IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR-ES-SALAAM

COMMERCIAL CASE NO.15 OF 2022

I & M BANK (T) LIMITED……..... PLAINTIFF

VERSUS

MUSTAFA'S (2005) LIMITED.....1ST DEFENDANT

SALIM M. RATTANSI…..2ND DEFENDANT

KEVAL SOLANKI…….....3RD DEFENDANT

JUDGEMENT

Last Order: 09/02/2023
Date of Judgment 05/04/23

NANGELA, J.:

The Plaintiff in this case has sued the Defendants jointly and severally seeking for Judgment and Decree against them as follows:

1. The sum (a) USD 553,537.84 which is equivalent to TZS 1,273,137,035.41 and (b) TZS. 700,000,000/=as per paragraphs 5,6,9 (ii), 10 and 13.

2. Interest on the said sum of (a) USD 533, 537.84 and (b) TZS 700,000,000/=at the Commercial from the date of default of payment to the date of judgement and thereafter at the Court rate till full payment.
3. The cost of the suit be borne by the Defendants.
4. Any other further remedies and/or relief(s) that the Honourable Court may deem just, fair and equitable.

Concerning the facts making up this claim, I will shortly and briefly state them henceforth. It all started on the 13th day of March 2012. On that material day, the Plaintiff advanced to the 1st Defendant a credit amount of TZS 500,000,000.00. Thereafter, the 1st Defendant obtained a one-year Overdraft Facility equal to TZS 100,000,000 and, which was repayable at the rate of 19%. Later on, the Plaintiff served the 1st Defendant with a Notice of Revision of Interest.

At some point later, the loan was restructured at the request the 1st Defendant. Unfortunately, things did not go well with the 1st Defendant and a default in payments ensued. Upon such default, the Plaintiff filed a summary suit in this Court. The initial suit was Commercial Case No. 53 of 2016, between **I&M Bank (T) Ltd vs. National Supplies Ltd,** for recovery of her monies advanced to the 1st Defendant. The suit was also based on a third party Mortgage created as security for the loan advanced to the 1st Defendant by the Plaintiff.

The suit was heard and determined by this Court in favour of the Plaintiff. A property belonging to National Supplies Limited who had secured the loan as a third-party mortgagor, was sold. However, the monies realized from the sale was only TZS 130,000,000/= which could not liquidate the amount owed in full (as it stood at USD 533,537.84). It has been alleged that, the previous case, i.e., **Commercial Case No.53 of 2016** was filed under a mistaken belief on the part of the Plaintiff who was misled by a Valuation Report that had indicated that the third party Mortgaged property valued between TZS 600,000,000 and 800,000,000, was an amount that could have sufficiently paid off the loan.

It is alleged, however, that, the reality was to the contrary as the respective property fetched only TZS 130,000,000 as the amount realized when it was disposed of leaving an outstanding balance of TZS 1,273,137,035.45 (U$ 553,537.84 at the prevailing rate of TZS.2300). It has been alleged that, following misleading report by the valuer, the Plaintiff instituted a suit against that valuer, i.e., High Court Civil Case No.16 of 2020. The case was heard and decided in favour of the Plaintiff and the professional valuer was found to be liable for acting negligently and/or did fraudulently procure the valuation report.

Being further dissatisfied with the amount realized from the property, the Plaintiff instituted a suit in attempt to recover the balance owed by the 1st Defendant and which was payable to the Plaintiff. The particular suit filed by the Plaintiff against the 1st Defendant herein was **Commercial Case No.110 of 2019**. The

suit, however, was struck out by this Court, Magoiga, J., for want of leave of the Court to have such a suit filed. Unrelenting, however, the Plaintiff sought the requisite leave of the Court through **Misc. Commercial Application 99 of 2021**. The application was heard, determined and leave was granted on the 11th January 2022.

Subsequently, the Plaintiff filed this suit against the 1st Defendant and joined in the 2nd and 3rd Defendants as guarantors who guaranteed due payment of all advances made by the Plaintiff to the 1st Defendant together with interests, commission and banking charges. It was also alleged that, as Directors, they took part of the monies loaned to the 1st Defendant Company amounting to TZS 230 million, for their own personal use. It is from that stated background facts; therefore, the Plaintiff brought the present suit to the attention of this Court, seeking for its intervention, hearing and determination, alleging that, the Plaintiff is entitled to the US$ 553,537.84 (equivalent of TZS 1,273,137,035.41) and TZS 700,000,000/= as well as interest accrued therefrom and costs.

During the final pre-trial conference, the following issues were agreed:

(i) Whether the loan taken by the 1stDefendant in 2012 and 2013 was repaid in full and, if not how much still remains to be settled.

(ii) Whether the Defendants still have the obligations to discharge on the balance of the loan, if any

notwithstanding the sale of the 3rd party Mortgage by the Plaintiff.

(iii) To what reliefs are the parties entitled.

On the day of its hearing of the Plaintiff's case, the Plaintiff called one witness, namely: Mr. Clemence John Kagoye who testified as Pw-1 and tendered a total of fifteen (15) exhibits. In his witness statement, received in Court as his testimony in chief, Pw-1 told this Court, that, indeed the 1st Defendant obtained a term Loan of **TZS 500,000,000.00** in the year, March 2012. He told the Court as well that, thereafter, in September, 2012 the Plaintiff obtained a Temporary Overdraft Facility amounting to TZS **100,000,000.00**. Pw-1 stated that, the loans were secured by personal guarantors, who are the 2nd, and 3rd, Defendants.

