IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 297 OF 2017

PHILIBERT KRISANTUS MPEPO .....PLAINTIFF

VERSUS

NATIONAL MICROFINANCE BANK PLC.....1ST DEFENDANT

MIRAJI TRADING CENTER LTD .....2ND DEFENDANT

JUDGMENT

I. MAIGE, J.

The fact that the plaintiff mortgaged his landed property at Plot No. 182 Block B, Kimara with Certificate of Title No. 53188 ("the suit property") to secure an overdraft by the first defendant to the second defendant, is not in dispute. Equally so for the execution of the mortgage deed in exhibit **P1** by the plaintiff. Whether exhibit **P1** is legal and effectual is that which is controversial. The claim by the plaintiff is that the same is illegal on account of being procured by fraud and mistake. This Court is therefore called upon to declare the mortgage illegal and to award the plaintiff **TZS 100,000,000/=** as special damages.

In paragraphs 7,8,9,10,11 and 12 of the plaint, the plaintiff pleads four elements of fraud and mistake. First, the offer for the overdraft in exhibit **P2** issued to the second defendant was undated. Two, the second defendant purportedly accepted exhibit **P2** without indicating the date of acceptance. Three, exhibit **P2** was accepted beyond the stipulated period of 14 days. Four, while exhibit **P2** constitutes an overdraft of the specific amount of **250,000,000/=,** exhibit **P1**, in so far as it purports to secure a facility agreement entered between the Bank and the borrower from time to time, is void for being uncertain and cannot be capable of operating as a security to the overdraft in exhibit **P2**.

In her written statement of defense, the first defendant while admitting that exhibit **P2** was undated and was accepted beyond the stipulated period of 14 days, contends that the alleged omissions do not render the overdraft facility void. In any event, it is further alleged, the Plaintiff is not privy to exhibit **P2**. He further denies the fact that exhibit **P1** is uncertain for want of specification of the overdraft facility. On his part, the second defendant generally admits the facts in the plaint.

In view of the contentions reflected in the pleadings, four issues were framed. First, whether there is *any* valid contract between the defendants from which a deed of guarantee could be created. Second, whether the mortgage between the plaintiff and the first defendant is illegal. Three, whether the plaintiff has suffered any damages. Four, what reliefs are the parties entitled to.

In the conduct of this matter, Mr. Edward Chuwa, learned advocate represented the plaintiff; Miss. Wivina Karoli Benedicto, learned advocate represented the first defendant and Mr. Juma Anti, the director for the second defendant, represented the second defendant.

The prosecution case was premised on the sole testimony of the plaintiff himself who testified as **PW1**. He admits in evidence to have executed exhibit **P1**. He does not doubt the fact that the second defendant was granted and utilized an overdraft facility of **TZS 250,000,000/=**. Neither does he question the fact that exhibit **P2** was executed by the second defendant. It is his evidence however that, when he was signing the mortgage in exhibit **P1,** he was unaware of the contents of exhibit **P2**. To his recollection, the informal agreement between him and the second defendant was that the latter would be granted an overdraft facility of **TZS 500,000,000/=**and not of **TZS 250,000,000/=** as reflected in exhibit **P2**. Unlike in the informal agreement and exhibit **P2**, **PW1** further testifies, exhibit **P1** does not specifically make reference of any amount of overdraft. He therefore invites the Court to find that exhibit **P1** does not secure the loan in exhibit **P2** and is uncertain and therefore void.

He testifies further that; while exhibit **P1** is dated 7th August 2015, it appears to have been signed by the plaintiff on 30/07/2015 which is seven days before the date of the contract. Testifying on exhibit **P2**, **PW1** professes that it was invalid for the reason of not being dated. He blames

in evidence the first defendant for serving him with a notice of default thereby occasioning unnecessary stresses on his part. He urges the Court therefore to invalidate the mortgage and award him general damages at the tune of **TZS 100,000,000/=.** On cross examination, he admitted that when he was signing exhibit **P1**, he was aware that the second defendant had taken loan from the first defendant. He admitted further to have been told by the second defendant to that effect.

