

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**(LAND DIVISION)**  
**AT DAR ES SALAAM**  
**LAND CASE NO.85 OF 2017**

**TEMEKE WOMEN SAVING AND CREDIT  
CO-OPERATIVES SOCIETY LIMITED ..... PLAINTIFF**

**VERSUS**

**1. CRDB BANK PUBLIC LIMITED COMPANY }  
2. ALTEMATE AUCTION MART LIMITED } ..... DEFENDANTS**

**JUDGMENT**

Date of Last Order: 28/05/2021 &  
Date of Judgment: 09/07/2021

**S.M KALUNDE, J:-**

The story in this suit goes that, the Plaintiff is a Savings and Credit Cooperative Society registered under **the Cooperative Societies Act, Cap. 185 R.E. 2002**, with **Registration No. DSR 817** issued on 28<sup>th</sup> December 2004. In 2013 the plaintiff took out a loan with the first defendant for purposes of constructing a Commercial structure as an Investment and Source of revenue to the Society. The loan amounted to **Tshs. 300,000,000**. The loan was advanced to the Society on 27<sup>th</sup> August 2013. The loan was to be repaid in sixty (60) monthly instalments extremely to July 2018.

Subsequent to the first tranche, a second tranche amounting to **Tshs. 160,000,000** was advanced to the plaintiff on 22<sup>nd</sup>

January, 2014. The second tranche was geared towards providing loans to the Saccos members. With the two tranches the total loan amount was **Tshs. 460,000,000/=**. As security for the entire loan amount the plaintiff pledged the property situated on **Plot No. 47, Block H with Certificate of Title No. 94100 situated at Boko Street, Temeke, Dar es Salaam ("the suit Property")**.

Sometimes in 2016 the plaintiff defaulted in repayment of the monthly instalments as agreed in the loan agreements, after the default the 1<sup>st</sup> defendant issued a Default Notice requiring for the repayment of the entire facility. The plaintiff did not make any payments. Upon failure to repay the amount as requested, the 1<sup>st</sup> defendant issued another Notice, this time it was a Notice to Sale the Security with a view to recover the facility amount.

Upon issuance of the Notice of Sale the plaintiff rushed to this Court and filed the present case in which they seek for the following orders:

- (a) Permanent injunction restraining the defendants from disposing the suit property;
- (b) Costs of the suit; and
- (c) Any other relief (s) as this Court may deem fit and just to grant.

The 1<sup>st</sup> defendants, through their advocate, **Mr. Mathiya Samuel** learned counsel, filed a Written Statement of Defence alleging that the full loan amount of Tshs. 300,000,000.00 was fully advanced and utilized by the plaintiff in accordance with the Loan Facility Letter. It was also pleaded that the facility had a specific repayment schedule which was not observed by the plaintiff leading to her default. Further to that the 1<sup>st</sup> defendant pleaded that, as of January, 2016 the outstanding loan plus interest stood at Tshs. 407,253,434.82.

Further to that, the 1<sup>st</sup> defendant pleaded further that, efforts to recover the loan were interfered by the Registrar of Cooperative Societies hence preventing the plaintiff from discharging its obligation to repay the loan. In all the 1<sup>st</sup> defendant pleaded that the plaint was misconceived as the terms of the facility letter were clear on the terms of the loan and the consequences of default. In their view the Bank was justified in exercising its right to recover from the security. It was, thus prayed that the suit be dismissed with costs.

Similarly, the 2<sup>nd</sup> defendant filed their Written Statement of Defence claiming that they were mere agents of the 1<sup>st</sup> defendant in disposing the mortgaged property following default by the plaintiff in repaying the principal amount plus interest. They also insisted that the 1<sup>st</sup> defendant was justified in disposing on the mortgaged property in satisfaction of the outstanding loan plus

interest. In the end, they prayed for dismissal of the suit with costs for lack of merit.

Upon completion of filing pleadings and in an effort to resolve the dispute, the following issues were agreed at the final Pre-Trial Conference and Scheduling Conference:

- 1. Whether the plaintiff was in default in servicing its loan as per the loan agreement,**
- 2. Whether the plaintiff informed the 1<sup>st</sup> defendant about the joint venture agreement with Chimbuko Vikoba Limited.**
- 3. Whether the 1<sup>st</sup> defendant is justified in exercising his rights under the mortgage, and;**
- 4. To what reliefs are the parties entitled to.**

The matter was placed before me for first hearing of the plaintiff case on 5<sup>th</sup> October 2020. At the hearing plaintiff was being represented by the **Mr. Methew Kabunga**, learned advocate, whilst the defendants were enjoying the legal representation of **Mr. Samuel Mathiya** learned counsel.

