IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 426 OF 2017

MUNSA TRADING ENTERPRISES LTD.....PLAINTIFF

VERSUS

ECO BANK TANZANIA LIMITED.....1ST DEFENDANT

LONGXING INTERNATIONAL LIMITED.....2ND DEFENDANT

JUDGMENT

S.M. MAGHIMBI, J:

On 29th November, 2017, the Plaintiff herein, a body corporate trading in the name of Munsa Trading Enterprises Limited, sued the two defendants Ecobank Tanzania Limited a financial institution and Longxing International Limited, a body corporate. In her plaint, she was seeking for a declaratory order that the 1st Defendant bank is unlawfully withholding Certificate of Title No. 38634 without any probable cause or justification and an order directing the 1st Defendant Bank to release to the Plaintiff the said Certificate of Title No. 38634; for a landed property situated on Plot No. 63, along Mhonda Street in Kariakoo, Dar es Salaam ("the suit property").

Briefly, as pleaded in her plaint, the plaintiff's claim has its roots from a transaction between the two defendants whereby the first defendant advanced to the 2nd defendant a credit facility, a loan, to the tune of Tshs. Nine Hundred Million (Tshs. 900,000,000.00). The loan was secured by a mortgage of a landed property which is the suit property abovementioned. It is in this security that the plaintiff comes in. Following a resolution of her Board of directors reached on 17th November, 2015 (EXP1), the plaintiff committed herself by depositing her property ("the Suit Property") to the 1st Defendant Bank as guarantee, executing a mortgage deed on 24th January, 2016 (EXD1). It is the mortgage transaction and the deposited security which is the core of the dispute in the suit at hand. According to the plaintiff, the agreed loan between the 1st to the 2nd defendant was not disbursed on time frustrating the second defendant's performance of the intended use of the loan, leading her to default payments.

According to the first defendant in her Written Statement of Defence, upon compliance with loan processing protocols, the mortgage was eventually executed and an encumbrance was registered and created on the certificate of suit property on 9th February, 2016 (Exhibit D. 2). The first defendant further alleges that upon fulfillment of the above procedures, the loan was disbursed to the 2nd Defendant in accordance with the terms and conditions of the credit facility letter (Exhibit P. 2) in her Account No. 0030015401210301 which is maintained at the 1st Defendant bank. The first defendant prayed for the dismissal of the suit with costs.

On her part, the 2nd defendant supported the plaintiff's claim burdening the defect to the 1st defendant delay in disbursing the loan amount, leading to the plaintiff's alleged withdrawal of her guarantorship. She maintained that the 1st defendant has no legal basis to act upon the plaintiff's property since the plaintiff allegedly served his letter to withdraw his interest of guarantorship. The 2nd defendant's prayers is that she is excluded from any liabilities. After mediation failed, when the matter came to me for final pre-trial conference on 22nd June, 2020, the following four issues were framed for determination:

1. What is the amount of loan which was secured by the disputed property held under Certificate of Title No. 38634 which belongs to the Plaintiff and guaranteed for the 2nd Defendant at the 1st Defendant Bank.
2. Whether there was undue delay in releasing the said funds/loan to the 2nd Defendant by the 1st Defendant.
3. Whether the Plaintiff's notice/application to withdraw the Certificate of Title No. 38634 from guaranteeing the 2nd Defendant's loan was lawful to be demanded from the 1st Defendant.
4. To what relief(s) are the parties entitled to.

In order to prove her case, the plaintiff called two witnesses PW1 was **Frank Werairuka Musari Lema** and PW2 **Jackson Werairuka Lema** both Directors at the plaintiff company. On her part the 1st Defendant brought one witness, DW1, **Irene Nkya** while the 2nd Defendant also had one witness DW2, **Rahim Shabaan Zuberi** a director with the 2nd defendant company.