On her part, the first defendant relied on the testimony of her debt collection officer one Dickson Eliyau Karani. He informs the Court that in 2015, the first defendant granted to the second defendant an overdraft of **TZS 250,000,000/=** as per exhibit **P1** (D1). He testified further that, as an additional security to the overdraft, the plaintiff pledged the mortgage in exhibit **P1**. He further testified that the second defendant has defaulted to service the loan and as a result the outstanding balance due and payable is **TZS 330,000,000/=.** On cross examination, he told the Court that, the second defendant was an existing client to the first defendant and that it was not her first time to be loaned by the first defendant. He admits that exhibit **P2** is not dated. He admits further that exhibit **P1** does not specifically refer the overdraft amount in exhibit **P2**. He admits further that the clause "from time to time" in exhibit **P1** refers to future loan while the exhibit **P2** refers to a specific principal loan amount of **TZS 250,000,000/=**. He admits further that while exhibit **P1** was made on 7/08/2015, it was executed by the plaintiff on 30/07/2015.

The second defendant on her part, placed reliance on the testimony of Juma Abdallah Hanti who represented himself as her shareholder and director. He admits to have executed the overdraft facility in exhibit **P2**. The overdraft amount of **TZS 250,000,000/=, DW2** said, was different from the amount of **TZS 500,000,000/=** which was in his contemplation when he was accepting the offer in exhibit **P2**. It is worthy to observe that, though the request letter was pleaded and attached in the plaint, it was never tendered into evidence and no reason for the omission is in evidence. He agrees with the plaintiff that the second defendant did not issue any board resolution before accepting exhibit **P2**. He prays that the mortgage be avoided.

On cross examination, by the counsel for the plaintiff, he confessed to have been supplied with exhibit **P2** on 6/07/2015. He agreed to have submitted it to the first defendant in August 2015 though he could not remember the date. He agreed to have utilized the overdraft though he could not recall the exact date when the same was advanced. It was, to his recollection, in August 2015. On further cross examination by the counsel for the first defendant, he admitted to have been the one who introduced the plaintiff as the collateral provider to the Bank. He admitted further that, the first defendant was not privy to the negotiation between the plaintiff and the second defendant. He further admitted that the mortgage was registered and the overdraft disbursed.

In his final submissions, Mr. Edward Chuwa contented, in the first place that, for the reason of not being accepted within the stipulated period of 14 days and for not being accompanied with the board resolution, the offer in exhibit P2 was not duly accepted as to create a binding contract between the defendants. The counsel placed reliance on the authority in **Ramsgate Victoria Hotel vs. Montefiore (1866) LR 1 Ex 109** to support the view that, if an offer has prescribed time for the acceptance, the same will lapse at the end of such time. He submits therefore that, by the time when the second defendant was accepting exhibit **P2**, there was no offer to accept. To fortify his contention, he cited the decision in **Hotel Travertine Limited and 2 others v. the National Bank of Commerce Limited (2006) TLR 133** wherein the Court of Appeal held that failure to accept an offer in the prescribed mode, renders the agreement unconcluded.

He submits further that, the overdraft secured in exhibit **P1**, is different from that in exhibit **P2** in that; while the latter is an overdraft for a specific principal loan of **TZS 250,000,000/=,** that which is secured in exhibit **P1** is in respect of unspecified overdraft to be entered from time to time. He therefore invites the Court to hold that exhibit **P1** secures a non- existing loan. In the first alternative, it is his submission that in not incorporating the overdraft amount in exhibit **P1**, the first defendant fraudulently misrepresented to the plaintiff as to the loan to be secured. Exhibit **P**1, the counsel contends, was void under section 20(1) of the Law of Contract Act for mistake. He relied on the authority in **Magee v. Pennine Insurance Co. Ltd. (1969) 2 All ER 891** where it was held as follows:-

i. *Although the plaintiff accepted that the defendant's offer constituted a binding promise, the parties were acting under common and fundamental mistake in that they thought that the original policy was binding; the contract was therefore voidable in equity and would be set aside because it was inequitable to hold the defendants to it.*

ii. *The promise was made on the basis of an essential contractual assumption and since that was false, the defendants were entitled to avoid the agreement on the ground of mutual mistake in a fundamental and vital matter. (equitable)*

Further referred was the authority in **Courturier v. Hastie (1852) 25 L.T. Ex 253** in support of the view that a mistake as to the existence of the subject matter renders a contract void *ab initio*.

In the second alternative, it is the counsel's submissions that, for the reason of referring the secured loan as "the Agreement entered into between the Mortgagee and the Borrower from time to time", exhibit **P1** is void for being uncertain. In the further alternative he submits, the uncertainty, if at all it does not vitiate the contract, should, under the *contra preferendum* rule be construed in favour of the plaintiff, the weaker party.