In support of their case the plaintiff paraded one witness, **Lucy Twininge Shedrack, PW1** and tendered, in evidence, two exhibits. That is a Loan Facility Letter executed between the

plaintiff and 1<sup>st</sup> defendant on 06<sup>th</sup> August, 2013 (**Exhibit – P.1**); and a Loan Facility Letter executed between the plaintiff and 1<sup>st</sup> defendant on 06<sup>th</sup> January, 2014 (**Exhibit – P.2**).

In her testimony, **PW1** a Manager of **Temeke Women Saving and Credit Co-operatives Society Limited (TEWO – SACCOS)** testified in chief that, she has been a manager of the SACCOS since 2007. She also stated that she was a member of the tenth (10<sup>th</sup>) Board Member of the SACCOS. She said that the SACCOS were good clients of the 1<sup>st</sup> defendant (the Bank) as they were taking loans for various activities and repay them according to the agreed arrangement. The witness recounted that, on 6<sup>th</sup> August 2013 the SACCOS and the Bank executed a Loan Facility Letter for advancement of 300,000,000.00 to facilitate the construction of an office building for the Saccos. She tendered **Exh. P.1** as evidence of the transaction.

It was DW1 testimony that, on 22<sup>nd</sup> January, 2014 the Saccos and the Bank executed another Loan Facility Letter for a loan amounting to Tshs. 160,000,000.00. This time the loan was intended to facilitate the lending to members of the SACCOS in financing their various business and social activities. **Exhibit P.2** was tendered as evidence to support the witness testimony.

The witness contended that the first tranche of the loan was amounting to Tshs. 300,000,000.00 was to be repaid in five (5) years. She also stated that, the Saccos was able to repay Tshs.

141,803,390.98 being monthly instalments for the period between September 2013 up to September, 2015. The witness added that, the second tranche of the loan was repaid to the tune of Tshs. 63,320,572.26. The witness complained that before the end of the term of the facility the Bank issued a Notice of Default and a Notice to sale of the suit property. In a bid to settle the matter the SACCOS involved the Tanzania Co-operative Development Commission (TC DC) to discuss with the Bank. Prior to conclusion of discussions CRDB issued a Notice of Sale, prompting the plaintiff to file the present suit.

During cross-examination PW1 said the Tshs. 300,000,000 were granted for construction of the ground floor and Mezzanine floor which were duly constructed. She added that the loan was to be repaid by equal monthly instalments of Tshs. 7,455,772. 73 up to 31<sup>st</sup> August, 2018. She admitted that the SACCOS did not pay all the instalments in accordance with the schedule. PW1 admitted that the suit property was part of the security to secure the two loans and said she was aware that upon default the suit property was to be sold to recover the loan.

In further cross - examination PW1 said the Tshs160,000,000 was disbursed and loaned to the SACCOS members. Her further testimony was that the loan was to be repaid in 24 equal monthly instalments up to 31<sup>st</sup> January, 2016. She said the loaned amount was not fully repaid leading to

issuance of a default notice by the Bank. When asked whether she had proof of repayment of part of the loan, PW1 said she did not have the Bank statement to prove the payments were made. She also admitted failure to make monthly Instalments amounted to breach of the agreed contract. She was not re- examined.

That concluded the plaintiff case.

The only witness for the defence was one **Godbless Francis Tumaini DW1** a Recovery Manager from the 1<sup>st</sup> defendant. He recounted that, sometimes in 2013 the plaintiff took a loan amounting to Tshs. 300,000,000 for construction of four Investment property and pledged the suit property as security. He said the loan was to be repaid through monthly installments of Tshs. 7,400,000. The witness stated that the repayments were duly made up to 2015 and in 2016 the plaintiffs defaulted leading to issuance of a Notice of default and subsequent appointment of an auctioneer.

DW1 testified in chief that, subsequent issuance of the first tranche of the loan, a second tranche amounting to Tshs. 160,000,000 advanced to the plaintiff on 06<sup>th</sup> January, 2014 a working capital to be advanced to members as laws. The loan was to be repaid in 24 equal monthly instalments of Tshs. 7,900,000. DW1 stated that the suit property was pledged as security for the loan. It was his testimony that the plaintiff failed to repay the loan and hence a notice of default and notice of sale was issued.

In his further testimony in chief, the witness stated that upon default and issuance of a Notice of Default which was followed by an appointment of an auctioneer the plaintiff filed the present suit. He stated that at the time of filing the suit, the combined outstanding amount plus penalties and interest stood at Tshs. 619,500,000.00 out of which Tshs. 411,500,000 is default amount from the first tranche and Tshs. 208,000,000 related to the second tranche. Further to that, DW1 prayed that the suit be dismissed with costs and, the plaintiff having failed to pay the outstanding amount plus interest, the bank allowed to recover from the security.

