff trading as Abeti Primary School and that the said loan facility was secured by the property on Plot No. 565 Block DD Unyankhae area in Singida Municipality in the name of Athanasia Tabu Ngeleja.

The third issue was whether the property that was used as collateral by the 1st plaintiff to secure a loan from the Defendant was subsequently transferred to the 2nd Defendant by way of assignment. Mr. Mtobesya was of the view that there was transfer of assets and liabilities from the 1st plaintiff to the 2nd plaintiff. In his arguments he relied on the Memorandum and Articles of Association of the 2nd Defendant (Exhibit P3), and further that the 1st plaintiff was the founder of Abeti Primary School. He further argued that the defendant recognised both the plaintiffs as correspondences on discharge of the mortgage were addressed to the 2nd plaintiff hence indicative that the assets and liabilities of Abeti Primary School were taken over by the 2nd plaintiff. PW1 on cross-examination informed the court that the Memorandum and Articles of Association of the 2nd plaintiff was the only document at hand that reflected the takeover of the property of the 1st plaintiff by the 2nd defendant.

With due respect, the Memorandum and Articles of Association is not proof of transfer or assignment of the assets and liabilities of Abeti Primary School to the 2nd Plaintiff, Abeti Company Limited. The Memorandum and Articles of Association is the constitution of the company in that the Memorandum provides for the objects of the company and the Articles provides for the regulations for the running of the company. The Memorandum and Articles of the 2nd plaintiff reflects the objects, the shareholders, directors and the capital of the 2nd plaintiff. The objects of the company and in particular object 3(a) of the Memorandum in which the plaintiff relies upon states:

This object only gives eligibility to the 2nd plaintiff to acquire and take over the business of Abeti Primary School. But under the law the actual acquisition and takeover of the assets and liabilities requires a further process of transfer and assignment. For transfer or assignment to be established according with the law, it was the duty of the plaintiffs to present to court a search report from the Land Registry confirming the current owner(s) of the Property or otherwise present the Title Deed proving the alleged transfer. In the absence of such proof, the argument that the assets and liabilities of Abeti Primary School were transferred or assigned, and specifically the Property that was used as collateral, would not have a leg to stand on. In essence therefore, Athanasia Masinde trading as Abeti Primary School and Abeti Company Limited are two different entities. These entities may be owned and run by the same people but there is nothing on record to substantiate that the 2nd Plaintiff has legally taken over the assets and liabilities of the Abeti Primary School by

way of transfer or assignment. Indeed, the defendant made communication to the 2nd Plaintiff but that does not necessarily mean that the said 2nd plaintiff took over the assets and liabilities of Abeti Primary School. The defendant was merely responding to a letter written by the officer of the 2nd plaintiff. In fact, the nexus between Abeti Primary School and the 2nd plaintiff has not been adequately proved by the plaintiffs. This third issue is therefore answered in the negative.

The fourth issue is whether the defendant was justified in refusing to release the Title Deed even after the 1st plaintiff serviced her loan and paid the discharge fees. Mr. Mtobesyan argued, and correctly in my view, that it was not proper for the defendant to refuse to discharge the mortgage. The reasons given by the defendant, even after several follow-ups that the 1st plaintiff has to withdraw a suit pending in court filed by the plaintiff against it and for the plaintiff to pay costs for the defendant to defend the suit were irrelevant in terms of the servicing of the loan and the discharge. The only obligation by the 1st plaintiff as regards the loan facility advanced to her was servicing the loan. Since the 1st plaintiff fully paid the loan according to the terms and conditions of the Loan Facility Agreement (Exhibit P2) and also the fees for discharge, the defendant had a duty to discharge the said mortgage and release the Title Deed to the 1st plaintiff immediately. The reasons advanced by the defendant were flimsy and unjustifiable. This issue is answered in the negative.

The fifth issue is whether or not the plaintiff suffered damages. The damages pleaded herein are in two-fold, that is, specific and general damages. As for the specific damages, it is the law that in the case of special damages the same must not only be specifically pleaded, but also strictly proved. (See **Zuberi Augustino vs. Anicet Mugabe [1992] TLR 137**) and **Masolele General Supplies vs. African Inland Church [1994] TLR 192** and **Bamprass Star Service Station vs. Mrs. Fatuma Mwale [2000] TLR 96**).

Mr. Mtobesya argued that failure by the defendant to release the Title Deed created a loss of 904,000,000/= because the plaintiffs failed to secure loans in other banks to undertake another project according to the business plan (Exhibit P9), to expand the school to accommodate more students. I agree that there was a Business Plan projecting how the plaintiffs intended to expand the school. But firstly, the Business Plan was in respect of the 2nd plaintiff who as established above, had not taken over the assets of the Abeti Primary School. Secondly, even if the assets and liabilities had been assigned/transferred to the 2nd plaintiff, which is not the case, then the Business Plan in itself was not enough to substantiate that such loss was suffered or was expected to be suffered because the 1st plaintiff in her testimony and even in cross-examination failed to show if she had applied for loans in other banks or if she had any offer of a loan that she was expecting from other banks. A Business Plan is a projection of an intended investment, without any other supporting evidence to demonstrate that indeed there was money or that money was expected to be received, then the claim for future

loss becomes theoretical. In other words, apart from the business plan the plaintiffs ought to have shown how much they were expecting in terms of loan applications or pending loan offers to assist the court to assess how the loss of **904,000,000/=** was arrived at.