Commenting on the manner exhibit **P1** was executed, the counsel doubts the variation of the dates of the execution of the contract between the plaintiff and the first defendant. He wonders how possible could the

contract be signed by the plaintiff on 30.07.2015 while it was prepared on 7th August 2015.

In her submissions in refutation, Miss Wivina Karoli maintains, in the first place that, exhibit **P2** was duly accepted in the manner prescribed in clause 9.2 of exhibit **P2** contrary to the contention by the counsel for the plaintiff. It was, in her humble view, in due compliance with the provision of section 7(b) of the Law of Contract Act.

The execution of exhibit **P1**, she submitted, emanated from no mistake to the plaintiff. She assigned three reasons to support her view. First, the plaintiff signed into exhibit **P1** while knowledgeable that he was pledging his landed property as security for the loan by the second defendant. He therefore invites the Court to dismiss the suit.

On his part, the third defendant did not file any written submissions.

Now that I have exposed the factual and legal foundation of the case, it is desirable to address the proposed issues. I have to put it very clearly right from the beginning that, the plaintiff being the one who is seeking to have a judgment in his favour basing on the factual propositions contained in the pleadings, he has the legal burden to adduce sufficient evidence to answer the four proposed issues in his favour.

Let me start with the first issue as to legality of the loan agreement. The loan agreement is contained in an overdraft the terms and conditions of which are contained in a document entitled "Offer Letter for an Overdraft". It has been exhibited into evidence as **P2**. It was equally tendered for the first defendant as exhibit **D1**. At page one of exhibit **P2**, the overdraft facility is described in the following words:

> *National Microfinance Bank Plc ("the Bank") is pleased to confirm its willingness to make available to you,* ***MIRAJI TRADING CENTRE LIMITED****, ("the Borrower") a* ***limited liability company*** *incorporated in Tanzania, an overdraft facility ("the Facility") described below on:-*
>
> *(a) the terms and conditions set out in this letter of offer* ***as may be varied from time to time*** *(the "Offer Letter");*
>
> *(b) the Bank's General Terms and Conditions applicable to term loans and overdraft (the "Conditions") attached hereto (and as may be varied from time to time); and*
>
> *(c) such other conditions as the Bank may require or may notify the Borrower from time to time. (emphasis is mine)*

What is apparent is that, the overdraft facility is not only limited in the terms and conditions set out in exhibit **P2** as may be varied from time to time, but the Bank's General Terms and Conditions applicable to term loans and overdraft ("the General Conditions") which is expressly incorporated and attached thereto as well. The **General Conditions** therefore, constitute an integral part of exhibit **P2**. The defendants who were privies to the said agreement were, for the reason better known to the plaintiff, not required, by way of a notice to produce, to produce them into evidence. Neither was they required to make discovery of the same. In the absence of the **General Conditions**, I submit, exhibit **P2** cannot

constitute the entire agreement constituting the overdraft facility unto which the mortgage was created. In other words, the agreement in exhibit **P2** is incomplete. This Court can therefore not base on an incomplete agreement in exhibit **P2** to determine legality of the loan agreement.

Assuming, without deciding that, I am wrong, it is yet my opinion that the plaintiff has not, in the required standard, proved that there was no valid loan upon which a mortgage could be created. I will substantiate my view as I go along. The agreement in exhibit **P2** is in the form of an overdraft. The borrower was the second defendant. There is no doubt from the pleadings and evidence that, the persons whose names and signatures appear in exhibit **P2** are directors of the second defendant. Equally not in dispute is the fact that the second defendant utilized the overdraft of **TZS 250,000,000/=** with the knowledge of the plaintiff. The complaint by the plaintiff is three-folds. First, exhibit **P2** is invalid because it is not dated. Two, it was accepted outside the stipulated period. Three, it was not supported by board resolution of the second defendant as required in exhibit **P2**.

There is no dispute that exhibit **P2** was not dated. Neither of the parties indicated the date of signing. The attesting witness did not as well. I agree with Mr. Chuwa, learned advocate that, in the absence of the date of the signing in exhibit **P2**, there cannot be factual materials on which the Court can ascertain whether the acceptance was within the stipulated period of time. Therefore, if the *contra referendum* rule is applied, exhibit **P2** will be

construed to mean that it was accepted after the expiry of the 14 stipulated period. I will so hold.

