

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 144 OF 2021

BETWEEN

AVITY RAPHAEL BURETA t/a

KANANA MOTORS GENERAL SUPPLY..... PLAINTIFF

Versus

KCB BANK TANZANIA LIMITED..... DEFENDANT

Date of last order: 3rd November 2022

Date of Judgment: 14th December 2022

JUDGMENT

MKEHA, J.

The plaintiff is a natural person who lives within the City of Dar es salaam engaging in amongst other things, a business of garage and trading as Kanana Motors General Supply. On the other hand, the defendant is a limited liability Company engaging in banking activities. The plaintiff's claim against the defendant is for an order of unconditional release of the original mortgaged Certificate of Title No.

2095, Block 'D' Mbezi Beach Area, which was handed over to the defendant, KCB Bank Tanzania Limited as a security for loan. The plaintiff is also claiming a compensation of TZS 350,000,000/= and General damages.

In terms of the plaint, the plaintiff as the registered owner of the disputed certificate of title handed over the same to the defendant to secure a loan facility for purposes of financing his business of garage spare parts. The plaint indicates further that, the loan facility was paid according to the terms and conditions. The payments by the plaintiff were completed in July 2021. According to the plaintiff, after the loan facility had been completely paid, the defendant refused returning back the mortgaged certificate of title to the borrower. This according to the plaintiff affected him as he failed to secure several loan facilities in view of sustaining his garage business since July 2021 when he completed paying the said loan to the date of institution of this suit.

Specifically, the plaintiff prays for judgement and decree against the defendant as follows:

1. An order for unconditional Release of the original mortgaged certificate of Title No. 108986, L.O No. 333149, Plot No. 2095,

Block 'D' Mbezi Beach Area within Kinondoni Municipality in Dar es salaam and duly signed Mortgage discharge forms;

2. An order for the payment of compensation in the sum of TZS 350,000,000/= for inconveniences suffered due to recovery process for negligent acts which occasioned loss of use of the certificate of title;
3. General damages to be assessed by this honourable court;
4. Interest at the commercial bank rate of 12% per annum on the decretal sum from the date of filing of this suit till the date of satisfaction of the decree;
5. Court interest rate at 7% per annum on the decretal sum from the date of judgement to the date of full satisfaction of the decree;
6. Costs of the suit be paid by the defendant bank;
7. Any other reliefs the court may deem fit to grant.

Before commencement of hearing, the following were framed as issues for determination:

- (i) Whether or not the defendant refused to release the plaintiff's original Mortgaged Certificate of Title No. 108986.

- (ii) If the above issue is answered in the affirmative, whether or not the plaintiff has failed to secure loan facilities from various Banks and Financial Institutions
- (iii) To what reliefs are the parties entitled.

Mr. Alex Balomi learned advocate represented the plaintiff. One witness appeared in court for cross examination on part of the plaintiff's case. On the other hand, Mr. Msuya and Ms. Kihumba learned advocates represented the defendant. One witness appeared in court for the purposes of cross examination for the defendant's case.

Mr. Avity Raphael Bureta appeared as the first witness for the plaintiff's case. He commenced his testimony in court by tendering his own witness statement as evidence in chief. The said statement was admitted without objection on the part of the defendant. In the said statement, the witness stated that, as a businessman he once approached the defendant bank for a loan facility and topped it up in the sum of TZS 233,000,000 at the interest rate of 21% per annum payable from 24 to 36 months. According to the witness, to obtain the loan facility, he mortgaged to the defendant his property, Certificate of Title No. 108986, LO No. 333149 Plot No. 2095 Block "D" Mbezi Beach

Area within Dar es Salaam City. A copy of the said Certificate of Title was admitted into evidence without objection and marked as Exhibit P1 for the Plaintiff's case.

According to PW1, he managed to repay the loan plus the exorbitant penalty for delayed payments. However, when PW1 asked the defendant to release his Certificate of Title, the latter refused doing so. Demand Notice and copy of a letter sent by the Plaintiff to the Defendant requesting for release of original certificate of title were received into evidence without objection and marked as Exhibits P3 and P4 respectively.

The witness statement indicates further that, the defendant was duty bound to return the original certificate to the plaintiff after the repayment in full of the said loan. Also that, there was neither evidence to the effect that the certificate got lost, nor proof indicating that efforts had been made to secure a duplicate copy if at all the original one could not be traced any more. PW1 added that, although the loan had been repayed in full, there was no express statement discharging the said mortgage before the Registrar of Titles.

The witness stated in his statement that, because of all what happened, he was entitled to compensation in the sum of TZS 350,000,000/=for

inconviniences suffered due to negligent acts which occasioned loss to him. According to PW1 the certificate of title had commercial significance to his business in securing finances from different financial institutions and Commercial banks to sustain his garage business. Therefore, having lost various car dealership business opportunities in the absence of the said Certificate of Title, PW1 thought that, it would be fair and just to be paid the claimed sum by the Defendant.

When PW1 was cross examined, he admitted having delayed paying the loan. PW1 told the court through cross examination that, whereas he demanded his certificate back in April, 2021, he received no response from the Defendant up to when he opted to institute this suit in court.

Responding to a question put to him by Mr. Msuya learned advocate for the Defendant, PW1 admitted that, he refused cooperating with the defendant as it was not his duty, having surrendered the said certificate of title to the defendant.

Upon being further cross examined, PW1 admitted that he produced no evidence before the court proving that, he failed to secure other loans as a result of the Defendant delaying returning the certificate of title back to him (PW1). Notwithstanding the said admission, PW1 was insistent that, he was entitled to the claimed compensation.