In cross examination, DW1 stated that when issuing the loans, the bank was satisfied with the plaintiff's turnover and capacity to repay the loan. He did not recall the value of the suit property but stated the same was part of the evaluation report. He stated that during settlement discussions the plaintiff stated they had a partner who was ready to repay the loan and were given sixty (60) days but nothing was paid. The witness was unsure of what constituted the principal amount in the default amount stated. However, he insisted that the auctioneer is issued with the default amount due to be recorded and not the repaid amount.

His response in re-examination was that the value of the disputed property was not in dispute and that the loan was issued



in compliance with all the procedures and the plaintiff have failed to repay the same. That, in essence, concluded the summary of the defence case.

Having summarized the testimony and evidence from both parties my duty now is to respond to the issues framed for determination and I will do so in seriation.

In the first issue I am being called to answer the question whether the plaintiff is in default in servicing the loan as agreed in the loan agreement. In accordance with evidence presented before the Court, there is no dispute that the plaintiff was advanced with two loan facilities from the 1<sup>st</sup> defendant. This is witnessed by the testimony of PW1 who stated that the two loans amounting to Tshs. 300,000,000.00 and Tshs. 160,000,000.00 for construction of an investment building and capital for loans to its members respectively. This also supported by the testimony of DW1 as well as the **Exh. P1** and **Exh P.2**, the Loan Facility Letters executed between the plaintiff and 1<sup>st</sup> defendant for advancement of the first and second loan respectively.

In accordance with **Clause 7.** of the Loan Facility Letters, Exh. P.1, the first tranche of the loan amounting to Tshs. 300,000,000.00 was to be repaid in 60 equal instalments of Tshs. 7,455,772.73. According to clause 11(a) read together with **Clause 11(d)** of Exh. P.1 it was an event of default if the plaintiff (borrower) fails or defaults in paying the agreed instalment when

they became dues and has not been repaid for thirty days (30) days. A similar clause was included in Exh. P.2 which advanced a loan of Tshs. 160,000,000.00 to be repaid in 24 equal monthly instalments of Tshs. 7,910,762.25.

In her testimony PW1 admitted that the plaintiff could only afford to make monthly installments between September, 2013 and September, 2015. Her claim was that Tshs. 141,803,390.98 was paid. When cross-examined she admitted that no further payments were made and that they defaulted in repayment of the loan. As for the second tranche, PW1 said they were able to repay around Tshs. 63,320,572.26. Despite the above admission no evidence was provided to prove that payments were actually made.

However, even assuming the amount claimed to be paid were correct, the said amounts fall short of the agreed repayment schedule. In accordance **Clause 7** of Exh. P.1, the total principal amount plus interest was Tshs. **447,346,363.81** for the first tranche of the loan; and **Clause 7** of Exh. P.2 provided that, the principal amount plus interest for the second tranche was Tshs. **189,858,294.09**. Subtracting the alleged amount claimed to be paid by the plaintiff from the amount in Exh. P.1 and Exh. P.2 would note that the plaintiff was in default of an estimated **Tshs. 305,542,972** and **Tshs. 126,537,721** for the first and second loans respectively. The total default amount would be around Tshs. 432,088,693. In accordance with **Clause 11(a) and 11 (o)** in the

respective amount became due and payable when the plaintiff defaulted in making monthly instalments.

DW1 testimony was that the plaintiff started defaulting around 2016, they visited her to discuss alternative settlement arrangements. In the discussions, the plaintiff said they have a partner who was willing to repay the loan. A grace period of 60 days was issued, however, upon expiry of the same no payments were made. He stated that at the institution of the suit the total principal amount plus interest had reached Tshs. 619, 500,000.00. The amount remained due and payable by the plaintiff.

On the basis of the above analysis, I am satisfied that the plaintiff is in default of the terms and conditions agreed by the parties through the Loan Facility Letters Exh. P.1 and P.2.

The second issue is whether the plaintiff notified the 1<sup>st</sup> defendant of its joint venture with Chimbuko Vikona Limited. The issue was framed based on the plaintiff claim in the plaint, paragraphs 9, 10 and 11, where the plaintiff claimed to have executed a joint venture with Chimbuko Vikoba Limited to proceed with the construction of the Investment house; and that upon signing the joint venture a request and approval of the 1<sup>st</sup> defendant was sought but there was no response thereof from the 1<sup>st</sup> defendant. However, PW1 did not provide any testimony or evidence in relation to this transaction. I suspect, for some

reasons, she abandoned this line of argument. That said, the second issue can only be answered in the negative.

