

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

**LAND CASE NO. 47 OF 2010**

**MOROGORO PETROLEUM CO. LTD.....PLAINTIFF**

**VERSUS**

**M/S AKIBA COMMERCIAL BANK.....DEFENDANT**

*Date of the Last Order: 19/5/2014*

*Date of the Judgment: 11/9/2014*

**JUDGMENT**

**B.R. MUTUNGI, J.**

The Plaintiff has filed the claim whose prayers are as follows:-

1. The defendant to hand over the two title deeds which are title No. T8176 and No. 17238 to the Plaintiff.
2. Payment as compensation for inconveniences and disturbances amounting to 60,000,000/=
3. Payment as compensation for loss of use of two title Deeds – 100,000,000/=
4. Costs of this suit to be born by the Defendant.

In response the Defendant raised a counter – claim praying inter – alia for Judgment and decree against the Plaintiff as follows:-

- i. Payment by the Defendant of the sum of 63,000,000/=
- ii. Interest on the decretal sum at the courts rate of 7% per annum from the date of Judgment till final settlement and/or in the alternative
- ii. Sale and vacant possession of the mortgaged property on Plot No. 25 and 26 Block C Morogoro Township and registered under a certificate of title No. 17238
- iii. Sale and the possession of the property on Plot No. 27 and 28 Block C Morogoro Township and registered under certificate of title No. 18170
- iv. Costs of the suit
- v. Any other relief as the Honourable Court may deem just to grant

The Plaintiff through (PWI) Mohamed Salehe Awadhi Balabou while testifying gave a background of what had transpired. He had deposited with the Defendant for a loan amounting to 80,000,000/= a title Deed No. 17233 for Plots No. 25 and 26 Block C Morogoro Municipality. The Plaintiff

further deposited with the Defendant another title deed No. 18170 for Plots 27 and 28 Block "C" Morogoro for purposes of securing another loan facility which did not materialize: (the copy of title deeds were Exhibit "P1" and "P2"). What followed after the Plaintiff having fully paid the loan advanced by the defendant wrote the Defendant several letters demanding the return of the Plaintiff's title deeds but the request fell on deaf ears. (Exhibit P4, and P6)

As a result of the foregoing the Plaintiff prays for the return of the two above mentioned title deeds and for compensation for the inconveniences and disturbance he has suffered to the tune of Tshs. 60,000,000/= and loss of use of the two title deeds in business for securing loans from other financial institutions.

The Defendant through Simon Edward Rugenga (DW1) an employee of the Defendant led by counsel Mutafya and in support of the counter – claim explained that indeed the Plaintiff did secure a loan for 80,000,000/= (exhibit DI) which loan had a security (title No. 17238) Exhibit "D2".

Thereafter the Plaintiff defaulted in the repayment of the loan as a result they sent him a demand letter (a claim of 174,115,000/=) Exhibit "D3". In response the Plaintiff admitted the debt and prayed for reduction on the interest Exhibit D4. This was agreed upon and the loan re-scheduled to Tshs. 100,000,000/= together with a payment schedule. The Plaintiff had to tender yet another security and with a new arrangement whereby he deposited certificate of title No. 18170 (Exhibit D5). This was not registered as it had a caveat note. The Plaintiff signed the acknowledgement note of the re-scheduling (Exhibit D6). The Plaintiff did not honour his words as he only paid Tshs. 37,000,000/= on behalf of Morogoro Petrol Station. To support his words DW1 tendered the bank statement. To their surprise the Plaintiff wrote them a letter requesting for his title deeds, a request which was turned down as he had not re-paid his loan as per payment schedule agreed upon.

DW1 further explained that the Plaintiff had wanted to secure yet another loan from Kenya Commercial Bank who had agreed to re-pay the outstanding Plaintiff's loan. The

Defendants refused and to date they are claiming for the outstanding loan debt and if not repaid they are ready to sell the Plaintiff's properties deposited as security. In conclusion DW1 narrated that the first loan was an overdraft where one is allowed to over draw to the limit and on the second agreement he was given new loan terms.

At the close of the case the two sides filed their written final submission each side trying to impress the court on the merit of their cases staged through their witness and exhibits. The Plaintiff's counsel summed up that the evidence demonstrated by the Plaintiff is to the effect that the loan had been liquidated and should be given back the two title deeds. More so the Plaintiff has suffered inconveniences hence should be granted general damages.

On the side of the Defendant the learned counsel went at length to show that the Plaintiff deposited title No. 18170 for securing a loan which was readily granted by the Defendant after negotiations having paid only 50,000,000/= and with the new loan he was to pay an additional sum of 100,000,000/=. Having deducted all that was paid the

Plaintiff is yet to re-pay 61,000,000/= and not 63,000,000/= as he had already paid 39,000,000/=.

Having gone through the summary of the evidence as above the issues that were framed by the court were as hereunder:-

1. Whether the Plaintiff deposited certificate of title No. 18170 and 17238 to secure the loan that was advanced by the Defendant .
2. Whether the Plaintiff is indebted to the Defendant or not
3. To what reliefs are the parties entitled to

Starting with the first issue, I find no dispute from both sides that the Plaintiff did secure a loan under certificate of title No. 17238 of 80,000,000/= as per Exhibit "D1" (the facility letter). The facility was to be payable by 31/3/2003.

The only dispute lies with certificate of title No. 18170 which is with the Defendant. I will straight away state that in one way or the other there is a way in which this certificate of title landed in the hands of the Defendant. The

Plaintiff states in evidence that this is due to the fact that she was intending to seek for yet another loan which never materialized. The Defendant disputes this and states that it was a deposit for an additional loan, after the loan had piled up. I have also considered Exhibit "D3" a letter from Hosea and Company Advocates which on bullet 4 it states.