The plaintiffs are also claiming a loss of TZS 208,870,000/= being failure to execute the project to expand the school which was intended to accommodate the enrolment of 160 extra students. This claim is, in my considered view, also theoretical. It is not certain that students would have enrolled at the school at that particular time even if the expansion of the school were done. The school registers showing the existing students does not ascertain that in anticipation a definite number of students would enrol. Since the claim cannot clearly be substantiated, then it cannot be awarded as special damages.

The plaintiffs are further claiming TZS 159,000,000/= in total as bus hire to transport students from the last quarter of 2015 to the end of this year. Mr. Mtobesya argued that if the plaintiffs would have secured a loan as was their intention then they would have bought their own buses instead of hiring mini buses to transport their students. The foundation of the claims are agreements entered between owners of the buses and the 2nd plaintiff. But the agreements alone without receipts or invoices cannot prove that indeed the plaintiffs hired mini buses and the owners of the said buses received from or they were expecting to receive the claimed

amount from the plaintiffs. There are also running costs and taxes to be considered which the plaintiffs have failed or did not endeavour to address. On the other hand, since, as established hereinabove, the assets and liabilities of Abeti Primary School have not been assigned/transferred to the 2nd plaintiff, then the hire agreements which are between the bus owners and the 2nd plaintiff in respect of Abeti Schools cannot be claimed as losses against the defendant who was in a contract with the 1st plaintiff trading as Abeti Primary School.

The claim of USD 1,000 for the TIC Incentive Certificate also falls under this category that is, it was issued to the 2nd plaintiff, and so these costs cannot be claimed against the defendant herein.

The claim of legal services also faces the same fate as the receipts for the amount of TZS 19,080,000/= claimed were issued to the 2nd plaintiff. Further, these receipts are also questionable as the learned Advocate Victoria Revocati (PW3) was not clear as to whether the receipts were issued before or after she was enrolled; and if she was yet to be enrolled why she failed to issue a receipt under the name of the law firm she was working with. It is common practice that, a receipt is issued against an invoice raised, but in this case, and for a professional like Ms. Revocati no clear explanation was advanced on how she issued receipts in respect of the instructions by the plaintiffs herein without raising an invoice and more so without requisite taxes being paid. The court cannot therefore award special damages based on such ambiguity.

Although Mr. Mtobesya has tried to detail the plaintiff's claim for special damages, but he has not succeeded in proving the extent of the actual loss the plaintiffs' claim to have incurred. It should be noted that hypothetical calculations when claiming special damages such as in the present case are discouraged. In the result, it is my considered view that, no proof has been validated to justify the award of special damages to the tune of TZS 389,150,000/= as claimed by the plaintiffs, and I hold as such.

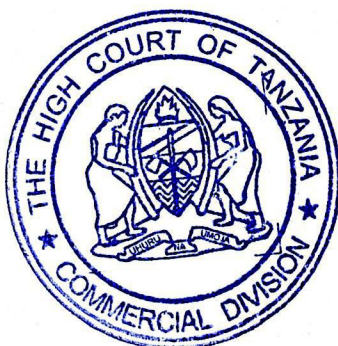
An award for general damages is the discretion of the court after taking all the relevant factors of the case. As established hereinabove, the defendant's action for holding on to the Title Deed while the loan was already serviced was a breach of the term of the contract. I am therefore in agreement with Mr. Mtobesya that the 1st plaintiff incurred costs and suffered some inconveniences when she was making follow-ups so that the Title Deed which was unnecessarily held up by the defendant was released. It is my considered view that the 1st plaintiff is entitled to some compensation and considering the circumstances, I am certain that the follow-ups must have been coupled with stress and anxiety. I have further considered that from July, 2015 until November, 2016 when the court came to her rescue the 1st plaintiff went through frustrations and lost her peace of mind while the defendant held on to the Title Deed despite knowing that it was her right under the facility letter. In that regard, I hold that the 1st plaintiff is entitled to general damages to the tune of TZS 70,000,000/=.

As for the reliefs prayed, Mr. Mtobesya has stated on the onset that the first relief has been overtaken by events as the Title Deed over Plot No. 565 Block 'DD' Unyankhae Area Singida Municipality in the name of Athanasia Tabu Ngeleja has already been released to the 1st Plaintiff. For reasons which have been stated above, the prayer for an award for special damages has been rejected and I also find no justification for granting interest as it has been included in the rejected prayer for special damages. The 1st plaintiff is awarded TZS 70,000,000/= as general damages, and costs shall be on the defendant.

In the final analysis, judgment is entered for the plaintiff as follows:

1. The defendants shall pay to the 1st plaintiff TZS 70,000,000/= (say Tanzania Shillings Seventy Million) only being general damages. No interest shall be charged on the award for general damages.
2. Costs of this suit shall be paid by the Defendant.

Order accordingly.



V.L. Makani
V.L. MAKANI
JUDGE
12/04/2019

Date: 12/4/2019

Coram: Hon. N.R. Mwaseba – DR

For the Plaintiff: Ntobesya and Nashon

For the Defendant: Denis Maringo.

CC: Bampikya Mrs.

Mr. Ntobesya:

The matter is coming for Judgment. We are ready.

Court:

Judgment is delivered on 12/4/2019 in the presence of Ntobesya and Nashon for the Plaintiff and Denis Maringo for Defendant.



Sgd: N.R. Mwaseba

DEPUTY REGISTRAR

12/4/2019

Rights of Appeal is open.



N.R. Mwaseba

DEPUTY REGISTRAR

12/4/2019