

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)**

AT DAR ES SALAAM

COMMERCIAL CASE NO. 117 OF 2019

BETWEEN

(MAIN SUIT)

BANK OF AFRICA TANZANIA LIMITED PLAINTIFF

VERSUS

SAFE LINE TRAVELS LIMITED 1ST DEFENDANT

**JERRY EDWARD NGEWE (As administrator of Estate of the late
PUMPHREY HALMAN LUWANJA 2ND DEFENDANT**

**JAMILA KHALFANI MBARAKA (As Administrator of estate of the late
MBARAKA SWAIBU YUSUPH) 3RD DEFENDANT**

AGNESS FELLICIA NJABILI 4TH DEFENDANT

MUKOLA-KAA EDDIE JACOB NKURLU 5TH DEFENDANT

AIMTONGA NKURLU 6TH DEFENDANT

HESSABIA LUWANJA 7TH DEFENDANT

FATMA FAZAL ESMAEL 8TH DEFENDANT

AND



(COUNTER CLAIM)

PUMPHLEY HALMAN LUWANJA 1ST PLAINTIFF

AGNES FELLICIA NJABILI 2ND PLAINTIFF

MUKOLA- KAA EDDIE JACOB NKURLU..... 3RD PLAINTIFF

VERSUS

BANK OF AFRICA TANZANIA LIMITED DEFENDANT

JUDGMENT

A.A. MBAGWA J.

This judgment is in respect of the counter claim raised by Pumphley Halman Luwanja, Agnes Fellicia Njabili and Mukola- Kaa Eddie Jacob Nkurlu, herein to be referred to as the 1st, 2nd and 3rd plaintiffs in the counter claim respectively against Bank of Africa Tanzania Limited, the defendant. This was following the dismissal of the main suit for want of prosecution. The brief facts obtaining in this matter may be recounted as follows;

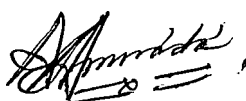
The plaintiff in the main suit, Bank of Africa Tanzania Limited, by way of a plaint, instituted a suit against the eight defendants as indicated above. The plaintiff's claims against the defendants in the main suit was TZS 2, 329, 249,624.56 being the outstanding principal sum and interest due as of 8th May, 2019 allegedly disbursed to the 1st defendant, Safeline Travels Limited.



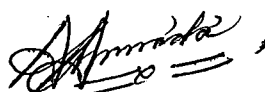
She stated that the plaintiff advanced to the 1st defendant, Safeline Travels Limited various bank facilities which they later converted into one term loan to the tune of Tanzanian shillings two billion one hundred million (TZS 2, 100,000,000/=) via a facility letter dated 27th October, 2017 with reference No. BCM/LO/jbb/0193/17 (exhibit P2 and D2). The plaintiff further contended that between 2009 and 2017, the Bank of Africa Tanzania Limited advanced various bank facilities to the 1st defendant Safeline Travels Limited which were secured or guaranteed by the 2nd to 8th defendants. Whereas the 2nd, 3rd, 4th and 5th defendants mortgaged their respective landed properties, the 6th, 7th and 8th defendants guaranteed the facility by executing personal guarantees and indemnity.

It was stated by the plaintiff in the main suit that the defendants defaulted repayment of the said term loan as such, by 8th May, 2019 the principal sum and interest had accrued to TZS 2, 329, 249,624.56. Owing to the defendants' default of repayment, the plaintiff Bank of Africa Tanzania Limited instituted the present suit praying for the following reliefs;

- a) That the defendants be ordered jointly and severally to pay TZS 2, 329,249,624.53