Pw-1 told this Court that, after some time the 1st Defendant requested to restructure the loan and convert the loan facility from TZS to USD and convert half of the overdraft amount to a term loan. PW1 testified further that, according to the terms and conditions of to the application for the grant of facility dated 13th March 2012 and the Loan agreement dated 13th March 2012, and the Loan agreement of 24th September 2012 the same was tenable for a year and attracted 19 % interest per annum and reserved the right to vary the interest rate as and when required by giving 7 days' Notice. The Application Letter and the said Loan Agreements were admitted as ***Exh.P-1, Exh.P-2*** and ***Exh.P-3*** respectively.

Pw-1 also tendered in Court enhancement request whereby the 1st Defendant requested on several occasion, an additional

facility of 100 million, enhancement of TZS 200 million and the letters from the 1st Defendant informing the Bank (Plaintiff) to allow them the intention to repay the additional 100 million were received in Court as ***Exh.P-4*** collectively. Pw-1 did also tender in Court a letter from the 1st Defendant requesting to convert the overdraft facility to USD facility and restructure it into a Term Loan. The document was admitted as ***Exh.P-5***.

Likewise, Pw-1 tendered in Court a bank statement together with an affidavit of authenticity of its contents, and these were admitted as ***Exh. P-6*** and ***Exh.P-7***. According to Pw-1, the 1st Defendant only managed to repay some of the interests but failed to repay the outstanding amount. Pw-1 did as well state that, the loan was restructured at the request of 1st Defendant and the Plaintiff did respond to her by consenting to the restructuring request, which responses were collectively admitted in ***Exh.P-8***. Tendered in Court as well was a Board of Directors Resolution on the effect of the overdraft and temporary facility which were admitted as ***Exh.P-9*** collectively.

According to Pw-1, the facility advanced to the 1st Defendant was secured by a third-party legal mortgage of the property on Plot No. 399/9, Samora Avenue/Makunganya street in the name of National Suppliers Limited. The mortgage was dated the 14th April, 2012 in respect of a Property known as shop No.5, Ground Floor, Parcel 26, Samora Avenue/Makunganya street under CT. No. 186018/26/5 Dar es salaam City. Other securities offered included, Debentures over all assets of Mustafa (2005) Limited, and Corporate Guarantees by National Supplies

Limited, Directors personal guarantees. The Guarantee and indemnity were collectively admitted as ***Exh.P-10***.

Pw-1 also told this Court, that, the tenability of the loan was extended for three months at the request of the Defendants up to 16th day of September 2021 when the whole amount plus interests was supposed to be settled. Pw-1 told this Court that, since the Defendants did not repay the loan amount, a demand notice was issued and the Defendants promised to pay and wrote *Promissory Notes* payable on Demand dated 24/12/2012, 13/03/2012 and 15/02/2013. All these were tendered in Court and admitted collectively as ***Exh.P-11*.**

Pw-1 told this court further that, despite the fact that the loan was restructured on several occasions at the request of the Defendants, even so, the Defendants defaulted in repaying the loan amount and, consequently, the Bank decided to file a suit based on the third-party mortgage in order to exercise her rights of sale of the mortgaged property. He tendered a Deed of Settlement in Commercial Case No. 53/2016 which was admitted as ***Exh.P-12*** and a drawn Order which was admitted as ***Exh.P-13***. Pw-1 tendered in Court as well, a judgement in respect of **Civil Case No. 110 of 2020** between the Plaintiff and Property Consultancy & Services Limited (the Valuer). The Judgment on the said case and a Certificate of Sale were admitted collectively as ***Exh.P-15*.** Pw-1 told this Court that the said **Commercial Case No. 110 of 2019** was struck out and the Plaintiff filed application in order to obtain leave of the Court.

Pw-1 told this Court further that, upon the granting of the requisite leave through **Misc. Commercial Application No. 99 of 2021**, the Plaintiff filed the present **Commercial Case No. 15 of 2022**, to recover the balance of monies borrowed by the 1st Defendant. The Ruling and Drawn Order of **Commercial Case No.110 of 2019** and **Misc. Commercial Application No.99 of 2021** were admitted as ***Exh.P-13*** and ***Exh.P-14*** respectively. He also tendered a Debenture issued by Mustafa's (2005) to the Plaintiff as security to secure unspecified amount and the same was admitted as ***Exh.P-16*****.**

During cross-examination, Pw-1 told the Court that, as ***Exh.P-5*** indicates, there was a letter about loan restructuring consented by both parties and that the loan issued was TZS.500, 000, 000 and on Sept 2012 the 1st Defendant was issued with a loan amounting to TZS. 100,000,000. He as well confirmed to this Court that, the Plaintiff hired a Company in the name of Property Consultancy Service Ltd, as one among the Valuers approved by Plaintiff Bank to value the property identified in the name of Plot No. 399/9 Samora Avenue/Makunganya Street in the name of National Supplies Ltd, the guarantor. He admitted that, the Valuer said the value of the Guarantor's property was worth TZS 834,000,000/= as of March 2012. He referred to paragraph 2.03 of ***Exh.P-1***.