I will start with the first issue, what is the amount of loan which was secured by the suit property for the 2nd Defendant's loan advanced by the 1st Defendant Bank. This issue was framed because the 1st defendant claimed that the amount of loan secured by the suit property was more than the alleged Tshs. 900 million. This issue was mainly to be proved by the 1st defendant and countered by the plaintiff and the 2nd defendant's witness. According to the **Exhibit D. 1** and **D. 2** on 9th February, 2016 and the testimony of **DW. 1**, the suit property was pledged as security by the Plaintiff to secure the amount of Tshs. Nine Hundred Million (Tshs. 900,000,000.00) which was advanced by the 1st Defendant to the 2nd Defendant. The loan was to be advanced upon perfection of the security documents. **DW1** also testified that the 1st defendant never knew the Plaintiff until when she was introduced by the 2nd Defendant by virtue of the agreement executed on 17th December, 2015 for use of the Plaintiff's certificate of title to secure the 2nd Defendant's additional loan. The agreement was admitted as **Exhibit P. 1.**

I have taken ample time to go through the EXP2, on cause 6 (a) and (b) of the exhibit, show the new credit facility, a short term loan at the tune of Tshs. Nine Hundred Million Only (Tshs. 900,000,000.00). The loan is said to be for the purpose of financing completion of construction contracts the 2nd defendant has with NSSF for construction of LOT 3, affordable housing scheme phase II at Mtoni Kijichi in Temeke Municipality in the city of Dar es salaam. This evidence is supported by the evidence on record of PW. 1 and PW2_who stated that the 2nd Defendant applied for a loan of Tshs. 1,000,000,000.00, but what was approved was Tshs. 900,000,000.00 only. Even in his final submissions,

Mr. Laswai admitted that the upon evaluation of the new loan facility applied by the 2nd Defendant, what was approved by the 1st Defendant bank is Tshs. 900,000,000.00 only, and not Tshs. 1,000,000,000.00 which was written in the memorandum of agreement dated 17th December, 2015 (EXP1).

On the above evidence, the first issue is answered in favour of the plaintiff, that although the initial agreement (EXP1) was for a guarantee of Tshs. 1 billion, the amount that was issued by the 1st defendant to the second 2nd defendant, which the plaintiff guaranteed is at the tune of Tshs. 900 million.

Having determined the first issue, I will now determine the second and the third issues together. The second issue is whether there was undue delay in releasing the said funds/loan to the 2nd Defendant by the 1st Defendant and the third issue is whether the Plaintiff's notice/application to withdraw the Certificate of Title No. 38634 from guaranteeing the 2nd Defendant's loan was lawful to be demanded from the 1st Defendant. The two issues were framed upon plaintiff's allegation that the 2nd defendant could not perform his part of the agreement because of the delay by the 1st defendant to disburse the funds. The plaintiff further alleged to have informed the 1st defendant of the delay and even went further to demand the return of her title deed, a subject of the suit at hand; it was upon the failure of the 1st defendant to yield to the plaintiff's demands that has led to the current suit. This is the basis of the second issue. But the issue cannot be determined in isolation of the validity and legality of the plaintiff's alleged notice notice/application to

withdraw the Certificate of Title No. 38634 from guaranteeing the 2nd Defendant's, validity which was framed as the third issue.

The evidence on the two issues was adduced by PW1, DW1 and DW2. To begin with, it was the plaintiff's (PW1) allegation that (EXP2) was executed on 12/02/2016 and after signing the documents, he did not see any signs that the loan was advanced because he expected by February would have been paid his money according to EXP1. So when March came, PW1 went to the bank and met with a Bank Officer called that he write a letter to withdraw from guaranteeing. That on a board meeting held on 17/03/2016, the directors resolved to withdraw from guarantee and wrote a letter to the bank informing them that they have withdrawn from being guarantors for the loan facility. At this point I have posed to ask myself two questions. First; whether the 1st defendant was privy to the EXP1 to have been entitled to assure the plaintiff that the loan was disbursed on time so that the 2nd defendant could pay the plaintiff as per EXP1. Second, whether it was true that a bank officer by the name of Victor Matondane did actually advise the PW1 to write a letter to withdraw the guarantee.

The first limb of argument is on the relationship between the 1st defendant's obligation under EXP2 in relation to the agreement between the plaintiff and the 2nd defendant (EXP1). Section 84 of the Law of Contract Act, Ca. 345 R.E 2019 ("The Contract Act") provides:

> *"Where two persons contract with a third person to undertake a certain liability, and also contract with each other that one of them shall be liable only on the default of the other, the third person not being a party to such contract, the liability of each of*

such two persons to the third person under the first contract is not affected by the existence of the second contract, although such third person may have been aware of its existence."

As gathered from the evidence above, the 1st defendant had nothing to do with the agreement between the plaintiff and the 2nd defendant executed in December 2015 (EXP1). As correctly argued by Mr. Laswai, according to the EXP3, the unilateral withdrawal letter of the Plaintiff dated 17th March, 2016, the reason which led to withdrawal of the Plaintiff's guarantee is delay in processing the loan arguing that the 2nd Defendant had breached a lot of agreements. In the said letter (EXP1), the plaintiff complained that the process had taken a long time to be effective.