***"That in breach of terms of the said banking facilities and supporting executed and deposited security documentation being title No. 17238 on plot No. 25 and 26 for Plot No. 27 and 28 Block 6 Morogoro region plus directors personal guarantee, you have failed to honour your contractual obligation and therefore in breach of the said terms"***

There is further evidence as per Exhibit "D4" letter replying to Exhibit D3 from the Defendants which states.

***"Secondly our client acknowledges that TWALIB KHALIB TWALIB requested for an over draft facility of Tshs. 250,000,000/=***

*from your client namely Akiba Commercial Bank. He subsequently deposited title No. 17228 for Plot No. 25 and 26 (which belongs to his wife JAMILA SAID MOHAMED NAHAD) and title No. 18170 for Plot No. 22 and 28 Block C at Morogoro (which is the property of our client).*

There is also in evidence Exhibit "D8" from Mohamed Balhabou written in .....

***"Kwabarua hiina ombanirejeshewehatimiliki  
zilizowekwa (T) Ltd ilikupatamkopo.***

Having found such clear documentary evidence the answer to the first issue is that indeed both the titles had been deposited by the Plaintiff to secure a loan which was duly granted by the defendant. I find no other documentary proof tendered by the Plaintiff refuting the existence of the documents I have already mentioned. It is not enough for the Plaintiff to simply state that the second



certificate of title was only deposited for an intended loan which was never advanced by the Defendant.

This takes me to the second issue framed. It is on record that indeed the Plaintiff was granted an overdraft facility as per Exhibit "D1" (the facility letter). This fact is in no way disputed by the Plaintiff. There followed a default in payment of facility and the Defendant was forced to write the Plaintiff a demand letter (Exhibit 'D3') which states in clear words that, the Plaintiff applied for an overdraft facility of 24,000,000/= and was offered the same on 9/5/2001. On 26/2/2002 the Plaintiff made a further application for an overdraft of Tshs. 250,000,000/= and upon consideration he was offered 80,000,000/= to be repaid before 31/3/2003. By 30/8/2003 the facility had accrued to 174,115,000/= as an outstanding amount. In reply as per (Exhibit D4) the Plaintiff acknowledges that he was advanced 134,000,000/= out of 250,000,000/= requested but as he received the same in installments it could not realize the purpose intended for the credit and proceeded to advance a proposal for settling the debt. This included the reduction on the interest rate

from 25% to 15% on the credit and payment of 10,000,000/= per month to the full satisfaction of the debt.

It is on record that on 1/4/2005 (Exhibit D6 ) the Defendant acknowledged the Plaintiff's repayment of the debt as had already paid 50 million and the bank was prepared to receive an additional of 100, 000, 000/= as full and final settlement of due liability but subject to some conditions.

The conditions were such that the Tshs. 100,000,000/= be paid to the bank by 31/5/2005 otherwise the offer will be withdrawn and the Defendant will demand payment of the entire debt together with the interest there to without any communication with the Plaintiff. The Plaintiff accepted the terms and conditions as offered above. The Plaintiff committed themselves as follows;

***“Will ensure that we deliver the evidence of payment which is Tshs. 100 million to Akiba Commercial Bank as stipulated in the letter, we also accept that the bank may demand payment from us of the total debt***

***outstanding debt together with interest thereto if we fail to fulfill the payment of the debt stipulated above”.***

There is evidence tendered “Exhibit D9” which shows that by 30/5/2005 the 100 million agreed upon was still outstanding despite the Plaintiff acknowledging the fair consideration by the bank though it had taken long to conclude. They were also informing the Defendant that they had approached Kenya Commercial Bank (T) Ltd to take over the outstanding debt which was Tshs. 100,000,000/= and were sorry for any inconvenience caused.

The Plaintiff had tried to dispute the debt that it is impossible for a loan of 80,000,000/= which is liquidated to 50,000,000/= can still leave a balance of 30 million plus interest. Further that the meaning of additional sum of Tshs. 100,000,000/= was not clear. I find this had well been explained as all was settled in the negotiations which the Plaintiff dully accepted, signed and was even approaching Kenya Commercial Bank to take up the debt.

The Plaintiff has tried to establish that they were making re-payment through the paying slips but as properly submitted by the Defendant these were not in relation to the new agreement of re-paying 100,000,000/=. There is evidence of payment from 2006 to 2008 amounting to 39,000,000/= which is the period after the Plaintiff had agreed to settle the debt of the agreed amount of 100 million with simple calculation the Plaintiff was yet to settle 61,000,000/=.

Concluding on this issue I find that indeed the Plaintiff is indebted to the Defendant. The Plaintiff has brought no proof to prove otherwise. It is the Plaintiff who has filed this suit, so it was the duty of the Plaintiff to have proved the claim in the plaint.

Lastly on the third issue framed, I find that the Plaintiff has failed to prove the claims in the plaint. There is a further claim of inconveniences and disturbances for loss of use of titles. It is my settled finding that the Plaintiff is the maker of what has happened. It follows that she cannot now come up with a pile of claims which have no legs to stand contrary to what is to be found in regards to the

Defendant's counter claim. They have proved that the Plaintiff is yet to pay 61,000,000/= or in the alternative failure to pay the same is to have the landed properties under the two certificate of titles sold to realize the debt. The amount is to attract an interest on the present commercial rate and costs of this suit. I also make an order that the Plaintiff's case is dismissed with costs.

**B.R. MUTUNGI**

**JUDGE**

**11/9/2014**

Read this day of 11/9/2014 in presence of Mr. Sengalawe for the Plaintiff and Elizabeth Mlemeta for the defendant.

**B.R. MUTUNGI**

**JUDGE**

**11/9/2014**