Pw-1 told this Court, while under cross-examination, that, the Debenture Assets were valued at a total of TZS. 1,437,000,000/=. He denied to have tendered a valuation report for 2019 when the Plaintiff disposed the property and that the

Plaintiff did not do the valuation of the property before signing the Deed of Settlement. He admitted that, based on the earlier valuation report by the Plaintiff, the Plaintiff had believed that the property would have discharged the loan. Pw-1 admitted, however, that, the Promissory Notes were of 2012 and, contended that, from his own knowledge, a Promissory Note could be claimed after 10 years.

He also admitted that, had it been known that the property was incorrectly valued, the loan would not have been taken and the bank would not have lent the monies to the 1st Defendant. He also admitted that, it was the Plaintiff who assured the Defendants that the value of the assets/property was sufficient for both loans applied by the borrower. He admitted that, he did not tender a 2019 valuation report and that, no valuation of the property was carried out before the parties signed a Deed of Settlement in the year 2018. He told this Court, however, that, it was possible for real property to depreciate from TZS 1.4 billion to TZS 130 million. He denied, however, that, when the Deed of Settlement was signed the Plaintiff believed that the property was sufficient to discharge the loan.

When asked about the case which the Plaintiff filed against the Valuer (i.e., ***Exh.P-15*** – **the Civil Case No. 10 of 2020),** Pw-1 told this Court that, he was not ready to speak about that case but admitted that, the Plaintiff did sue the Valuer, M/s Property Consultancy & Services Limited and that, the Court did find that, the Valuer was negligent. He admitted that, the Plaintiff came to know that, the Valuer has cheated in his valuation report and so,

the Plaintiff is claiming for the balance after the property was disposed of.

He told the Court that all the loan agreements were secured by the property at Samora as one of the securities and that, the Plaintiff had sued National Supplies Ltd to make sure that she repays the monies or the security she offered be sold to repay the loan.

During re-examination, Pw-1 told this Court that, their business was not of real estate for them to have leased the property. He told the Court that, the Board Resolution was signed by the 2nd and 3rd Defendants and they were the Directors of National Supplies Ltd. Pw-1 told this Court further that, it was the borrower who benefitted when the valuation was exaggerated. He told the Court that, valuation being a technical issue, it was the valuer who did it and the Plaintiff relied on his report.

When asked by the Court regarding who procured the valuer to undertake the valuation, Pw-1 stated that, it was the Plaintiff who procured the services of the valuer, and the borrower was the one who paid for the services. He told the Court that, that was an arrangement as provided for under the facility agreement. He stated further that, the Plaintiff keeps a list of valuers and that, the valuer was referred to the borrower and did the valuation.

Since the Plaintiff's case came to an end, the Defendants' case opened. The Defendants called 1 witness, Mr. Salim Mustafa Ranttasi, the 2nd Defendant herein. He testified as Dw-1 for the 1st and 2nd Defendants, while the 3rd Defendant was at large. Dw-1 tendered only one Document, which was admitted as ***Exh.D-1***.

According to his testimony in chief, Dw-1 admitted that, the Plaintiff advanced to the 1st Defendant a sum of TZS 500million as overdraft facility and later TZS 100 million, the security being a legal mortgage on Property located at Plot 399/9 Samora Avenue/ Makunganya Street, Corporate Guarantee issued by National Supplies Ltd, and personal guarantees of the Directors of the Company who are the 2nd and 3rd Defendants.

He told this Court that, since 2012, the 1st Defendant showed initiatives of repaying the loan and issued 3 promissory Notes so as to satisfy part of the loan but the Plaintiff never demanded for the amount specified in the indicated promissory notes. Dw-1 told this Court that, when the Plaintiff instituted **Commercial Case No. 53 of 2016** (between the Plaintiff and the National Supplies Limited (as a corporate Guarantor)), the Court ordered the Plaintiff to exercise his right of sale of the property No. 339/9 shop No.5, which was sold by the Plaintiff of TZS 130million, at a lower value than the real market value of the said property.

Dw-1 told this Court that, by then on its valuation, the real market price was at TZS 834million which was believed to be sufficient to discharge the entire outstanding loan amount. Dw-1 told the Court, therefore, that, in his view the Plaintiff had no more valid claims against the Defendants. According to Dw-1, it is the 1st Defendant who should complain against the Plaintiff for underselling the property and causing the 1st Defendant loss. He told the Court that, before the loan was issued to the 1st Defendant, the Plaintiff had appointed a valuer who did the valuation of the

said property and found it to be worth 800million of which the Plaintiff was satisfied that was sufficient amount which could have discharged the entire loan. He testified that; it is surprising why the Plaintiff should claim for additional amount while through negligence on the Plaintiff's part the loan balance was not paid.

DW-1 also stated that, the Plaintiff instituted a case against the Valuer who did the valuation- **Civil Case No. 10 of 2020** and this Court made a finding that that there was misrepresentation on the part of the Valuer who was ordered to pay compensation to the Plaintiff. He told the Court that, the Plaintiff misrepresented the value of the property mortgaged and made the 1st Defendant to sign a loan agreement. Dw-1 told the Court as well that, in **Civil Case No. 10 of 2020**, the 1st Defendant was not made a party while he had sufficient interest over that same matter. Dw-1 told this Court that, since the valuer was liable on negligence, the 1st Defendant should be relieved of the liabilities regarding the outstanding balance. Dw-1 tendered in Court Judgment (*Ex-parte Judgment*) in Civil Case No. 10 of 2020 admitted as *Exh.D-1*.