- b) That in the event of failure by the defendants to pay as ordered, the plaintiff be allowed to sell the landed properties mortgaged to secure the credit facilities in order to realize the outstanding amount
- c) That the 3rd, 6th, 7th and 8th defendants be ordered to pay any outstanding amount as agreed in their personal guarantee in the event properties advanced to secure the loan will not be sufficient to pay the outstanding amount.
- d) That the defendants be ordered jointly and severally to pay interest on the debt due as per the paragraph (a) herein above at the commercial rate of 25% per annum from 9th day of May, 2019 to the date of judgment.
- e) That the defendant be ordered to jointly and severally pay interests on the decretal amount at the court rate of 12% from the date of judgment to the date of payment in full.
- f) That the defendants be ordered jointly and severally to pay costs of the suit
- g) Any other reliefs (s) that the honourable court shall deem just and fit to grant

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In response to the plaintiff's claim in the main suit, three separate written statements of defence were filed in court. The 1st, 3rd and 8th defendants jointly filed their written statement of defence whereas the 6th and 7th defendants jointly filed a separate defence. Likewise, the 2nd, 4th and 5th defendants brought their defence jointly.

In essence, all the defendants denied the claims raised by the plaintiff against them. The 2nd, 4th, 5th, 6th and 7th defendants, in particular, denied their liabilities arising from a facility letter dated 27th October, 2017 (exhibit P2). The bone of their defence was that their liabilities were specific and limited to the facility letter dated 10th May, 2013 which was admitted in evidence as exhibit P1 hence they were not responsible for whatever loan agreements purportedly entered after 2013.

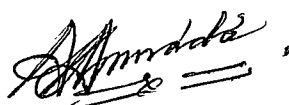
In addition, the 2nd, 4th and 5th defendants raised a counter claim against Bank of Africa Tanzania Limited. As such, they became the 1st, 2nd and 3rd plaintiffs respectively whereas Bank of Africa Tanzania Limited turned to be the defendant in the counter claim. Basically, in the counter claim the plaintiffs, Pumhley Halman Luwanja, Agnes Fellicia Njabili and Mukola- Kaa Eddie Jacob Nkurlu strongly disputed liabilities arising out of facility letter dated 27th October, 2017. They stated that they entered into mortgage



agreements in respect of various bank facilities which were advanced to Safeline Travels Limited but their last mortgage agreements were in respect of a facility letter dated 10th May, 2013 (exhibit P1). They clarified that they did not authorize mortgage of their properties after the facility letter of 10th May, 2013. They further disowned all the consents and spouse consents to create mortgages (exhibits D21 -D44) in respect of bank facilities allegedly made by the plaintiffs in the counter claim and their spouses after the facility letter dated 10th May, 2013 (exhibit P1).

In the event, the plaintiffs in the counter claim prayed for judgment and decree against the defendant, Bank of Africa Tanzania Limited as follows;

- a) That defendant be ordered to unconditionally return the original certificates of title namely, Title No. 186151/54 in respect of Plot No. 204 Regent Estate, Kinondoni area Dar es Salaam, Title No. 56565 in respect of Plot No. 38/1 Block E Changanyikeni area Dar es Salaam and Title No. 056019/48 in respect of Plot No. 33/34, Bristol Road Moshi Township which are the properties of the 1st, 2nd and 3rd plaintiffs respectively.
- b) That the defendant be ordered to pay general damages as shall be determined by the Court in its discretion to the plaintiffs for wrongful

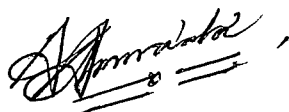
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act of the defendant namely, unjustified continual holding of the plaintiffs' certificates of title.

- c) That the defendant be ordered to pay interest on (b) above at the commercial rate of 25% per annum from the date of counter claim to the date of judgment and decree.
- d) Interest at the court's rate of 12% per annum on the decretal sum from the date of judgment and decree to the date of full and final satisfaction thereof.
- e) Any other or further relief this Court deems fit and proper to grant in the circumstances.
- f) Costs of the counter claim be borne by the defendant.

Upon completion of the pleadings i.e., during final pre-trial conference, the court, upon consensus with the parties, framed the following four issues sought to determine claims both in the main suit and counter claim;

1. Whether the loan facility granted to the 1st defendant pursuant to the facility letter dated 27th October, 2017 was fully repaid by the 1st defendant.



