IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 202 OF 2020

(Originating from the judgment and decree of the District Land and Housing Tribunal for Kinondoni in land Application No. 454 of 2019 dated 1st September, 2020)

LIZA NATHAN MWANKUSYE.....APPLICANT

VERSUS

CRDB BANK PLC.....RESPONDENT

JUDGMENT

Dated 23rd & 1st June, 2021

J.M. RAYEMAHA, J.

The brief background of this matter as can be discerned from the record of the trial District Land and Housing Tribunal (the DLHT hereinafter) is that. Way back in 2015 the appellant knocked on the doors of CRDB for a loan of Tshs. 55,000,000/=. According to PW1 (Liza Nathan Mwankusye), DW1 (Novatus Anthony Materu, the respondent's loan officer) and exhibit P1 (the loan facility letter), the loan was extended to the appellant on 27/5/2015. As par exhibit P1 the rate of interest agreed upon was 18% per annum accrued daily on the outstanding balance and charged to the account monthly. Exhibit P1 demonstrates further that the loan inclusive of interest thereon, would be paid in monthly instalments of Tshs. 3,509,318/=. The loan was secured by the appellant's landed property with document of title CT No. 136402, LO No. 529901 standing in Plot No. 612, Block 'Q4' Kibamba Area Kinondoni Municipality. This landed property was mortgaged.

The appellant continued to liquidate the principal debt to the point of clearing more than half of it. In her testimony, the appellant candidly accepted that she took a loan and after paying almost half of it she asked to top up. In support of this DW1 testified that the balance was Tshs. 20,319,886/= when she requested for a top up. When the application for top up landed in the bank, it was accepted right away. Again, the amount rose to Tshs. 55,000,000/=. As usual both parties signed an agreement exhibit D3. In view of this document the rate of interest rose to 20% from 18%. It was agreed thereat that the appellant would liquidate Tshs. 3,574,929/= per months as per the schedule contained in exhibit D3.

Unfortunately, business didn't flourish as expected. The appellant's business dwindled. One of her business was sold by her young brother without her knowledge. On making follow up, she could not attend the business in Dar es Salaam, hence a down fall. Consequently, she was unable to liquidate the monthly agreed amount of Tshs. 3,574,929/=.

In order to create harmony, both parties decided to enter into the restructuring agreement (Exhibit D4) on 22/6/2017. Nevertheless, the interest remained 20%. The remaining amount was to be paid within 18 months at the instalment of Tshs. 994,554/=. According to DW1 who was not controverted by the appellant, the appellant paid as per the schedule from June, 2017 to January, 2018. DW1 testified further that in February she paid Tshs. 473,981.26 instead of 994,669.35. She later paid Tshs 200,000/= but failed to pay other instalments. She was in that sense served with a 14 days reminder to pay but that did not work. This notice served as a reminder to the appellant a loan balance to be paid, i.e, Tshs. 43,081,362.28.

When all failed, the appellant was served with a 60 days demand notice, exhibit D6. After 60 days Comrade Auction Mart was engaged and instructed by the respondent to announce the sale of the mortgaged property which he did through *Jamvi la Habari* newspaper on 8/9/2018. Following that step the appellant first filed an application for injunction and later the application in the DLHT for the following orders:

1. *An order discharging a house on Plot No. 612, Block 'Q4' CT No. 136402, Kibamba, Dar es Salaam.*
2. *A permanent injunction restraining the respondent or agents, or receivers, or workmen or any other person working under it from selling or any other person working under it from selling or any how disposing or alienating house in Plot No. 612, Block 'Q4' CT No. 136402, Kibamba, Dar es Salaam.*
3. *Costs of the suit.*
4. *Any other relief as the hon. Tribunal shall deem fit.*

After hearing both parties the learned Chairman and assessors who sat with him during the trial, were of the unanimous decision that the appellant did not prove her case to the required standard. Consequently, her application was dismissed for lack of merits. The DLHT ordered further that the applicant ought to pay the loan within 60 days from the date of the judgment, failure of which the mortgaged property would be auctioned for the bank to recover the claimed amount.