Finally, Dw-1 stated that, since **Commercial Case No. 53 of 2016** was determined through Consent Judgment and Deed of Settlement was recorded as the Decree of the Court, the same settled all the outstanding liabilities and the Plaintiff is estopped from claiming against the Defendants. He told this Court that, the Plaintiff cannot claim in respect of the Promissory note because these were already out of time.

During cross-examination, Dw-1 told this Court that, he had no liability due to the fact that, through the mutual consent and

Deed of settlement, the Bank agreed to sale the Mortgaged property which, according to valuation report was worth of TZS. 800million. Dw1- admitted during cross examination, that, the 1st Defendant did receive the TZS 500million and another 100million as loan, and later the amount was converted to USD.

He stated that, the respective loans were taken because the collaterals offered had allowed the 1st Defendant to borrow to that extent. He stated also that, as per the Plaint it could be noted that, the Bank did the valuation of the property and the same was initially valued at TZS. 1.4billion and the third valuation was for an amount of TZS 220million of which forced value could be TZS 178million and those valuations were done by one company. He wondered how possible could such property be sold below that price of the third valuation.

When asked if the Deed of Settlement had provided for a fall-back position in case the amount fetched from the sale of the property was insufficient to discharge the loan, Dw-1 responded that, he was unable to recall any such clause being there. He insisted, however, that, the property was valued by the Plaintiff's own chosen valuer but was sold at a very low rate. He wondered why would the Bank go to the same valuer on three occasions getting different valuation amounts and then take the valuer to Court and proceed *ex-parte* without even informing the 1st Defendant? As for him, there has been misrepresentations and negligence and the 1st Defendant has been defrauded because, the property offered as security was sold off at almost less than 10%

approximately of the initial valuation done by the bank (Plaintiff) through a Valuer of their own choice.

According to Dw-1, although he is a layman, his little knowledge does tell him that, real property appreciates. He told the Court that, the Plaintiff had filed the **Commercial Case No.53 of 2016** because it had intended to recover its monies by way of selling the mortgaged property which was belonging to National Supplies Limited.

When asked by this Court, Dw-1- told the Court that, Mustafa's (2005) took the loan after the Bank had made a valuation of the collateral property owned by National Supplies Limited (3rd party Mortgage), that being one of the Bank's conditions. He told the Court that, the Valuer was brought by the Bank as the Defendants were not allowed to bring any valuer. Dw-1 told this Court that, the loan was being repaid regularly as agree until the Defendants' company realized that it was time to allow the Bank to sell the mortgaged property to discharge their loan. So far that marked the end of the Defense case.

At that juncture, the learned counsels for the parties prayed to be granted time to file closing submissions and this Court granted their prayer. They did comply with the schedule of filing and I will go through their submissions in the course of my deliberation of the issues raised in this Case. As I pointed out earlier here above, there are three issues which I am called upon to address taking into account the cardinal principle that, he who alleges must prove.

The first and second issues are somehow interlinked and need to be addressed together. These were as follows:

> ***1st Issues:*** Whether the loan taken by the 1st Defendant in 2012 and 2013 was repaid in full and, if not how much still remains to be settled.
>
> ***2nd Issue:*** Whether the Defendants still have the obligations to discharge on the balance of the loan, if any notwithstanding the sale of the 3rd party Mortgage by the Plaintiff.

I will address the above two issues by first looking at the closing submissions by the learned counsel for the contesting parties as well. In her closing submissions, Ms. Hamida Sheikh, the learned counsel for the Plaintiff has urged this Court to make an affirmative finding to the first issue hereabove and that, only TZS 130,000,000 was paid out of the sale of the mortgaged property reducing the outstanding amount to US$ 553,537.84. Ms. Sheikh relied on the testimony in chief of Pw-1, in particular paragraphs 24 and 25 where Pw-1 referred to this Court, Bank Statements and the supporting affidavit which had been collectively admitted as ***Exh.P-7*** and ***Exh.P-6*** respectively, and told the Court that, the loan was not repaid in full.

She also pointed out that, while under cross-examination, Dw-1 did tell this Court that, not all the loan amount was repaid. She submitted that; the Plaintiff would not have gained anything in inflating the value of the security as such would be a practice by unethical borrowers not lenders. Ms. Sheikh submitted that, although Dw-1 had testified that a Deed of Settlement was entered

in respect of Commercial Case No.53 of 2016 (***Exh.P-12***) and that it determined all outstanding liabilities between the Plaintiff and the Defendants, such draconian claims cannot stand as it is only TZS 130 million which was repaid and, which were from the proceeds of the sale of the 3rd party mortgage property.

She submitted that, neither the said Deed of Settlement nor its Decree (***Exh.P-12***) contain anything stated on it to the effect that, once the Deed of Settlement is filed in Court or recorded as a judgment, the Plaintiff Bank will be rendered unable to claim any balance of the loan from the Defendants. She contended that, the Deed of settlement was solely concerned with the settling of that Commercial Case No.53 of 2016 upon Sale of the Mortgaged Property and never mentioned that the Plaintiff would forfeit its rights to pursue the rest of its claims.

She added that, the Defendants were not even parties to that Commercial Case No.53 of 2016 and so, they cannot enforce the Decree or the Settlement Deed in that case to avoid liability. She banked on the fact that, having been granted leave by this Court to file a recovery case to pursue the balance of the loan, it meant that the Sale of the 3rd party mortgaged property by the Plaintiff does not absolve the Defendants from their obligations to repay and discharge the remaining balance and interest thereon. She surmised, as a matter of principle, that, part-payment is never satisfaction for the full amount.