The third issue for determination is whether the 1<sup>st</sup> defendant is justified in exercising his rights under the mortgage. In accordance with **Clause, 8 (Security)**, specifically **Clause 8(a)** item 3 of the table in both agreements one of the securities for the loan was:

*"First charge legal mortgage over landed property located at Temeke Boko Area Dar es Salaam with Plot No. 47 Certificate of title No. 390964 Block H Temeke Municipality in the name of Temeke Women Savings and Credit Co-operative Society Limited. The building is under construction".*

Under **Clause 11(a)** of both agreements parties set up a mechanism for actions in case of breach of the fundamental terms of the Loan Facility Letters. It was also thus agreed that:

***"Upon any breach of any of the foregoing terms and conditions covenants and/or breach of any provision of security documents created thereto, the balance of the Loan together with interest then outstanding shall immediately become payable and fall due to be discharged. Without prejudice to the generality of the foregoing the principal moneys and interest thereon shall immediately become payable and***

*fall due to be discharged without demand if”.*  
*[Emphasis mine]*

One of the events of default as payment of the agreements as and when they become due. The condition was provided for under **Clause 11(0)** in both agreements. The clause read:

*“The borrower fails or defaults in paying the agreed instalments when they fall due. For the purpose of this condition, default shall be proved when an instalment is due and has not been repaid within thirty (30) days.”*

The rights of the mortgagee, that is the 1<sup>st</sup> defendant are provided for under **sections, 126, 127 and section 132 of the Land Act, Cap. 133 R.E. 2019**. In accordance with section 127 (1) where the Mortgagor default in repayments of the principal amount and interest, the mortgagee is required to serve the Mortgagor with a notice of default. The section reads:

***“127.-(1) Where there is a default in the payment of any interest or any other payment or any part thereof or in the fulfillment of any condition secured by any mortgage or in the performance or observation of any covenant, express or implied, in any mortgage, the mortgagee shall serve on the mortgagor a notice in writing of such default.”*** *[Emphasis mine]*

Further to that, section 132 (1) of **the Land Act** (supra) provides that upon expiry of 60 days from the date of Service of a

Notice of Default under section 127, the Mortgagee may proceed to sell the Mortgaged land. For ease of reference section 132 provides that:

***"132.-(1) A mortgagee may, after the expiry of sixty days from the date of receipt of a notice under section 127, sell the mortgaged land.***

*(2) A mortgagee may exercise the power of sale in relation to any such land as referred to in paragraph (a) or (b) of subsection (5) of section 130.*

*(3) The exercise by a mortgagee of his power of sale shall not be a disposition which is subject to the provisions of section 38.*

*(4) Where a sale of mortgaged property shall be made by means other than public auction, a mortgagee shall be required to give notice of sale of not less than ten days to the mortgagor and to any third party holding a registered interest in the property." [Emphasis mine]*

The takeaway from section 132 above is that the mortgage power of sale under S. 126 of **the Land Act** (supra) are only exercisable upon issuance of a 60 days' Notice of Default and Notice of sale of the suit property under S. 132(4) cited above. The requirement to issue a Notice of Sale is also provided for under **section 12(2) of the Auctioneers Act Cap. 227 R.E. 2002.**

Now, I will apply the above position of the law in the present case; Having resolved the first issue in the affirmative, that the plaintiff defaulted in repayment the outstanding principal amount plus interest, it therefore follows that the 1<sup>st</sup> defendant had a legitimate right to exercise their power of sale under the loan facility letters and the provisions of Cap. 113. The third issue is answered in the affirmative.

However, I should point out that, the powers of sale explained above are only exercisable upon compliance of the mandatory provisions of **the Land Act Cap. 113 R.E. 2019** and **the Auctioneers Act Cap. 227 R.E. 2002**. Such procedure includes, but is not limited to, issuance of the Mandatory 60's Days' Notice of Default, and 14 Days' Notice of Sale as well as public auction notice.

I will now proceed to the final issue and determine the reliefs accorded to the parties. The plaintiff prayed for:

- (a) Permanent injunction to restrain the defendants from disposing the suit property;
- (b) Costs of the suit; and
- (c) Any other reliefs as may be appropriate.

Having resolved the first and third issue favour of the defendants to the effect that the plaintiff was in default in servicing the loan, and that the 1<sup>st</sup> defendant are justified in exercising their

right to sale, I am satisfied that the prayer for permanent injunction cannot be sustained.

To that end, I must conclude that the plaintiff case must be fail. In the result, the suit is, accordingly, dismissed with costs.

**DATED at DAR ES SALAAM this 09<sup>th</sup> day of JULY, 2021.**



A handwritten signature in blue ink, appearing to read "S.M. Kalunde". The signature is stylized and fluid.

**S.M. KALUNDE**

**JUDGE**