

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

COMMERCIAL CASE NO.128 OF 2019

FIRST NATIONAL BANK (T) LTDPLAINTIFF

versus

YOHANE IBRAHIM KADUMA1st DEFENDANT

MARIANNE KUSAGA KADUMA. 2nd DEFENDANT

RULING

Last Order: 4th May 2021

Date of Ruling: 5th May 2021

NANGELA, J.:

The Plaintiff is suing the Defendants, jointly and severally, for repayment of monies alleged to have been advanced to the 1st Defendant, a borrower and a natural person, working for gain in Tanzania. The 2nd Defendant is alleged to be a guarantor of the 1st Defendant.

The amount claimed by the Plaintiff from the Defendants is a sum of **TZS 513,916,258.48**, of which, **TZS 443,155,722.86** is amount in respect of a "Home Loan" and **TZS 70,760,535.62** being personal loan.

When this suit was called on for its hearing on the 4th May 2021, the Defendants enjoyed the services of Mr Makaki Masatu, learned Advocate while learned Advocate Mr Innocent Mushi appeared for the Plaintiff.

Having commenced the hearing after the Plaintiff's case opened, the first witness for the Plaintiff, Mr Francis Mangula (**PW-1**), prayed to tender in evidence two documents, namely: a **Home Loan Agreement** and a **Personal Loan Agreement**, all of which are alleged to have been entered between and signed by the Plaintiff and the 1st Defendant.

The learned counsel for the Defendants, Mr Masatu, objected to their admissibility. This ruling, therefore, arises from that objection. In his submission, Mr Masatu contended that, because the two documents lacked evidence regarding payment of stamp duty, they contravened section 47(1) of the Stamp Duty Act, Cap.189 R.E 2019, and should be denied admissibility. Indeed, according to that provision, an instrument chargeable with stamp duty and which is not duly stamped is inadmissible in evidence.

It was a further contention by Mr Masatu that, admissibility of the two documents was also being challenged on the ground that, they did not conform to the requirements of execution of Company documents. Mr Masatu argued that, since the Plaintiff is a Company, under section 39 of the Companies Act, Cap.212, documents belonging to it ought to have been authenticated by having the Company Seal witnessed by a director of the said Company and the Company Secretary or two directors.

He contended, based on the above provision, that, the two documents which PW-1 seeks to be admitted in evidence in this Court, i.e., **the Home Loan Agreement**, and **the Personal Loan Agreement**, were executed by a person whose position is a **Credit, Security and Litigation Manager** and another who is a **Head of Credit**, thus not in conformity with the above provision.

Mr Masatu contended that, signing of a document has the purpose of authenticating its genuineness. To bolster his argument, he referred to this Court the Court

of Appeal Decision in the Case of **Yohana Mussa Makubi and Abuubakar Ntundu v Republic, Criminal Appeal No.556 of 2015 , (CAT) (at Mwanza) (unreported).**

Mr Masatu submitted that, according to the above cited authority, a document whose signing is questionable cannot be admitted to be part of the record of the Court. In view of that, he prayed that this Court should reject the two documents and thus term them as inadmissible.

In rebuttal to his submissions, Mr Mushi was quite vociferous. He submitted that, the documents which **PW-1** seeks to be admitted in evidence are properly signed documents. He argued that, the two documents are duly signed by proper officers according to the Plaintiff's own policy and are sealed with the Plaintiff's seal. In that regard, he contended that it is erroneous to state that, the documents are improperly signed.

Commenting on the relevance of the Court of Appeal decision in **Yohana Mussa Makubi (supra)**, cited by Mr Masatu, Mr Mushi distinguished it. He

maintained that, the underlying facts in that case, are different from those in the instant case at hand.

Secondly, and, referring to page 12 of the said authority, Mr Mushi was of the view that, what the Court of Appeal stated was that, if the maker of the document was unknown, then the authenticity of the document and the genuineness of the proceedings cannot be established.

He contended, however, that, in the instant matter at hand, the issue is not who the maker of the documents is. He submitted that, the documents in question are loan agreements which are properly executed by the officers of the Plaintiff and bears the Plaintiff's Official Seal, and that, all was done in accordance with the Plaintiff's own policies.