Mr. Damas Gabriel Mwangange, appeared as the sole witness in support of the defendant's case. He commenced his testimony in court by tendering his own witness statement as evidence in chief. The said statement was admitted without objection on part of the plaintiff. His witness statement indicates that, the plaintiff applied and was granted a loan facility to the extent of TZS 233,000,000/= and secured the said loan facilities by a mortgage security of his property described as Plot No. 2095, Block 'D' Mbezi Beach Area, Kinondoni Municipality. DW1 further stated that, it was a procedure that, the mortgagor had to surrender his original certificate of the mortgaged property to the Bank and once he completes repaying the loan facility, the certificate would be returned to him upon making a formal request. DW1 stated that, the repayment was completed by the plaintiff sometimes in July 2021 despite having previously defaulted in respect of some instalments.

According to DW1, the said certificate of title was unfortunately lost and the plaintiff was accordingly informed and advised to cooperate with the defendant to report the loss to the Police so that a duplicate certificate of title could be obtained from the Ministry of Lands Housing and Human Settlement Developments. DW1 further stated that, the plaintiff refused to render any cooperation as requested by the defendant.

Instead, the Plaintiff waited until November 2021 when he formerly wrote a demand letter for the release of the certificate of title while he indeed knew the said certificate had been lost and the process to procure a duplicate one was underway. According to DW1's witness statement, it was until 25th April 2022 when the defendant was able to procure a loss report. The Report was admitted and marked as **Exhibit D2** for the defence case. According to DW1, after obtaining the Police Loss Report, efforts for procuring a duplicate certificate of title commenced. A letter requesting for certified copy of Certificate of Title No.108986 registered in the name of Avity Raphael Bureta to the Ministry of Lands was admitted and marked as **Exhibit D1**.

DW1 insisted further that, the compensation of TZS 350,000,000/= claimed by the Plaintiff was unfounded because of his (Plaintiff's) refusal to cooperate in the process of procuring a duplicate certificate from relevant authorities. According to DW1, the Plaintiff's cooperation would have shortened the period for obtaining the duplicate certificate.

During cross examination, DW1 told the court that, it was between September and October 2021 when the defendant came to a conclusion that the Defendant's title deed was nowhere to be found. The

witness added that, loss of the said certificate had been reported to the police since April 2021.

The first issue is whether or not the defendant refused to release the plaintiff's original Mortgaged Certificate of Title. PW1 testified that, upon repayment of the loan facility in full, he asked for release of his Certificate of Title without success. According to him, there was no evidence that the Certificate got lost or that efforts were being made to secure a duplicate copy. However, upon being cross examined, the witness admitted having refused to cooperate with the defendant in the efforts initiated to have a duplicate copy obtained. According to DW1, it was until November, 2021 when the plaintiff made a formal request for release of the Certificate of Title which was a necessary step towards procuring a duplicate certificate after detecting that the original one had been lost. DW1 insisted that, refusal of the plaintiff to cooperate with the the defendant delayed the process of procuring the duplicate certificate. DW1 testified that, between September and October 2021, the defendant came to a conclusion that the certificate was no where to be seen. Police Loss Report was admitted as Exhibit D2 without objection. Admission of PW1 to have refused cooperating with the defendant in the efforts to procure the duplicate certificate, is a proof

that the plaintiff was made aware of loss of the certificate. Therefore, it is not true that the defendant refused releasing the Certificate back to the plaintiff without justifiable reasons. It appears from the evidence on record that, delay in releasing the Certificate to the plaintiff was for reasons communicated to him, being loss of the Certificate.

The second issue is whether the plaintiff failed to secure loan facilities from various banks and other financial institutions. The plaintiff testified that the delayed Certificate had commercial significance in securing finances from different financial institutions and commercial banks to finance his garage business. It was in that regard he asked for compensation to the tune of TZS 350,000,000/=. However, upon being cross examined, the plaintiff admitted to have failed producing evidence in court, of his failure to secure other loans as a result of delay in receiving back, his Certificate of Title from the defendant. Thus, the second issue is answered in the negative.

Notwithstanding the foregoing, the fact remains to be that, since when the plaintiff liquidated his loan facility in full in July 2021, to December 2021 when this suit was filed, the defendant was yet to release the plaintiff's Certificate of Title although not because of the reasons earlier alleged by the plaintiff. The defendant had delayed the Certificate for

about five months up to when this suit was instituted in court. The plaintiff has failed proving special damages of TZS 350,000,000/= for want of specific proof of how he suffered the said loss. However, in any case, the defendant cannot assert that loss of the plaintiff`s original certificate of title has caused no embarrassment on part of the latter, entitling him to receive compensation in terms of general damages.

For the foregoing reasoning, the plaintiff`s claim succeeds to the following limited extent:

1. An order is hereby made for handing over by the defendant of a duplicate Certificate of Title No.108986 L.O. No. 333149 Plot No. 2095 Block `D` Mbezi Beach Area, Kinondoni Municipality in Dar es Salaam to the plaintiff.
2. The defendant shall pay TZS 20,000,000/= as general damages to the plaintiff.
3. The defendant shall pay 7% interest per annum to the plaintiff on the decretal sum, from date of judgment to the date of payment in full.
4. The plaintiff shall have his costs.

Dated at DAR ES SALAAM this 14th day of December, 2022.




C. P. MKEHA

JUDGE

14/12/2022

Court: Judgment is delivered in the presence of Mr. Balomi learned advocate for the Plaintiff and Ms. Ndesamburo learned advocate for the Defendant.




C. P. MKEHA

JUDGE

14/12/2022