To support her submissions, she placed reliance on the cases of **Exim Bank (T) Ltd vs. Dascar Limited and Another**, TLS

(LR) 2017 at page 120 and **Abdala Said Mushi vs. CRDB Bank Ltd**, (HC) Civil Case No.235 of 2003 (unreported).

For his part, Mr. Nkoko who appeared for the Defendants, commenced his closing submission by citing from what the Court said in the case of **Omari Musa and Others vs. Republic**, [1970] E.A 42 concerning the concept of justice. In that case, the Court was of the view that:

> "Justice is not a cloistered virtue. It is a tree under whose spreading branches all who seek shelter will find it. But it is a tree which flourishes on in the open; in the glare of public scrutiny…if kept in the darkness of secrecy, this tree will wither and its branches will become deformed."

From that premise, Mr. Nkoko submitted holistically, to issues without particularity, that, before this Court Pw-1 did admit that there was negligence on the part of the Plaintiff who was under a duty to exercise due diligence before disbursing loans to the 1st Defendant under the re-known banking practice – "Know Your Customer" (KYC). He submitted that, Pw-1 tendered ***Exh.P-1*** and ***Exh.P-2*** all of which show different value of the mortgaged property, the value having been procured by a Valuer sanctioned by the Plaintiff.

Relying on ***Exh.D-1***, (the decision of this Court in Commercial Case No.10 of 2020) Mr. Nkoko submitted that, the Plaintiff has no right whatsoever to come to this Court and claim in this instant case on a matter which had already been closed by

this Court declaring that, the Valuer was negligent and the 1st Defendant was insolvent. He submitted that, Pw-1 and Dw-1 tendered in Court copies of the Judgment of this Court in **Civil Case No.10 of 2020** between the *Plaintiff* and *the Property Consultancy & Services Ltd (the Valuer)* to prove that, the Plaintiff and her valuer misrepresented to the 1st Defendant a fraudulent valuation of the mortgaged property and so the 1st and 2nd Defendants were induced to sign the loan agreement believing that the security would cover them should the 1st Defendant fails to repay.

Mr. Nkoko has relied on section 18 of the Law of Contract and argued that, a careful revisiting of the pleadings, the testimonies together with the contents of ***Exh.P1, Exh.P-2*** and ***Exh.P-14***, one will grasp a fact that, the Plaintiff and the valuer of the Mortgaged Property made a misrepresentation in regard to the value of the property and made the 1st Defendant to believe the same as being true and proceeded to sign the loan agreement.

In his further submissions, Mr. Nkoko argued that, this Court is even so, *functus officio* by now as the matters here present were dealt with in **Civil Case No.10 of 2020,** in which case the Court determined that, the 1st Defendant is insolvent and cannot repay the loan and the, the Valuer was negligent by preparing a concocted valuation report. He relied on the case of **International Airlines of the United Arab Emirates vs. Nassor Nassor**, Civil Appeal No. 379 of 2019 (CAT) [2022] TZCA 685 (08 November 2022) where the Court of Appeal of Tanzania was of the view that:

> "In our settled view, it was inappropriate for the same court to

> overrule its own earlier decision. This is because, the High Court was *functus officio* and could not re-open the same subject once again (See Kamundi's case (supra); NBC Limited and Another (supra) and Celina Michael (supra) where the court observed that it was a misdirection of the successor Judge to sit as an appellate Judge over a decision of a fellow Judge of the same court as it was irregular."

In line with the above, he contended that this Court is now functus officio and it being an issue of jurisdiction it can be raised at any time, even at the appellate stage and because also the parties are bound by their own pleadings which include the witness statements. He referred to this Court the case of **James Funke Gwagilo vs. Attorney General** [2004] TLR 16 in a further support to his submissions.

In conclusion, Mr. Nkoko submitted that, under para 19 of the Pw-1 testimony in chief, he made it clear that the property valuer was found to have acted fraudulently and, that, because of that, the Defendants were discharged by such proclamation in the Civil Case No.10 of 2020 taking into account that the Plaintiff failed to adduce evidence or any fresh valuation report made before the auctioning of the property to substantiate that by the time the property was auctioned it has a value of TZS 130,000,000/-. He contended that, instead, the Plaintiff hurriedly

sold the property which was found to have been undervalued. He urged this Court to dismiss the case.

Having looked at the rival submission and the existing evidential materials placed before me, let me start by saying that, from my own point of view, the first issue is very clear and straight forward. As per ***Exh.P-1, Exh.P2, Exh.P-3***; ***Exh.P-4***, and ***Exh.P-9***, it is clear and with no doubt whatsoever, that, the 1st Defendant borrowed from the Plaintiff. Further, the evidence of ***Exh.P.10*** does show that the 2nd and 3rd Defendants guaranteed the borrowing and, it is also clear, as per ***Exh.P-5*** and ***Exh.P-8***, that, the loan was converted from TZS to US$ at the request of the 1st Defendant's Directors.

Besides, it is also clear, as per ***Exh.P-6*** and ***Exh.P-7***, that, up to the 31st day of January 2021, the loan account balances were showing an outstanding balance of **TZS 1,673,414,390.82,** meaning that, the loaned amount was not fully repaid. In view of the above, the first issue will be partly responded to in the affirmative. I say partly in the affirmative because that should not be a concluding fact. More information and what transpired when the 1st Defendant defaulted in repaying the loans advanced to her is of importance as well and must be looked at when discussing the conclusivity of the first and the second issues herein.