2. Whether the properties of the 2nd, 4th, and 5th defendants were properly mortgaged to secure various credit facilities advanced to the 1st defendant.
3. Whether the repayment to the credit facility, the subject matter of this suit was guaranteed by 6th to 8th defendants.
4. What reliefs are parties entitled to the main suit and counter claim.

When the matter was called on for hearing, the plaintiff, Bank of Africa Tanzania Limited was represented by Peter Swai and later on Kephias Mayenje and Mwang'eza Mapembe, learned advocates on the one side. On the other side, the 1st, 3rd and 8th defendants had legal services of Nehemia Nkoko, learned advocate whilst the 2nd, 4th and 5th defendants were appeared through Abdallah Gonzi and Frank Mushi, learned advocates. The 7th defendant was solely represented by Edson Kilatu, learned advocate.

At the outset, it is worthwhile to note that the plaintiff's case in main suit was, on 9th June, 2022 dismissed with costs for want of prosecution. As such, the trial proceeded in respect of the counter claim. It is against this backdrop this judgment determines the claims raised in the counter claim.



In the endeavours to prove the claims in the counter claim, the plaintiffs paraded three witnesses namely, Jerry Edward Ngewe (PW1), Agnes Fellicia Njabili (PW2) and Mukola Kaa Eddie Jacob Nkurlu (PW3) whose statements were adopted and admitted to form part of their testimonies before they were cross examined. In addition, the plaintiffs' side through PW1 produced in evidence two documentary exhibits to wit, facility letter dated 10th May, 2013 with Reference No. PDO/CDT/knk/0321/13 (exhibit P1) and facility letter dated 27th October, 2017 with Reference No. BCM/LO/jbb/0193/17. On the adversary, the defendant marshaled one witness namely, Joseph Bakari Mkonje (DW1) and tendered forty seven (47) documentary exhibits. The exhibits tendered by the defendant include facility letters and addendum to facility letters, mortgage deeds and deeds of variation of mortgage, consents to create mortgage and spouse consents to create mortgages and affidavits allegedly sworn by the plaintiffs in respect of Misc. Land Application No. 07/2019 which was instituted in the High Court at Dar es Salaam before Hon. Mlyambina J.

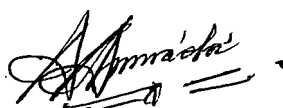
The plaintiffs' main claim in the counter claim is for the return of their title deeds to wit, Title No. 186151/54 in respect of Plot No. 204 Regent Estate, Kinondoni area Dar es Salaam, Title No. 56565 in respect of Plot No. 38/1

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Block E Changanyikeni area Dar es Salaam and Title No. 056019/48 in respect of Plot No. 33/34, Bristol Road Moshi Township which they allege that the defendant, Bank of Africa Tanzania Limited is unlawfully retaining them. The plaintiffs contend that they were not aware of the bank facility advanced to the 1st defendant SAFELINE TRAVELS LIMITED via a facility letter dated 27th October, 2017 (exhibit P2) on which the defendant, Bank of Africa Tanzania Limited relies to withhold their certificates. All the plaintiffs' witnesses stated that the last bank facility to which they consented to mortgage their properties was the loan in respect of facility letter dated 10th May, 2013 (exhibit P1). The plaintiffs strongly maintained that they did not enter into any mortgage agreement with the defendant, Bank of Africa Tanzania Limited after the facility letter of 10th May, 2013. Further, the plaintiffs testified that consents and spouse consents to create mortgages (exhibits D22 to D44) that were purportedly signed after 2013 are forged ones. The plaintiffs further stated that the loan advanced via facility letter (exhibit P1) was for twelve months as such, upon expiry of twelve months i.e., as of 9th May, 2014 and without any default notice from the mortgagee, Bank of Africa Tanzania Limited, they were made to believe that the loan was fully liquidated.