The next issue therefore, is whether the omission to indicate the date of signing of an overdraft and accepting the same out of the stipulated time limit render the contract unconcluded? While Mr. Chuwa sees the impediment as fatal to the agreement, Miss. Wivina views it as a minor irregularity which does not go to the root of the agreement. In any event, she submits, the plaintiff being a stranger to the agreement, is not the right person to fault it.

It would appear to me from the pleadings and available evidence that, the dispute at hand revolves around a tripartite situation involving the first defendant as the lender, the second defendant as the principal debtor and the plaintiff as the guarantor. As a guarantor, the plaintiff, though not privy to the overdraft facility, cannot be said to have no any interest. The reason being that, a guarantee being an accessory contract, cannot be enforced against the guarantor unless the borrower is primarily liable in terms of the loan agreement. It is also the law, under section 80 of the **Law of Contract Act** that, the liability of the guarantor is co-extensive with that of the borrower. I will therefore not accept the submissions by the counsel for the first defendant that for the reason of not being privy to exhibit **P2**, the plaintiff cannot question the legality of the same.

Does the omission to date an overdraft vitiate the same? I think the answer is certainly no. As I understand the law, an overdraft being an agreed line of credit operating directly through the current account, does not necessarily require a formal written agreement. It is implied where a customer operating a current account in a bank overdraws in his account. Therefore, M.L. Tannan, one of the renown jurists in banking law jurisprudence remarks, at page 203 of his **Tannan's Banking Law ,** the remarks which I absolutely subscribe to, as follows:-

> *No express, oral or written agreement is necessary for overdraft. The agreement for grant of overdraft facility can be implied from the conduct of the parties. Where a customer having a current account in a bank even without any express grant of an overdraft facility, overdrafts on his account and the cheque issued by him are honoured, without there being sufficient balance in the account, the transection over amounts to a loan and the customer is bound to make good the loan to the bank with reasonable interests".*

Lord Blackburn made more or less a similar observation in **Brogden v. Metropolitan Co**. quoted in **Hotel Travertine case supra** where he said;

> *I have always believed the law to be this, that when an offer is made to another party, and in that offer there is a request express or implied that he must signify his acceptance by doing some particular thing, then as soon as he does the thing, he is bound.*

The position above, in my humble view, is more or less in line with the provision of section 8 of the Law of Contract Act, Cap. 345, R.E., 2002 which provides as hereunder:-

> *8. Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with proposal, is an acceptance of the proposal*

There was also the contention that for the reason of being accepted after expiry of the 14 days period, the contract was void. While the first defendant admits the omission, it is his submission that the same does not vitiate the contract. If I understand well the counsel for the plaintiff, he intends to mean that lapse of the prescribed time of acceptance amounted to revocation of the proposal. He must have based his contention on the provision of section 6(b) of the Law of Contract Act. It is however to be noted that, the prescribed time for acceptance of an offer envisaged in the respective provision does not constitute the mode of acceptance. In any event, the revocation therein depicted cannot be at the instance of the acceptor. It is solely at the instance of the proposer. The revocation at the instance of the acceptor is provided for under section 5(2) of the same law which provides as follows:-

> *(2) An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.*

What constitutes mode of acceptance, in my reading, is covered under section 7 of the Law of Contract Act wherein prescribed time for

acceptance is not. For clarity, I will reproduce the said provision hereunder:

> *7. In order to convert a proposal into a promise, the acceptance must-*
>
> *(a) be absolute and unqualified.*
>
> *(b) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted;* ***and if the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise, but if he fails to do so he accepts the acceptance****. (Emphasis is mine)*

Apparent from section 7(b) is the fact that; where, like in the instant case, the proposal prescribes the manner it has to be accepted, the acceptance must be made in the said manner. It is equally the law, according to the respective provision that, if the acceptance is not accepted in the manner proposed, the proposer is entitled as of law, to insist that the proposal should be accepted as such and if he does not, he is deemed to have accepted the acceptance despite being not made in the proposed manner. Therefore, assuming, which is not, that the prescribed time for acceptance constituted the manner of acceptance, for the reason of disbursing the loan without insisting on the mode of acceptance, the first defendant was deemed to have accepted the acceptance.