From that vantage point, what is of importance at such a juncture is the question: *what did the Plaintiff do when the loans were not repaid in full and what is its effect in the present suit?* As it may be observed from the facts of this suit, there is an uncheckered trail of events that culminated into the filing of this suit. The trend of

events following the default by the 1st Defendant, started with filing in this Court, before Sehel, J (as she then was), of a case, **Commercial Case No.53 of 2016** which culminated with the signing of a consent deed and a decree there on.

The Defendant in that case, *National Supplies Ltd* was an associate of the borrower (the 1st Defendant herein) who had pledged her property as a third-party mortgagor to secure the borrowing by the 1st Defendant herein. In that suit, therefore, the Plaintiff had prayed, among others, that, the Defendant therein be ordered to make payment to the Plaintiff of all monies secured by the said mortgage and due to the Plaintiff under the mortgage amounting to **US$ 404,300.00**. Further, that, in default of payment, the Court be pleased to order that the Plaintiff as a mortgagee exercise her rights of sale of the mortgaged property.

At the end of the day, the parties inked a binding consent deed and a consent decree was issued pursuant to Order XXIII rule 3 of the Civil Procedure Code, R.E 2019. The consent decree was to the effect that:

> (i) The Plaintiff as the mortgagee shall exercise its right of sale by auction the mortgaged property, Plot 339/9 Shop. No. 5 on ground floor of the building part of land known as Block 186018 parcel 26 Samora Avenue/Makunganya Street, Central Area, Dar-es-Salaam City, Certificate of Title No.186018/26/5.

(ii) Each party shall bear its own costs."

From the above decree and the prayers which the Plaintiff had presented before the Court, it was made clear that, the Plaintiff was not asking for a partial repayment of the loan but a full repayment thereof and, had a firm belief that, if the Defendant therein was unable to pay in cash, then the property so pledged as security be disposed of to settle the debt. But was such a property able to fully settle the scores? What was the basis of such a prayer?

According to the available evidence (***Exh.P-15***) and testimonies of both Pw-1 and Dw-1, the borrowing was premised and approved by the Plaintiff there having been a valuation of the property pledged as security in the year 2012/2013 which established that the property had an open market value of TZS 823,000,000.00 and a forced market valued of TZS 658,000,000.00. It was then on that basis the loans were issued.

When the case was filed in 2016 following the default, it was clear, therefore, that, the Plaintiff was pretty satisfied that, the property would sufficiently cushion her risks of default, otherwise she would not have advanced the loan. Indeed, Dw-1 alluded to that fact when testifying before me in this present case that, had there been a contrary valuation report, the loan processes would not have been approved. That is one set of the story regarding what transpired upon default by the 1st Defendant herein.

The second part of it, however, is that, after the settlement deed had been entered and the **Commercial Case No.53 of 2016** "settled" the enforcement of the decree did not yield the amount

anticipated. What was obtained was on TZS 130million. Why and how that happened is yet another story to tell.

In 2019 as per ***Exh.P-15***, the Plaintiff herein re-engaged the same valuer who initially valued the property and, the second report had indicated that, its size and value was completely different from what was stated in the first report. It was on that account that the Plaintiff sued the Valuer and obtained an *ex-parte* judgement in **Civil Case No. 10 of 2020**.

In the said *ex-parte* judgement of this Court, it was stated, (Luvanda, J) as follows at page 9-10 of the typed judgement:

> "The circumstances of this case does (sic) not justify placing the defendant into the shoes of a defaulter borrower. Although the defendant has been held to be negligent, but the same cannot justify imposing punitive award against him. I say so because, the Plaintiff was *still under duty to exercise due diligence before approving and disbursing loan to the said Mustafa (2005) Limited*, under the renowned banking practice and slogan "know your customer (KYC)."

In the above holding by the Court, it is clear that, the Plaintiff had as well a share of the blame for not acting which due diligence in approving and disbursing the loan. In his testimony to the Court, Dw-1 told this Court that, the Valuer who misrepresented the true facts of the value of the property was not

one brought by the Defendants but was sourced by the Plaintiff as per the Facility Agreement. Had he been sourced by the borrower that would have made a difference but, having been sourced by the Plaintiff and having valued the property to the extent of indicating that it could sufficiently cushion the risk of default, the Defendants are, indeed justified, in my view, to hold that, the Plaintiff and the valuer misrepresented the facts which made them, as borrower, to proceed with the transaction.

In principle, no one borrows with a view that he would default along the way unless such is an unscrupulous borrower. In this case, no evidence was led to the effect that the 1st Defendant was of such a character. Those who specialize in studying why do borrowers default repaying their loans have at least two theories leaving aside fraud. One of the theoretical frameworks, as advanced by Riddiough[1] is premised on the reasoning that, defaults are triggered by life events that reduce the borrower's cash flows.

The other theory has been postulated by Foster, Chester, and Robert Van Order in their article: "*An Option-Based Model of Mortgage Default*" 1984 (3) ***Housing Finance Review***, 351–372 where they contend that defaults do happen due to "*negative equity*", this being sometimes referred to as well as "*strategic default*" it being a function of the property's value, which makes the option to have it sold becoming worthless. In other words, the debt becomes too huge relative to the value of the mortgaged property.