As regard the issue of stamp duty and applicability of section 47(1) of the Stamp Duty Act, Cap.189 R.E 2019, Mr Mushi contended that, the objection raised by the learned counsel for the Defendants should be overruled. According to Mr Mushi, the reasons for his

submission were that, the registration of loan documents is done at the land registry and stamp duty is paid there.

However, Mr Mushi was quick to add that, the only document which is supposed to be registered there is the Mortgage Deed itself and the loan agreements are annexure to it. He therefore submitted that, for this particular transaction, stamp duty was paid at the Land Registry amounting to TZS 10,000/=.

On the other hand, Mr Mushi submitted as well that, the Stamp Duty Act, Cap.189, R.E 2019, does not state that loan agreements should be subjected to payment of stamp duty. He referred this Court to Section 5(d) (ii) of that Act and argued that, stamp duty was not required for the kind of documents sought by **PW-1** to be admitted in evidence.

Mr Mushi contended further that, the spirit of the law regarding loan agreements is to exempt them from the requirement of stamp duty payment because it is not certain who between the bank and the borrower should pay the requisite 1%.

In the alternative, Mr Mushi submitted that, if at all the payment of stamp duty was a necessity, the amount would be only TZS 1000/-. He invited the Court, should it find that there was such a requirement to pay, to invoke the Oxygen Principle, and order that the documents be admitted only for identification purposes (I.D), while directing the Plaintiff to pay the requisite amount before proceeding later with admitting the documents, provided that proof is availed that such payments have been made.

In a brief rejoinder, Mr Masatu submitted that, Mr Mushi missed a point regarding execution of documents by a company, since the objection by the Defendants is based on section 39 of the Companies Act. He submitted that, Mr Mushi did not, in essence, address his mind to that provision and, for that matter; he reiterated his submission in chief arguing that the law does not recognise company policies providing a contrary view.

He maintained further, as regards the relevance of the Court of Appeal decision in **Yohana Mussa Makubi (supra)**, that, Mr Mushi was as well on the erring path for failure to grasp the principle emanating from that

case. According to Mr Masatu, the underlying principle in that case is that, if a document is not properly authenticated it renders it questionable and cannot be relied upon by the court of law. He argued, therefore, that, the case was relevant and applicable to the situation at hand.

As regards the issue of non-payment of stamp duty, Mr Masatu rejoined that, the learned counsel for the Plaintiff was blowing hot and cold at the same time. In particular, Mr Masatu argued that, while Mr Mushi said that stamp duty was paid, he at the same time contends that the law does not provide that stamp duty should be paid for loan agreements.

Mr Masatu maintained that, under section 47(1) of the Stamp Duty Act, Cap.189, R.E 2019, Courts are required to reject as inadmissible, all documents for which no stamp duty was paid. He concluded, therefore, that, the two documents should not be admitted.

Mr Masatu rejoined further that, Mr Mushi did not refer to any provision of the Stamp Duty Act to support his argument that loan agreements are exempted from

payment of stamp duty. He contended, and indeed correctly so, that the section 5(d)(ii) referred to by Mr Mushi is non-existent in the Stamp Duty Act, Cap.189 R.E 2019.

Mr Masatu contended that, in principle, loan agreements are covered under umbrella agreements which, by virtue of the Schedule to the Act, are chargeable for stamp duty.

As regard Mr Mushi's submission that this Court should invoke the Oxygen Principle, Mr Masatu urged this Court to decline from that invitation. He contended that, what Mr Mushi seems to be doing is a fishing expedition because, had he conceded to the objection he could have tabled that proposal straight away instead of wasting the precious time of this Court. He prayed, therefore, that, this Court should uphold the objection and declare the two documents inadmissible.

From the above rival submission of the learned counsels for the parties herein, the only key issue to address is whether the objection raised by Mr Masatu is meritorious. Essentially, the gist of Mr Masatu's objection

is that the two documents which the Plaintiff's witness (**PW-1**) seeks to be admitted in evidence should not be admitted because, first, they contravene section 47 of the Stamp Duty Act, Cap.189 R.E 2019 and, two they contravened section 39 of the Companies Act, Cap.212 R.E 2002.