The authority in **Hotel Travertine case** (*supra*), I have read it between lines, is distinguishable and therefore inapplicable in the instant case for three main reasons. First, unlike in the current case, in the said case, it was the bank and not the mortgagor who was the plaintiff. It was an action for recovery of loan. The burden of proof was therefore on the bank. Secondly and more importantly is the fact that, while in the instant case, the grant of the overdraft of TZS 250,000,000 million and utilization of the same is not in dispute, in the said case it was seriously in dispute. This fact is reflected in the submissions for the appellants appearing at page 135 of the report which is, for clarity, reproduced hereunder:-

> *The learned advocate challenged the conclusion of the learned trial judge that exhibit P3 and P6 read together, contained the terms and conditions that are binding on the appellants and that the appellants were in breach of the same. Mr. Nyangarika also disputed the quantum of the decretal sum of TZS 592 250 163. He contended that the respondent bank did not adduce any evidence how this figure was arrived at. For instance, the respondent bank did not produce in Court the first appellant's cheque of withdrawal or bank statement to that effect.*

Another distinguishing feature of the two cases is that, while in the instant case, the offer to the overdraft was signed and initialed by the directors of the borrower to signify acceptance and the same has never been doubted in evidence, in the said case it was the vice versa. Addressing the issue, the Court opined at page 139 and 140 of the report as follows:

With respect, we do not read anything in exhibit P3 which provides for an alternative route of accepting the offer-Exhibit P3. The only method was to countersign the duplicate letter and the learned trial Judge clearly said so in his Judgment. There is no provision for a different approach in exhibit P3.

The Court of Appeal, in my reading, did not reject the principle in **Brogden v. Metropolitan Railways** ***(supra)*** as to acceptance by conduct. Instead, it dismissed the respondent's submissions on account that the same was neither in pleadings nor in evidence. In his own words, my Lord Nsekela, J.A, as he then was, speaks of acceptance by conduct at page 141 of the report as follows:-

Mr. Mjuluzi, learned advocate for the respondent, like the good "soldier" he is, had also submitted that there was acceptance of the offer by conduct. The anchor of this submission was the alleged disbursement of TZS. 373 378 200 to the first appellant. On the face of it, this is an attractive argument. However, acceptance by conduct was not pleaded. It should have been pleaded in the alternative of the respondent bank relying solely on exhibit P3 and P6.

In the instant case, I have noted, though the first defendant did not have the burden of proof, she pleaded, in paragraph 12 of the Plaint, acceptance by the conduct in the alternative.

It is also important to observe that, an overdraft does not become operational as against the borrower upon signing of the same. Instead, it speaks after first disbursal. On this, I am inspired by the learned author Tannan, in his book *supra*, where he remarked at paragraph 36 as hereunder:-

36. Overdraft. In case of an overdraft granted by a banker to his customer, the period will run from the time the overdraft is made use of unless it is extended by an acknowledgment of the debt in writing signed by the debtor or his agent, or part payment of a debt has been made and the fact of such payment appears in the handwriting of the debtor or his agent. The reason is that an overdraft granted by a banker is a loan not money deposited with the banker" (PAGE 224 ibid)

On that account therefore, and considering the fact that the second defendant neither denies the signatures and initials of her directors in exhibit **P2** signifying acceptance of the offer nor the utilization of the overdraft of **TZS 250,000,000/=**, the claim by the plaintiff cannot have value both in law and equity. Issue number one therefore is answered against the plaintiff.

Let me proceed with the second issue as to the legality of the mortgage agreement (exhibit **P1**). In the first place, it is doubted on account of being founded on a non-existing loan agreement. I have however already held in relation to the first issue that, exhibit **P2** was a valid agreement. That would suffice in my view, to dismiss the contention.

It was also submitted that, the overdraft in exhibit **P2** does not relate to what is secured in exhibit **P1**. The reason being that; while that which is secured in exhibit **P1** is referred as the Agreement entered between the borrower and the Bank from time to time , exhibit **P2** constitutes an overdraft of a specified loan of TZS 250,000,000/=. I

will not accept this submission for three main reasons. First, I have already held in relation to the first issue that in exhibit **P2**, the plaintiff has unreasonably omitted to include one of the essential document constituting the overdraft agreement, to wit, the General Conditions. As a result, exhibit **P2** does not constitute an entire loan agreement upon which inference may be drawn on the validity or otherwise of the loan agreement. Two, the provision of exhibit **P2** as observed elsewhere in this judgment is express that, the terms and conditions therein set out are " as may be varied from time to time". Therefore the series of future transactions portrayed by the phrase "from time to time" is implied in exhibit **P2.**