[1] Riddiough, Timothy J. 1991. "Equilibrium mortgage default pricing with non-optimal borrower behavior." PhD diss. University of Wisconsin.

In the circumstances of the case at hand, however, whether the two theories played role in the default exhibited by the 1st Defendant or not has not been clearly stated. The fact, however, is that, the 1st Defendant defaulted and the Plaintiff pursued the mortgagor for the full amount. One notable point in the two previous cases filed by the Plaintiff in this Court is that, the Defendants herein were not made parties to those cases. The Plaintiff decided to pursue only the mortgagor and left out Defendants.

I have posed to ask, *was the Plaintiff justified in pursuing the mortgagor?* And, did the Plaintiff's action of disposing the mortgaged property at TZS 130million justified and can she still claim for the balance from the Defendants herein? Is this Court *functus officio* as contended by Mr. Nkoko?

Perhaps it will be more useful to start with the last question regarding the issue of *functus officio*. The Latin concept of a Court being "*functus officio*" as defined under the *Black's Law Dictionary, 10th Edn.*, at page 787, means that, the Court or the body in question having performed its functions or duties lacks further legal competence or authority to further re-open the matter. In this present suit, Mr. Nkoko raised that issue of being *functus officio* in his submissions arguing that, by virtue of its decision in **Civil Case No.10 of 2020**, this Court is now *functus officio*. He relied on the Court of Appel decision in the case of **International Airlines of the United Arab Emirates (supra)**.

In my view, however, I do not think that in the circumstance of this case that plea can be relied upon by the Defendant. What

the Plaintiff is seeking here is the remaining balance following the sale of the mortgaged property which sale did not discharge the loan in full. As regards the other question which flows from the issues raised herein, I find that, the Plaintiff had a right under the law to sue the mortgagor, especially when her intent was to dispose of the mortgaged property and recover her monies for which it was pledged as a security.

However, one thing needs to be noted in the sense that, much as such a right to dispose of the mortgaged property can be exercised by the mortgagee, the law is clear that, the mortgagee owes a duty of care to the mortgagor, any guarantor of the whole or part of the sums advanced to the borrower. That duty is one of obtaining a true market value of the mortgaged property at the time of its disposal/sale.

Section 133 of the Land Act, Cap.113 R.E 2019 does provide for such a duty. The law states that:

> "133-(l) A mortgagee who exercises a power to sell the mortgaged land, including the exercise of the power to sell in pursuance of an order o f a Court, owes a duty of care to the mortgagor, any guarantor of the whole or part of the sums advanced to the mortgagor, any lender under a subsequent mortgage including a customary mortgage or under a lien to obtain

> the best price reasonably obtainable at the time of sale"

In the case of **CRDB Bank Plc vs. True Colour Limited and Another,** Civil Appeal No. 29 of 2019 (unreported), the Court of Appeal made it clear that:

> "It is worthy to observe that, the rule that a mortgagee is under duty to take reasonable care to obtain the true market value of the property, is a long-standing common-law principle which has been codified in our land law."

The Court of Appeal made a reflection on the common law position as reflected in the case of **Western Bank Ltd vs. Schindler** [1976] 2 All E.R. 393, where Salmon, L.J. had the following to say:

> "I accordingly conclude, both on principle and authority, that a mortgagee in exercising his power of sale does owe a duty to take reasonable precaution to obtain the true market of the mortgaged property at the date on which he decides to sell it No doubt in deciding whether he has fallen short of that duty, the facts must be looked at broadly, and he will not be adjudged to be in default unless he is plainly on the wrong side of the line."

The above legal position, therefore, invites a consideration of the question I had posed earlier herein above regarding whether the Plaintiff's action of disposing the mortgaged property at TZS 130 million was justified and whether she can still claim for the balance from the Defendants herein. I find it apposite to start by looking at the last part regarding whether the Plaintiff can still claim for the outstanding balance.

Essentially, it is a general legal position that, where a lender has disposed of a mortgaged property and still the amount fetched could not sufficiently discharge the loan obligation, *i.e.,* where the amount obtained from the sale failed to clear the outstanding debt, the lender is still entitled to pursue the remaining balance. This position was made out clearly by the Court of Appeal of Tanzania in the earlier cited case of **CRDB Bank Plc vs. True Colour Limited and Another,** (supra).

In that case, the Appellant Bank had exercised her right of sale of mortgaged properties which the borrower (1st Respondent) had mortgaged to secure a loan which remained unpaid due to default in its repayment. The mortgaged properties were auctioned at a price of TZS 700,000,000 which the borrower was unhappy with. The borrower commenced an action at the High Court at Mwanza ("the trial court") against the appellant, the second respondent and the auctioneers for two reliefs.

First, for nullification of the sale of the disputed properties on account that, it was made without publication and, as a result, the price at which it was sold did not correspond to its best or current forced value. **Second** and, in the alternative, for an order

that, the first respondent is no longer indebted to the appellant as the value of the disputed properties was equal to the outstanding loan of 1,907,040,315.20 which was demanded by the appellant. Having heard the matter, the trial Court made a finding and held that, the power of sale was rightly exercised and the purchase price was that which was obtained in the auction.

Following such findings by the trial court, the trial judge went ahead and discharged the borrower from further liability for the reason that, by accepting a price which was lesser than the secured amount, the appellant assumed her own risk. It was upon that point *inter alia*, that the Appellant (CRDB Bank) appealed to the Court of Appeal to challenge the decision of the trial Court as being erroneous. The Court of appeal heard the appeal and considered the relevant rival submissions made by the parties to the case and handed down a decision.