Mr Mushi has had divergent views regarding Mr Masatu's objection and has argued in the first place, and to summarise his assertion, that, the Stamp Duty Act is inapplicable. Thus, he disputes applicability and relevance of the provision relied upon by Mr Masatu. Secondly, he has challenged, as well, Mr Masatu's submission concerning the issue of who should have signed the two documents.

On the other hand, although Mr Mushi did not comment on the applicability of section 39 of the Companies Act in the manner argued by Mr Masatu, I am of the view that, it is also a warranted exercise to look at that provision. I will, therefore, endeavour to examine it in the course of my deliberations in this ruling.

To start with, section 47 of the Stamp Duty Act provides as follows:

"47.- (1) No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive the evidence or shall be acted upon, registered in evidence authenticated by any such person or by any public officer, unless such instrument is duly stamped:

Provided that-

- (a) any such instrument not being a receipt, an acknowledgement of debt, a bill of exchange, other than a cheque or a bill of exchange presented for acceptance, accepted or payable elsewhere than in Mainland Tanzania or a promissory note shall, subject to all just exceptions, be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of an instrument insufficiently stamped, or the amount required to make up such duty, together, with a penalty of a sum of money equal to ten times the amount of the proper duty or deficient thereof portion or four hundred shillings, whichever be the lesser sum of money;
- (b) where any person from whom a stamped receipt could have been demanded has given an unstamped receipt and such receipt if stamped would be admissible in evidence against him, then such receipt shall be admitted in evidence against him on payment of a penalty of ten shillings by the person tendering it;

- (c) where a contract or agreement of any kind is effected by correspondence consisting of two or more letters and any one of the letters bears the proper stamp, the contract or agreement shall be deemed to be duly stamped;
- (d) nothing contained herein shall prevent the admission of any instrument in evidence in any proceeding for a criminal offence;
- (e) nothing contained herein shall prevent the admission of any instrument in any court when such instrument has been executed by or on behalf of the Government, or where it bears the certificate of a proper officer as provided by section 23 or section 44 or any other provision of this Act.

(2) The provisions of subsection (1) shall not apply to any instrument chargeable with duty and not duly stamped which was drawn, given, or executed by the Administrator General or Public Trustee in his official capacity prior to the 31st day of August, 1933.

(3) Failure by any public officer to examine and impound any instrument as required by this subsection shall, in no circumstances affect - (a) any proceedings under this Act or any other written law; or (b) the chargeability, or otherwise, of such instrument, for the purpose of this section."

It is clear, from the above section 47(1) of the Stamp Duty Act, Cap. 189, R.E 2019, that, "instruments" which are not duly stamped are inadmissible in evidence. The term "instrument" is defined under section 2 of the

Stamp Duty Act, to include: "*every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded in a paper or electronic form.*"

One pertinent question which needs to be asked is: which kind of instruments, or documents for that matter, are subjected to the provisions of this Act? The answer to this question lies within the same law.

Specifically, Part II of the Stamp Duty Act, which is made of sections 5, 6, 7 and 8, provide for a variety of instruments which fall within the ambit of the Stamp Duty Act. A follow-up question, therefore, will be: *do the impugned documents fall within the varieties provided for under those provisions?*

It should be noted that, the above named sections are to be read together with the Schedule to the Act before one reaches to a conclusion regarding whether the documents under consideration fall within or outside the ambit of the Stamp Duty Act. As it might be noted from section 5 of the Act, there are instruments for which no stamp duty is charged.

However, Mr Masatu has submitted that, the two documents in question, i.e., loan agreements, fall within the umbrella agreements which, by virtue of the schedule to the Act, are chargeable stamp duty. Mr Mushi did not support that position though erroneously pegged his tent of argument on a non-existent provision of the law to argue that the two documents were exempted from the scope of this particular law.

I have given a keen view on the Act and the Schedule to the Act. Although I have not been able to see an express mention of the kind of the two documents in question, (loan agreements), I am of a settled view that, looking at **Item No.65 in the Schedule to the Stamp Duty Act**, one will conclude that being instruments, as per the definition of the term "instrument" under section 2 of the Stamp Duty Act, the two documents fall under the group of **"ANY INSTRUMENT (if attested) not otherwise provided for"** and, for that reason, they should have been chargeable an amount equal to **TZS 1000 (500 TZS each)** as stamp duty.