Three, it was also express in clause 9 read together with recital A of exhibit **P1** that, the guarantee therein created was a continuing guarantee which is allowed under the laws of Tanzania. Section 81 of the Law of Contract Act provides that *"a guarantee which extends to a series of transactions is called a continuing guarantee"*. As I understand the provision of section 82 of the same, a continuous guarantee, unless revoked by notice to the creditor, is relevant to the future transactions. As held by Lord Cotton in **Re Sherry, London and County Banking Co. vs. Terry, (1884) 25 Ch. D. 692,** the amount secured in a continuing guarantee consists of the general balance of the customer's account existing at the time the guarantee comes to an end. I therefore, do not agree with the counsel for the plaintiff that, the

expression entered from time to time in exhibit **P1** renders the contract uncertain. The reason being that in banking practice, the expression is commonly used in guarantee of overdrafts to signify that the secured loan consist of series of transection. That was also express in exhibit P2.

There was also a submission that exhibit **P2** was void for being procured under fraudulent misrepresentation. Fraudulent misrepresentation, as held by the House of Lord in **DERRY VS. PEEK, (1889) APP. CAS. 337**, is proved if it is established that a false representation has been made (i) knowingly, or (ii) without belief in its truth or (iii)recklessly whether it is true or false".

The settled position of law is that for a person to claim an action for fraud, the particulars of fraud must be specifically pleaded and strictly proved. In this case, the particulars of fraud has never been pleaded. There has not been adduced any evidence to prove, leave alone strictly, the alleged fraud. The claim is based on a mere assumption of fact. The position of law however is that an assumption of fact is not in evidence.

It was also submitted that because of variation of the dates of signing, exhibit **P1** is invalid. I do not think that the contention has any merit. Truly, the dates of execution of exhibit **P1** between the parties are different. Whereas the plaintiff signed on 30th July 2015, the first

defendant signed on 7th August 2015. The contract is silent as to the operational date. It is a notorious principle of law that however that, unless otherwise expressly provided for, a contract becomes operational upon being signed by both parties. Here, as elsewhere within the common law jurisdiction, where a contract is signed on different dates, the last signature principle would apply. It is such that the date of the last signature shall be deemed to be the date of operation of the contract. That should be so in the instant case. It is not the law to say that because the parties signed on different dates and places, the agreement is unauthentic.

It was further submitted that exhibit P2 was void under section 20 of the Law of Contract Act for the reason of mistake as to matter of fact. With respect, the submission is misplaced. Section 20 speaks of mistake by both parties and not unilateral mistake as pleaded in the instant case. That is the same theme in the cited English authority in **Magee v. Pennine Insurance Co. Ltd (1969) All ER 891**. Unilateral mistake as to matter of fact is covered by section 22 according to which it not render the contract voids neither voidable. It provides as follows:-

> *22. A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.*

In any event, a contract induced by a unilateral mistake arising from misrepresentation is not void. It is voidable at the instance of the innocent party. This is according to section 19 of the Act. For the

action to stand, the plaintiff must prove either of the elements in section 18. In here, the plaintiff has not proved either. He has totally failed to prove the alleged misrepresentation as to the terms of the loan. Neither the fact that he has been negatively influenced by any of the representations of the first defendant in exhibit P1. After all, the plaintiff confesses in paragraph 6 of the plaint and in his oral testimony that, before execution of exhibit P1, he was aware that the second defendant had sought a loan of TZS 500,000,000 from the first defendant and he had agreed to offer his landed property as a security. He cannot be heard complaining that he has, for the reason of misrepresentation, secured a non-existing loan while according to pleadings and evidence, the outstanding loan is lesser than the said amount.

On the above discussions therefore, I do not agree with the plaintiff and his counsel that, the mortgage in exhibit **P1** was illegal. Issue number two is also answered against the plaintiff. The resolution of the first two issues obviously renders the third issue nugatory as whether or not the plaintiff suffered any damages would be relevant if any wrong was proved against the defendants and each of them. Issue number four would be answered against the plaintiff. As a result, the suit is hereby dismissed with costs.

I. MAIGE
JUDGE
21/02/2020

Date: 21/02/2020

Coram: Hon. D.P. Ngunyale - DR

For the Plaintiff: Absent

For the 1st Defendant: Wivina Kalori for the 1st defendant

For the 2nd Defendant: Absent

RMA: Bukuku

COURT: Judgment delivered.

D.P. Ngunyale

DEPUTY REGISTRAR

21/02/2020