This decision did not bed well with the appellant who consequently, come to this Court armed with four grounds of appeal namely:

1. *That, the Tribunal Chairperson erred in law and in fact by failure to state the exactly claimed amount that the Bank is entitled to recover.*

2. *That, The Tribunal Chairperson erred in law and fact by declaring that the Appellant defaulted to repay the loan amounting Tshs. 55,000,000/=*

3. *That, the Tribunal Chairperson erred in law and fact by declaring that he Appellant defaulted to repay the loan while the loan term eexpired on 30th December, 2023 and the Appellant denied for re-structuring agreement.*

4. *That, the Tribunal chairperson erred in law and fact by declaring that the mortgaged property by auctioned without allowing the appellant right to conduct current valuation of the security to determine the market price of the mortgaged property.*

On 23/6/2021 when this matter was called on for hearing Mr. Fissoo Godwin learned advocate featured for the appellant and Ms. Janeth Njombe learned advocate for the respondent. I laboured to read, digest and compare the rival arguments by learned counsels. I shall, where necessary, make specific reference to them in the course of this judgment.

After reading the pleadings, evidence and exhibits I have noted that this appeal is very direct. It involves a loan contract, default to liquidate, intention to pay and intention to sell the mortgaged property standing in Plot No. 612, Block 'Q4' Kibamba Area Kinondoni Municipality to recover the loan outstanding amount.

In order to sail smoothly, let me put the complaints forming basis of this appeal in a simple language. The appellant faults the DLHT:

1. For not stating clearly the loan balance she has to pay the respondent instead it declared that she had to pay Tshs. 55,000,000/= which she had already paid some instalments.
2. That the loan which she was told to had defaulted in paying was ending on 30th December, 2023.
3. That the appellant was denied for a restructuring agreement.

I shall not argue one after another but in the course of my discussion it will be vivid that all these complaints have been deliberated on.

I start by agreeing with Ms. Njombe that the appellant must fulfil her contractual obligation to pay the loan as agreed. Since the agreement in this case is a contractual agreement between the appellant and the respondent, the court is not allowed to interfere with the contractual obligation of the parties. I am guided by these words of wisdom which were stated in the case of **General Tyre E. A. LTD v HSBC Bank PLC** [2006] TRL 60. Similarly, in **SME Impact CV & 2 others v Agroserve Compant Ltd**, Civil Appeal No. 9 of 2018 (unreported) the court cautioned about the trend to use the court by defaulters to hide from their obligation to repay the loan.

Again, I agree with her that the trial DLHT had no duty to inform the appellant the amount she was to pay or interfere the contractual obligations of the parties. The appellant had all the agreements from which she could get the data. Also, she had access to the bank.

The appellant (PW1) was the lone witness during the trial. She testified very honestly on oath that she applied for and was granted a loan to a tune Tshs. 55,000,000/= form the respondent. She did not object the admissibility of exhibit D1 which was tendered by DW1. Exhibit D1 is a loan

facility letter which indicates that the loan was granted to her, to be paid within 18 months and the expiry date was 31/12/2016. Exhibit D1 indicates further that the interest would be 18%. Exhibit D1 was dully signed by the appellant and the respondent and the appellant admits that fact. The issue of the interest was neither contested by the appellant while signing exhibit D1 nor during the trial.

It is also in evidence that after the appellant had paid almost half of the loan amount, i.e, Tshs. 20,319,886/= she asked for a top up of the loan which was unhesitatingly granted. In view of un objected documentary evidence (Exhibit D3) after the top up the amount due then became Tshs. 55,000,000/=. It is in that agreement that the interest rose up to 20%. The appellant did not contradict this piece of documentary evidence and the version of DW1's testimony intimating to accept the facts contained therein to be true.

In view of this cogent evidence, it is very difficult to agree with Mr. Fissoo that there was a dispute on the formula used by the respondent to calculate the interest which was unclear and unknown. It appears that Mr. Fissoo did not go through the substance of the evidence and exhibits D1 and D2. Had he paid good visit to them, he could have noted that this issue is resolved by the strong and tangible evidence from these exhibits and a non-denying testimony of the appellant. The appellant was recorded telling the DLHT that he defaulted paying the loan because her business encountered problems. However, her intention was to pay. What do we learn from her. It is simple. She admits the loan, the interest and the default.

Besides, the appellant after facing difficulties and failing to pay the loan as per the schedule, she applied for the restructuring of the agreement. The uncontested testimony of DW1 and Exhibit D4 at the time of restructuring the amount due was Tshs. 43,235,222.54 which was extended up 78 months, i.e, up to 30/12/2013. In exhibit D4 parties agree that:

> *"In the event that any instalment is not paid in time, the bank reserves the right to revert to foreclosure measures without having to give further notice to the borrower."*

The appellant gave a covenant as follows

> *"I LIZE NATHAN MWANKUSYE hereby accept the banking Arrangements stated herein and upon the terms and conditions and subject to the covenants set out in this loan facility letter."*

As per exhibit D4 the interest remained 20% and was conditioned to liquidate Tshs. 994,554/= per month.