Having found that the two documents fall under the category of documents for which payment of stamp duty is a requirement, their admissibility cannot be permitted without there being proof of compliance with section 47 (1) of the Stamp Duty Act, Cap.189 R. E, 2019. They cannot, as contended by Mr Masatu, be admitted in evidence. That is the law as clearly stipulated in the statute and as applied by the Courts in this country and, even in other jurisdictions.

In the case of **Zakaria Barie Bura v Theresia Maria John Mubiru [1995] TLR 211, at 216**, for instance, the Court of Appeal, looked at a somewhat similar situation where document containing agreement had no indication of payment of stamp duty as required by the law.

Citing with approval the decisions in **Nizam Din Chur v Devonshire Stores Limited [1958] 1 EA 729** and **Sunderji Nanji Limited v Mohamedali Kassam Bhaloo [1958] 1 EA 762**, the Court, stated that:

“By law, such omission renders the sale agreement inadmissible as evidence in court,

unless the party concerned pays the stamp duty before the document is admitted as evidence.”

In view of the above, I tend to agree with Mr Masatu that, a document for which stamp duty ought to have been paid, cannot be admitted in Court. However, let me have a pause and ask: is that the end of the matter? Can the Court grant an opportunity to have the stamp duty paid?

As it may be observed in this ruling, Mr Mushi, in his submission, invited this Court, should it find that stamp duty should have been paid, to halt the issue of admissibility and order that, such payments be effected in the first place and proof thereof be made available to the Court before it proceeds to admit the documents in question.

Mr Mushi invited this Court to take the route on the basis of the Overriding Objective Principle, which essentially is an issue of upholding substantial justice. Mr Masatu, on the other hand, has urged this Court to decline from such an invitation. I have given a careful

and balanced consideration on Mr Mushi's and Mr Masatu's submissions.

In the case of **Sunderji Nanji Limited v Mohamedali Kassam Bhaloo [1958] 1 EA 762**, which was cited with approval by the Court of Appeal in the case of **Zakaria Barie Bura (supra)**, this Court did provide guidance regarding whether there can be an opportunity to pay the stamp duty in compliance with the law.

Briefly stated, in that case, during trial in the lower court, the appellant had sought to put in evidence an unstamped letter of guarantee and to rely on it. The respondent raised an objection arguing that, being unstamped, it was inadmissible. In its deliberations, the trial court did not make a ruling immediately but dealt with this issue in its judgment, holding that the unstamped document was inadmissible in evidence.

In a subsequent application for review the trial court refused to vary its judgment, holding that it was for the applicant to make the document admissible by paying the penalty prescribed by the Stamp Ordinance, and,

that, it was for the appellant to ask for the court to assess the penalty and to pay it "there and then".

An appeal was preferred and it was contended that, the appellant could not pay the penalty nor could he ask the court to assess the penalty before a ruling was obtained whether or not the document was liable to stamp duty at all; and since this ruling was only delivered as part of the judgment, it was argued that the appellant was deprived of the opportunity of paying the penalty and duty, and thus making the document admissible in evidence.

In his deliberation, Law, J (as he then was) stated as follows, that:

"As was held in *Bagahat Ram v. Rattan Chand (2)* ((1930), *A.I.R. Lah. 854*), before holding a document inadmissible in evidence on the sole ground of its not being properly stamped, the court ought to give an opportunity to the party producing it to pay the stamp duty and penalty. The position in this case is exactly the same. The appellant has never been given the opportunity of paying the requisite stamp duty and the prescribed penalty on the unstamped letter of guarantee on which he sought to rely in support of his claim against the second

defendant/respondent, and he must be given that opportunity.”

On the authority of the above case, and also the cases of **Boniface Jeremiah v Stephen Lukumay, [1995] TLR 122**, and **Monyi Teri Pettit v Jerome Shirima and 5 Others, Land Appeal No.217 of 2017, HC LandDv (unreported)**, I am convinced that the invitation by Mr Mushi is valid and meritable.

In the circumstance of the matter, therefore, and acting under section 45 (1) of the Stamp Duty Act, Cap.189 R.E 2019, I hereby impound the two instruments and do direct the Plaintiff within seven days, to pay to the registrar of this Court the sum of **TZS. 11,000/-**, being **TZS 1000/-** as the unpaid stamp duty and **TZS 10,000/-** as the penalty prescribed under section 47(1) (a) of the Stamp Duty Act, Cap.189 R.E 2019.