I have also revisited para 7 of the plaint where the plaintiff pleaded that the 1st defendant failed to release the loan facility on time agreed to the 2nd defendant hence the plaintiff resolved to withdraw the guarantor ship due to uncertainty. This is what the plaintiff has pleaded. In the case of **Charles Richard Kombe t/a Building vs Evarani Mtungi& Others (Civil Appeal No.38 of 2012) [2017] TZCA 153; (08 March 2017)** the Court of Appeal held:

"It is a cardinal principle of pleadings that ***the parties to the suit should always adhere to what is contained in the pleadings unless an amendment is permitted by the Court.*** *The rationale towards this proposition is to bring the parties to an issue and not to take the other party by surprise. Since no amendment of pleadings was sought and granted that the defence ought not to have accorded any weight".*

Having the above principle in mind, according to what is pleaded on para 7 of the plaint, the plaintiff constructively admits the release of the funds, her only complaint being the time within which it was so released. The strange new evidence adduced by DW2 that the bank never released any fund to the 2nd defendant is not only unfounded but absurd. This is because through the PW1, the plaintiff tendered EXP5 and EXP6 several communication demanding the performance of the loan by the 2nd Defendant.

I have further noted that Mr. Laswai raised an argument on the 2nd defendant's failure to respond to the demand notices from the 1st Defendant bank which were written on 21st July, 2016 (Exhibit P. 5). Having had a close scrutiny of the demand notices, there is no one which is addressed to the 2nd defendant or copied to them so this argument is off the context. What is before me is an issue between the plaintiff and the two defendants and not between the defendants.

As for the 2nd defendant, he cannot come up with a mere allegation through DW2 that the funds were never released, because he had the duty of proving that the funds were never released. This could have been either through her bank statement or other document and should have raised as a claim from the pleadings by filing a counter claim. This was never done hence that argument cannot be entertained.

The next question on the allegation of delay in releasing the fund, (now that I have concluded that the fund was released), is who has the burden to prove the delay in the disburse of the funds. Section 110 (1) of the Evidence Act Cap. 6 [R.E. 2019] ("The Evidence Act") requires the person who alleges to prove. Therefore if the plaintiff pleaded delay in

disbursement of funds to the 2nd Defendant and the 2nd defendant supports that allegation in her WSD, the two parties bear the burden to prove the alleged delay by establishing and prove the existence of facts which she asserted. This is because the two parties desire the court to believe the existence of the delay, they must have proved the delay. According to the evidence of PW1, there was a delay in releasing the funds to the 2nd defendant and that is how they sent the 1st defendant notice of withdrawal (EXP3). The evidence did not show any documentary proof of delay whether by a bank statement or by any admission by the first defendant.

Another disappointing surprise which raise eyebrows is the evidence of DW2. The witness came up with his own version of the story completely denying the receipt of any fund at all, whether by delay or on time. I must point out at this point that the demeanor of the witness was questionable, avoiding some questions and refusing to answer some questions and his evidence was contradicting, let alone the fact that it did not at all auger with the pleadings of the 2nd defendant. There was nothing in the WSD of the 2nd defendant saying that they did not receive the loan amount. In fact there is a constructive admission of the receipt of funds by the 2nd defendant on para 6 of the WSD of the 2nd defendant where it was pleaded that:

> *".....Moreover. The letter of withdrawal of the plaintiff came before the loan was released to the second defendant...."*

The para directly implies that the funds were released; only that (according to the WSD of the 2nd defendant), after the plaintiff had applied for withdrawal. Surprisingly, this DW2 came and completely

denied everything as if he is in an acting class. He seems to have forgotten that in the EXP1 as well as the PW1's testimony, it was agreed that certificate of title (EXD2) was to be released from CRDB Bank PLC after the 2nd defendant receives the funds from the 1st defendant and pay the CRDB an outstanding sum of under clause B of the (EXP1). The agreement terms included that immediately upon signing the said agreement, the Plaintiff and the 2nd Defendant shall sign the transfer forms for transfer of one share in the 2nd Defendant company to the Plaintiff and the 2nd Defendant shall pay Tshs. 25,000,000.00 to CRDB Bank PLC, so that CRDB Bank PLC would release the original certificate of title (EXD2) and the 1st Defendant shall retain the title for the security advanced to the 2nd Defendant. As it stands, the EXD2 was released upon payment of the sum of Tshs. 25,000,000.00 by the 1st Defendant to CRDB Bank PLC on account of the 2nd Defendant and the same was tendered in court as EXD2 now in the hands of the 1st Defendant. All the above facts are sufficient to establish that the funds were released as opposed to what the DW2 would want the court to believe. It is also worth noting that in the absence of the documentary proof that there was a delay in releasing the funds that affected the 2nd defendant's performance of the EXP2, then the inference is drawn adverse to the plaintiff and the 2nd defendant who had the burden to prove the existence of such a delay.