By such evidence and admissions, the appellant cannot be heard to say that she did not know the amount to be repaid after defaulting and that the calculation of the percentage uncertain and unknown. As pointed out hereinabove, the interest of 18% in Exhibit D1 died with the advent of Exhibits D3 and D4 which are obviously well known to the appellant.

Apart from that, the appellant lamented in ground 3 that the trial tribunal did not declare the amount the appellant ought to liquidate. In this ground reference is made on Exhibit D5 and exhibit D6. It is apparent in

those documentary evidence that the appellant knew the amount she defaulted to pay was Tshs. 43,222,195.41 by 11/6/2018 (as per exhibits D6) and Tshs. 41,173,298.68 as on 25/9/2018 (as per exhibits D5) respectively. Both documents were admitted in evidence without being subjected to any objection form the appellant. I am quite sure that the trial tribunal was not at any rate tasked to interpret or comment on these figures on obvious reasons that they were not in dispute and were subject to parties' agreement.

Regarding the complaint that the appellant was denied the re-structuring agreement in ground 3 of the petition of the appeal, if find this complaint with no merits. The appellant failed to give evidence on that. What is in record is that parties agreed to re-structure their agreement as exhibited by a document marked D4. There is no evidence adduced to the effect that there was another application for re-structuring and the same was turned down by the respondent. Besides, in accordance with the evidence in the record restructuring was made and breathed new hope in the appellant's life. These obvious and truthful factual pieces of evidence have increasingly attracted me to borrow the words of wisdom from Hon. Mlay, J (as he then was) that:

> *"After a party has been in breach of the loan agreement and the other party being entitled to enforce the agreement, the party in breach cannot be entitled to extension or rescheduling of the loan in terms of the Agreement of which he is already in breach."*

In view of the above quoted extract, courts are curtailed from ordering the respondent from extending time to liquidate the loan or order

restructuring of the agreement. In my humble observation, the appellant needed no much force. In the same vein, the appeal on this issue was unnecessary and I am invited to think that the appellant is tending to consume time. She needed to sit with the respondent as far as extension or restructuring of agreement is concerned. The respondent has sole autonomy to do so with a view of benefiting each side. Conversely, I think, it is impossible for the court to order or coerce the bank to restructure the agreement. I reservedly, say so but add that each case is to be determined pending on the prevailing circumstances. Therefore, this complaint is misplaced.

Be it as it may, the appellant has a loan agreement with the respondent. It is also true that she defaulted paying. Looking at her evidence closely, she constantly told the court that her intention is to pay. The loan agreement is binding both of them. Even if the trial tribunal did not mention the amount to be liquidated, still the bank statement in place, valid contracts in terms of section 11 (1) of the Law of Contract Act [cap. 345 R.E. 2019], and other relevant documents will witness what is due to the respondent.

I have also subjected DW1's evidence in particular on cross examination. It is clear from it that the appellant failed to cross examine DW1 on important matters such all documentary evidence and the change of the interest from 18% to 20%. It is a settled principle that such failure amounts to accepting the truth of that evidence. That was the wisdom of the court of appeal in the case of ***Bushiri John v Republic,*** Criminal Appeal No. 486 of 2016 CA at Iringa (unreported) which held that:

"The record is apparent that the appellant did not cross-examine PW1 on the two issues he raised during his defense. Both courts bellow were, therefore, entitled to arrive at the findings that it was an afterthought. We find support from the Court's decision in the case of ***Cyprian Athanas Kobogoyo v Republic****, Criminal Appeal No. 88/1992 in which the court said that the failure to cross-examine a witness on an important matter implies the acceptance of the truth of the witness' evidence"*

In the upshot, from the observations above, I don't see any merits in the appellant's appeal. She is to pay the money she borrowed from the respondent not to use the court to hide from her contractual obligation to repay the loan. That then marks my word that I entirely uphold the trial tribunal's decision and orders thereto. The merits lacking appeal is dismissed with costs.

It is so ordered.

Dated at Dar es Salaam this 1st day of July, 2021

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J.M. KARAYEMAHA
JUGDE