Having said that, what about the relevance of section 39 of the Company Act, Cap 212 R.E 2002, and the Court of Appeal Decision which Mr Masatu relied upon to support his second view regarding the inadmissibility of

the two documents? I will also consider that submission shortly here below.

Section 39 of the Companies Act provides as hereunder:

"39.-(1) A document is executed by a company by the affixing of its common seal. A company need not have a common seal, however, and the following subsections apply whether it does or not.

2) A document signed by a director and the secretary of a company, or by two directors of a company, and expressed (in whatever form of words) to be executed by the company has the same effect as if executed under the common seal of the company.

(3) A document executed by a company which makes it clear on its face that it is intended by the person or persons making it to be a deed has effect, upon delivery, as a deed; and it shall be presumed, unless a contrary intention is proved, to be delivered upon its being so executed.

(4) In favour of a purchaser, a document shall be deemed to have been duly executed by a company if it purports to be signed by a director and the secretary of the company, or by two directors of the company, and where it makes it clear on its face that it is intended by the person or persons making it to be a deed, shall be deemed to have been delivered upon its being executed. A "Purchaser" means a purchaser in good faith for valuable consideration and includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in property.

(5) For the purposes of any enactment providing for a document to be executed by a

company by affixing its common seal, or referring in whatever terms to a document so executed, a document signed or subscribed by or on behalf of the company in accordance with the provisions of this Act shall have effect as if so executed.”

In my view, and having carefully looked at the above provision in its totality, I fail to agree with Mr Masatu that it does make the two documents to be inadmissible in evidence. What is clearly stated in section 39 (1) and (2) of the Companies Act, Cap.212 RE 2002, which seems to be at the centre of Mr Masatu’s objection, is that, a document will be said to be executed by a company if there is affixed on it, the Company’s common seal.

If the company lacks a common seal, still the rest of the subsections under section 39 of that Act will apply. That is to say, that, as per subsection 2, if a document is signed by a director and the secretary of a company, or by two directors of a company, and is expressed (in whatever form of words) as having being executed by the company, it will have the same effect as if executed under the common seal of the company.

In the present case at hand, the two loan agreements were executed under the common seal of the Plaintiff. That was, by itself, a sufficient ground to water down any query regarding their authenticity.

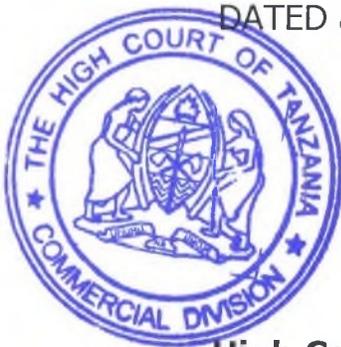
I must also comment, albeit briefly, on the Court of Appeal Decision cited by Mr Masatu i.e., the case of **Yohana Mussa Makubi (supra)**. With due respect, I don't agree with Mr Masatu's submission that the principle enunciated in that case does bear relevance to the issue under consideration. Instead, I am in total agreement with Mr Mushi that, the case of **Yohana Mussa Makubi (supra)**, is distinguishable, and, the reason being that, no one has doubted the authenticity of the signatures appearing on the two documents which the Plaintiff seeks to produce in Court as evidence.

Having stated as I did herein above, I will, for the mean time, temporarily uphold the objection and put on hold the issue of admissibility of the two documents to allow the Plaintiff time to rectify the anomaly by paying the requisite stamp duty, and the penalties thereon, within seven days from this date.

I view of that, this matter will stand adjourned for a while. The Court will continue with its hearing on a date to be fixed by the Court. Plaintiff must ensure that he fully comply with the order requiring the requisite stamp duty to be promptly paid within seven days and proof of such payment be made availed to the Court when the hearing resumes.

It is so ordered.

DATED at **DAR-ES-SALAAM**, this **05th May 2021**



A handwritten signature in blue ink, appearing to read "Nangela". The signature is written over a horizontal dotted line.

**HON. DEO JOHN NANGELA
JUDGE**

**High Court of the United Republic of Tanzania
(Commercial Division)**