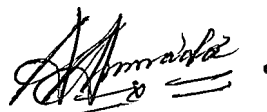
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In rebuttal, the defendant, on its part, refuted the plaintiffs' contention. DW1 said that the plaintiffs' properties were deposited as continuing security. He adamantly testified that it was proper for their properties to secure loans subsequent to the one in the facility letter dated 10th May, 2013. However, upon cross examination, DW1 admitted that there were no mortgage agreements between the plaintiffs and the defendant after 2013. DW1 also admitted that for mortgagee, Bank of Africa Tanzania Limited to disburse loan to the borrower, three documents were supposed to be obtained and signed by the plaintiffs namely, consent to create mortgage, spouse consent and mortgage agreement. He admitted that there was no mortgage agreement with regard to the credit facility advanced via a facility letter of 27th October, 2017 (exhibit P2). In the end, DW1 therefore beseeched the court to dismiss the plaintiffs' claims in the counter claim for being baseless. Having narrated the substance of evidence for both plaintiffs and defendant, it is now apt to deal with the issues framed. As hinted above, the court framed a total of four issues intended to determine the claims both in the main suit and counter claim. However, having dismissed the main suit, this court will only deal with issues which arise from the counter claim. In the premises, only two issues remain relevant for determination of the counter



claim to wit; **one**, whether the properties of the 2nd, 4th, and 5th defendants were properly mortgaged to secure various credit facilities advanced to the 1st defendant in the main suit **two**, what reliefs are parties entitled to the counter claim.

To start with the first issue, I have carefully canvassed the submissions by the parties, the evidence tendered by both sides as well as the pleadings. It is common cause in the pleadings that the defendant's basis for withholding the plaintiffs' title deeds is anchored on the alleged default of repayment of loan amount advanced to Safeline Travels Limited via a facility letter dated 27th October, 2017 with Reference No. BCM/LO/jbb/0193/17 (exhibit P2 and D2). The plaintiffs insisted that the last loan to secure was the one in the facility letter dated 10th May, 2013. On the contrary, the plaintiffs deny knowledge of, and involvement in the credit facility granted to Safeline Travels Limited via the facility letter of 27th October, 2017 (exhibit P2 and D2). I have painstakingly scanned the documentary exhibits particularly the mortgage agreements and deeds of variation (exhibits P15 to P20). It appears whenever, Safeline Travels Limited wanted to extend loan or vary terms and conditions of loan agreements (facility letters), new mortgage agreement or deed of variation was entered into between the plaintiffs and



the defendant. For example, in exhibit D16, title No. 56565 in respect of Plot No. 38/1 Block E Changanyikeni area, Dar es Salaam in the name of Agnes Fellician Njabili was used to secure loan through the facility letter with Reference No. PDO/CDT/fjm/185/11 dated 11th April, 2011 but when the borrower extended loan via facility letter dated 10th May, 2013 (exhibit P1) another and independent mortgage agreement was entered into via exhibit D17.

Furthermore, according to exhibit D18 (mortgage deed) title No. 186151/54 in respect of Plot No. 204 Regent Estate, Kinondoni area Dar es Salaam in the name of Pumphley Halman Luwanja was used to secure loan via facility letter dated 16th June, 2009 with Reference No. PDO/CDT/kjm/567/09 but when the borrower wanted to extend loan through facility letter dated 10th May, 2013 (exhibit P1) another mortgage agreement (exhibit D20) was entered into between Pumphley Halman Luwanja and the defendant, Bank of Africa Tanzania Limited.

In addition, there is exhibit D15 in which Mukola- Kaa Eddie Jacob Nkurlu entered into mortgage agreement with the defendant, Bank of Africa Tanzania Limited to secure loan in respect of facility letter dated 20th May, 2010 with Reference No. PDO/CDT/kjm/0480/10.