Having so found the second issue in favor of the 1st defendant, the next issue is on the validity of the EXP3, the alleged notice to withdraw the use of EXD2 as collateral. According to the evidence of PW1 and EXP1, the 2nd defendant was to return the EXD2 after ten months, the ten

months did not even go for 1% of the time and the plaintiff had already written a letter to have his title deed back. Question is, was this a game? That question leaves a lot to be desired. Furthermore, as pointed out by Mr. Laswai, since 2016 from when the loan agreement was signed, there has been no complaint in writing from the 2nd Defendant that the 1st Defendant bank had delayed to disburse the loan. Complaints on delay in disbursement of the loan ought to have emanated from the 2nd Defendant as the Borrower and not the plaintiff whose duty was only to guarantee the performance of the loan.

Indeed there are situations in our laws in which the guarantor can withdraw from guaranteeing a loan, for in a situation where an additional loan is granted without your consent. For instance, Section 85 of the Contract Act discharges the surety as to transactions subsequent to the variance if it is made without the surety's consent in the terms of the contract between the principal debtor and the creditor. The other situation is when there is a substitute guarantor for the loan upon a written application by the mortgagor under Section 122 of the Land Act, Cap. 113 R.E 2019. The other situation that releases a mortgagor from liability is under Section 121 of the Land Act, when the borrower pay back the whole outstanding amount hence discharging his obligation that was guaranteed by the mortgaged property.

The above notwithstanding, I have also gone through the mortgage deed (EXD1), the agreement between the plaintiff and the 2nd defendant (EXP1) and the credit facility letter (EXP2) and I have not found in any of those documents any clause where it is stipulated that in case of delay in releasing the funds, the plaintiff/guarantor can withdraw her liability as a

mortgagor by withdrawing her title from liability. Therefore the notice of the plaintiff is not backed by any document or terms of any agreement that was admitted in court.

On those findings, coupled with the crucial fact that both the plaintiff and the 2nd defendant have failed to prove that the was a delay in disbursing the funds by the 1st defendant, the third issue is answered in favor of the 1st defendant. The Plaintiff's notice/application to withdraw the Certificate of Title No. 38634 from guaranteeing the 2nd Defendant's loan was not lawful.

The last issue is on the relief(s) that the parties are entitled to. The plaintiff's prayer was for declaration that the act of withholding of certificate of Title (EXD2) by the 1st defendant is unlawful and an order of immediate release of the said title. However, having found all the three issues in favor of the 1st defendant, I still cannot make a conclusion without commenting on some issues. It seems to me that the plaintiff's main basis to deposit her title to the 1st defendant was the collateral agreement with the 2nd defendant (Exhibit P. 1). A close scrutiny of the exhibit (in which the 1st defendant is no a party to) has revealed that the parties have agreed that any dispute arising from what they termed to be a "lease" it shall be amicably settled. And in case of failing to sign the mutual agreement of settlement, then the aggrieved party shall be at liberty to institute legal proceedings at the Tribunals or courts established for such purpose by the Land Act, Act No. 4 of 1999 and the Land Disputes Courts Acts (sic) No. 2 of 2002. If you look at the evidence of both PW1 and PW2, there seems to be a failure of

performance by the 2nd defendant hence that should be taken up at their instance as per the terms of the EXP1.

As for the case at hand, having made the above findings, the plaintiff has failed to prove her case to the required standards. The 1st defendant prayed for the dismissal of the suit with costs while the 2nd defendant has prayed for discharge from liability. Much as I have failed to clearly grasp which liability that the 2nd defendant is craving to be discharged, but from what is proved above, the evidence is conclusive that the funds were disbursed and therefore the 2nd defendant still has his liability to perform his part of the terms of the credit facility as per the EXP2, he cannot be discharged from liability as prayed. All the above said and done, the suit is hereby dismissed with costs.

Dated at Dar es Salaam this 11th day of June, 2021

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S.M MAGHIMBI

JUDGE