In its decision, the Court of Appeal stated, *inter alia*, as follows:

> "Much as we appreciate, as correctly submitted for the first respondent that, a mortgage is made for the purpose of securing the repayment of the loan, it is not the law that; **in the absence of negligence or bad faith**, a mortgagee who fails to realize the full loan from the proceeds of the mortgage is barred from claiming the outstanding loan balance. The common banking practice has been

> to the contrary and there are many authorities to that effect. Perhaps, the following commentary from the learned author Fidler, in Sheldon and Fidler's ***Practice and Law of Banking***, 11th Edition, at page 379 may be instructive:
>
> "*If, after sale, the net proceeds are insufficient to discharge the mortgage debt in full, the mortgagee has a right of action against the mortgagor on the personal covenant to pay, if, as is usual, one is contained in the mortgage, and if not, he still has a right of action on the debt against the debtor, whether he be the mortgagor or a third party*." (Emphasis added).

The position stated hereabove does indicate that, it is not absolute. As I read between the lines, it is clear to me that, where it can be established that the lender was negligent or acted in bad faith when disposing of the mortgaged property, which negligence or bad faith made her fail to realize the full loan from the proceeds of the mortgaged property, then, the lender will be barred from claiming the outstanding loan balance from the borrower.

With that in mind, the question that trickles down out of it for my further consideration is whether at all the Plaintiff herein was negligent or acted in bad-faith when disposing the mortgaged property having obtained the order of this Court in the **Commercial Case No.53 of 2016**.

In his testimony in chief, Dw-1 testified that, having obtained the order to exercise the right of sale of the property on Plot No.339/9 shop.No.5 ground floor, the Plaintiff sold it at TZS 130million which was a lower price than its real market value since in 2012 it stood at TZS 834 million. He told this Court as a matter of fact, that, the value of landed property does appreciate with time. He had maintained that the sale discharged all defendants from liability. Dw-1 has further relied on the fact of misrepresentation by the Plaintiff and her property valuer who was found to be negligent by this Court (Luvanda, J.) in **Civil Case No.10 of 2020**.

As I stated hereabove, the defendants can only be said to have been discharged from liability where it is proved that the Plaintiff was negligent and/or acted in bad faith when disposing of the mortgaged property in exercise of her power of sale.

From the facts of this case as may be ascertained from ***Exh.P-15*** (the Judgment in **Civil case No.10 of 2020**), it is clear that, there was negligence and bad-faith on the part of not only the valuer who valued the property but also the Plaintiff herself. The negligent part on the Plaintiff was depicted from her lack of diligence but I also find that, there was bad faith on her part which arose from the kind of misrepresentation exhibited by the valuer whom she had procured.

It is clear that, such a misrepresentation of facts perpetrated by a Valuer who was procured by the Plaintiff, induced the 1st Defendant to proceed with the borrowing transaction with a belief that the property was sufficient to provide the requisite cover in

case of default. Since the ***Exh.P.15*** proved that the valuer who was procured by the Plaintiff acted negligently, the Plaintiff cannot escape a share of the same blameworthy state of the Valuer. I hold it that way because, in any agreement it is of utmost importance that both parties stand on the same page and act in good faith.

But if one party out of negligence makes a false representation or mislead positions as to the facts thence inducing the other party into concluding the agreement which, had the facts been what they ought to be would not have convinced him/her to conclude such agreement, the party so mislead has a right to be freed from any or all negative consequences that may ensue afterwards from the agreement.

In my humble view, the misrepresentation exhibited by the Valuer who was sanctioned by the Plaintiffs is also, by itself evidence of bad-faith not only on the Valuer but also on the Plaintiff who procured him and such cannot be condoned or its effects cannot be laid on the Defendants who were acting in bona fides that the property was worth the value it was said to represent at the time of borrowing.

Had the Defendants known that the security would not cover them, they would not have entered into the borrowing agreement and, since the valuer was procured by the Plaintiff, the latter has to shoulder the consequences. This was a fact known to the Plaintiff that is why she decided to sue the valuer.

Secondly, I do also share the views of Dw-1 that, practically, the Plaintiff was, as well, duty bound to have valued the property and obtain its true current market price before auctioning it. This

duty of care as I stated, flows from section 133 of the Land Act, Cap.113 R.E 2019. There was no evidence whatsoever that the Plaintiff did value the said property once again after obtaining the Court Order to have it disposed by way of sale.

In her submission, Ms. Sheikh has contended that, the Plaintiff would not have gained anything in inflating the value of the security as such would be a practice by unethical borrowers not lenders. However, much as that could make a valid contention, one would have expected, as well, that, before auctioning the property, a valuation of it is made to obtain its current true market value and the mortgagor should have been made aware of its outcomes given that the mortgagee owes a duty of care to the mortgagor to ensure that the price obtained is the best price reasonably obtainable at the time of sale.

It is from such conclusion I find that the Plaintiff herein cannot claim anything more from the Defendants. In the upshot of all that, this Court settles for the following orders:

(i) That, this present suit is hereby dismissed in its entirety.

(ii) That, the dismissal is with costs to the Defendants.

It is so ordered.

DATED AT DAR-ES-SALAAM ON THIS 05th DAY OF APRIL 2023

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DEO JOHN NANGELA
JUDGE

RIGHT OF APPEAL EXPLAINED