From the above exhibits namely, D15 to D20, it is clear that defendant was entering into fresh mortgage agreements with the plaintiffs whenever the borrower, Safeline Travels Limited was granted bank facility or the terms of facility letter were varied. Indeed, the mortgage deeds or deeds of variation are very specific to the facility letter for which the properties were mortgaged. In this case, the defendant did not produce any mortgage agreement in respect of bank facility advanced to Safeline Travels Limited via facility letter dated 27th October, 2017 with reference No. BCM/LO/jbb/0193/17 (exhibit P2 and D2).

To crown it all, when DW1 was cross examined as to whether the defendant served the plaintiffs with notice of default, he readily conceded that no notice of default was ever served to the plaintiffs as required under clause 13.0 of the mortgage deeds (exhibits D15 to D20).

Besides, the plaintiffs denied their signatures on the consents to create mortgages purportedly signed after 2013 (exhibits D22 to D42). At paragraph 2 of the counter claim the plaintiffs state;

'That the 2nd 4th and 5th defendants state that their authorisation and consent for their landed properties above to be used as security was



limited and specific to credit facilities they had specifically consented to and which ended only with credit facility referred to in the credit facility letter dated 10th May, 2013. The 2nd, 4th and 5th defendants state that this credit facility was liquidated by the 1st defendant and from that point onwards they never again authorized for neither consented to their landed properties to be used as security for the plaintiff to advance any credit to the 1st defendant. Letter of the said credit facility dated 10th May, 2013 is attached herein as annexure CC1 and leave is craved for it to form part of this counter claim'.

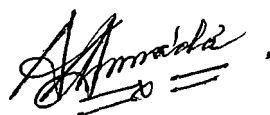
As indicated above, the plaintiffs denied the purported consents to create mortgages allegedly signed after 2013 in the pleadings, written witness statements and in their testimonies in court. All the disputed consents were purportedly made before Commissioner for Oaths. Nonetheless, the defendant did not see it fit to bring Commissioners for Oaths who attested the contested documents to testify in order to refute the plaintiffs' disownership of the alleged documents. This anomaly led the court to draw negative inference on the defendant's case.

When all the above is cumulatively considered, it necessarily follows that the credit facility to the tune of Tanzanian shillings two billion one hundred

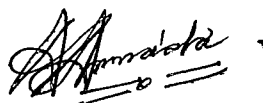
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million (TZS 2, 100,000,000/=) disbursed via a facility letter dated 27th October, 2017 with reference No. BCM/LO/jbb/0193/17 (exhibit P2 and D2) was not secured by properties of the plaintiffs. I thus agree with the plaintiffs' evidence that their properties were lastly mortgaged to the credit facility of USD 638,219.00 which was granted to Safeline Travels Limited via the facility letter dated 10th May, 2013 (exhibit P1) and not more.

In fine, it is my unfeigned findings that the plaintiffs' properties namely, Title deed No. 186151/54 in respect of Plot No. 204 Regent Estate, Kinondoni area Dar es Salaam, Title deed No. 56565 in respect of Plot No. 38/1 Block E Changanyikeneni area Dar es Salaam and Title No. 056019/48 in respect of Plot No. 33/34, Bristol Road, Moshi Township were not properly mortgaged to secure various credit facilities advanced to the 1st defendant after 2013. The plaintiffs' liabilities ended with the credit facility in the facility letter dated 10th May, 2013 (exhibit P1). In the case of **Exim Bank (Tanzania) Limited vs Dascar Limited & Johan Harald Christer Abrahamsson**, Civil Appeal No. 92 of 2009, CAT at Dar es Salaam, the Court of Appeal enumerated six conditions under which a mortgagor would be discharged from liabilities namely;




1. When the terms of the contract between the principal debtor and the creditor are varied without the consent of the surety.
2. When there is any contract between the creditor and the principal debtor, releasing the principal debtor; or where there is any act or omission on the part of the creditor, the legal consequence of which is to discharge the principal debtor.
3. If it is a continuing guarantee, it is revoked by the surety by notice to the creditor, at any time, as to future transactions.
4. If the surety dies, and in the absence of any contract to the contrary, it revokes the operation of a continuing guarantee as regards future transactions.
5. When the creditor enters into a composition with the principal debtor, or promises to give time to the principal debtor, or not to sue the principal debtor, unless the surety assents to such contract, and;
6. If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired.



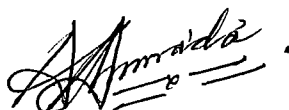
In the case at hand, according to the defendant's witness (DW1), the credit facility in exhibit P1 which the plaintiffs secured was later on varied and converted into a term loan via a facility letter dated 27th October, 2017 (exhibit P2). The variation of the terms in exhibit P1 were not communicated to the plaintiffs, let alone to be consented. Further, the term for the loan under the facility letter (exhibit P1) was twelve (12) months that is to say that it was supposed to have been completely liquidated by 9th May, 2014 but until the date DW1 testified in court, the plaintiffs were not served with the default notice. In the circumstances, I find that conditions number one and six above exhibited in this case hence the plaintiffs/mortgagors become discharged.

As to what reliefs are parties entitled to, the plaintiffs prayed for orders including unconditional return of their original certificates of title deed namely, Title deed No. 186151/54 in respect of Plot No. 204 Regent Estate, Kinondoni area Dar es Salaam, Title deed No. 56565 in respect of Plot No. 38/1 Block E Changanyikeni area Dar es Salaam and Title deed No. 056019/48 in respect of Plot No. 33/34, Bristol Road Moshi Township, general damages for unjustified continual holding of their titles, interest on the general damages above at the commercial rate of 25% per annum from



the date of counter claim to the date of judgment and decree, interest at the court's rate of 12% per annum on the decretal sum from the date of judgment and decree to the date of full and final satisfaction thereof, any other or further relief this Court deems fit and proper to grant in the circumstances, and costs of the counter claim.


In their evidence, the plaintiffs said that they, on different occasions, went to the defendant, Bank of Africa Tanzania Limited to claim their titles to no avail. They also demanded the same from Safeline Travels Limited but in vain. On the other hand, the defendant's witness DW1 admitted that they had never served the plaintiffs with default notice. He also admitted continual retention of the said title deeds. Given that the defendant failed to produce a mortgage agreement with the plaintiffs after 2013 and taking into account that no default notice was served to the plaintiffs and considering that loan term/period under facility letter dated 10th May, 2013 (exhibit P1) was twelve (12) months, it goes without saying that the defendant has deliberately and maliciously continued to hold the plaintiffs' titles without legal justification. As such, the defendant caused inconveniences to the plaintiffs including the costs for shuttling to the defendant's offices to claim

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their titles and loss of economic opportunities such as borrowing by using the said titles.

In view of the deliberations above, I enter judgment and decree against the defendant, Bank of Africa Tanzania Limited in the following orders;

- a) That defendant, Bank of Africa Tanzania Limited is ordered to unconditionally return the original certificates of title namely, Title No. 186151/54 in respect of Plot No. 204 Regent Estate, Kinondoni area Dar es Salaam in the name of Pumphley Halman Luwanja, Title No. 56565 in respect of Plot No. 38/1 Block E Changanyikeni area Dar es Salaam in the name of Agnes Fellician Njabili and Title No. 056019/48 in respect of Plot No. 33/34, Bristol Road Moshi Township in the name of Mukola- Kaa Eddie Jacob Nkurlu which are the properties of the 1st, 2nd and 3rd plaintiffs in the counter claim, respectively.
- b) The defendant is ordered to pay each of the plaintiffs general damages to a tune of Tanzanian shillings five million (TZS 5,000,000/=) for unjustifiable withholding of the plaintiffs' certificates of title.
- c) Interest at the court's rate of 7% per annum on the decretal sum under (b) above from the date of judgment and decree to the date of full and final satisfaction thereof.



d) Costs of the counter claim be borne by the defendant.

It is so ordered.

The right to appeal is explained.




A. A. Mbagwa

JUDGE

10/02/2023