

IN THE HIGH COURT OF TANZANIA  
(LAND DIVISION)  
AT DAR ES SALAAM  
LAND CASE NO.9 OF 2021

FLORA CELESTINE KAIMUKILWA ..... PLAINTIFF

VERSUS

ECO BANK TANZANIA ..... 1<sup>ST</sup> DEFENDANT

MOHAGASHI INVESTMENT COMPANY LTD ..... 2<sup>ND</sup> DEFENDANT

KELVIN RAPHAEL MZELELA ..... 3<sup>RD</sup> DEFENDANT

HARVEST AUCTION MART LTD ..... 4<sup>TH</sup> DEFENDANT

**JUDGMENT**

*Date of the last Order: 25.07.2022*

*Date of Judgment: 31.08.2022*

**A.Z. MGEYEKWA, J**

This suit was lodged before this court by the Plaintiff herein FLORA CELESTINE KAMUKILWA against the Defendants herein ECO BANK TANZANIA, MOHAGASHI INVESTMENT COMPANY LTD, KELVIN

RAPHAEL MZELELA, and HARVEST AUCTION MART LTD. Plaintiff is claiming against the defendants jointly and or severally for declaratory orders that the house situated at Yombo Vituka is a matrimonial home and cannot be disposed of without the spousal consent.

The facts of the case can be deciphered from the pleadings and evidence on record go thus: the Plaintiff claims against the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Defendants jointly and severally for a declaration that the alleged mortgage deed to secure the loan facility is null and void an order for a permanent injunction against the 1<sup>st</sup> and 4<sup>th</sup> Defendants from selling and of disposing of the suit premises situated at Yombo Vituka and general damages to be assessed by the Court and cost of the suit.

The Plaintiff is claiming that she and the 3<sup>rd</sup> Defendant are husband and wife and the 3<sup>rd</sup> Defendant acquired a loan of Tshs. 800,000,000/= from the 1<sup>st</sup> Defendant and the said loan was secure the Plaintiff's and the 3<sup>rd</sup> Defendant's property situated at Yombo Vituka and the loan was fully paid and the premises was discharged. The Plaintiff alleged that she was surprised by an announcement made by the 4<sup>th</sup> Defendant on 13<sup>th</sup> January, 2021 under the instruction of the 1<sup>st</sup> Defendant to auction the suit premises alleging that it was mortgaged to the 1<sup>st</sup> Defendant to secure another loan.

The Plaintiff made a further inquiry and discovered that the 3<sup>rd</sup> Defendant mortgaged the said suit premises to the 1<sup>st</sup> Defendant in favour of the 2<sup>nd</sup> Defendant, and he was advanced a loan facility to a tune of Tshs. 500,000,000/= without the consent of the Plaintiff. The Plaintiff claimed that she has never signed the spousal consent.

In her Complaint, the Plaintiff prays for Judgment and Decree against the defendants jointly and severally for the following orders as follows:-

- a) A declaration order that the mortgage deed entered between the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Defendants is null and void.*
- b) An order for a permanent injunction against the 1<sup>st</sup> and 4<sup>th</sup> Defendants from selling and or disposing of the suit premises.*
- c) An order for payment of general damages is to be assessed by the Court.*
- d) Costs of the suit.*
- e) Any other relief(s) the Court may deem just and fair to grant.*

On the other hand, the Defendants, in response to the Plaintiff's claims, has filed a Written Statement of Defence and a Counter Claim. The Defendant in the Counter Claim prays for the dismissal of the Plaintiff's suit in its entirety with costs and Judgment and Decree be entered for the Defendant as follows:-

1. *For payment of an outstanding amount of Tanzania Shillings Nine Hundred Forty Million One Hundred Twelve Thousand Eight Twenty-Seven (TZS 940,112,827) being repayment of the Outstanding Credit Facilities as of the 12<sup>th</sup> day of February, 2021 extended to the 1<sup>st</sup> Defendant by the Plaintiff and guaranteed by the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants vide the Credit Facility Agreements dated 05<sup>th</sup> January, 2018 and 09<sup>th</sup> July, 2019 respectively duly executed by the 1<sup>st</sup> Defendant.*
2. *For payment of interest on the total outstanding amount as stipulated in 1 above at the rate of 22% per annum computed and accruing from 12<sup>th</sup> February, 2021 to the date of Judgment.*
3. *An order for payment of interest on the decretal amount mentioned in Paragraphs (a) and (b) above at the Court's rate of 12% per annum, computed from the date of the judgment to the date of payment in full.*
4. *In the alternative, upon failure to pay the amounts as prayed for in paragraphs 1, 2, and 3 herein, an order for the realization of the mortgaged properties identified as;*
  - 4.1 *Mortgaged landed property in Plot Number 2529, Block "A", Yombo Vituka Area Temeke Municipality with Certificate of Title Number 144188 in the names of the 2<sup>nd</sup> Defendant,*

4.2 *Landed Property in Plot 2531, Block "A", Yombo Vituka Area within Temeke Municipality with Certificate of Title Number 143509 in the name of the 2<sup>nd</sup> Defendant.*

4.3 *Any other orders or reliefs as the Honorable Court may deem for and just to grant.*

It is imperative at the outset to point out that, this matter has also gone through the hands of my learned sister Hon. Mango, J, and Hon. Hamza, Deputy Registrar conducted the 1<sup>st</sup> Pre-Trial Conference and Mediation respectively. I thank my predecessor for keeping the records well and on track. I thus gathered and recorded what transpired at the disputed land and now I have to evaluate the evidence adduced by the witnesses to determine and decide on the matter in controversy.

At all the material time, the Plaintiff was represented by Mr. Desidery Ndibalema, learned Advocate, the 1<sup>st</sup> Defendant had the legal service of Mr. Claudio Msando, learned Advocate, and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were represented by Mr. Paul (as a Legal Attorney of Kelvin Raphael Mzelela). Therefore, following the prayer by the Plaintiff's Advocate to proceed *ex parte* succeeding the absence of the 4<sup>th</sup> Defendant, this court granted the Plaintiff's Advocate prayers. The matter proceeded *ex parte* against the 4<sup>th</sup> Defendant.

During the Final Pre-Trial Conference, three issues were framed for determination as follows:-

- 1) *Whether the Plaintiff in the main suit issued spousal consent to the restricted facility issued in 2018 and 2019.*
- 2) *Whether the Defendant is the Counter Claim is indebted.*
- 3) *What relief are parties entitled to?*

In what seemed to be a highly contested trial, the Plaintiff led evidence of two witnesses and the Defendants summoned two witnesses. The Plaintiff's case was founded on Flora Celestin Kaimukilwa, who testified as **PW1**, and Abas Mfaume Sakapala (**PW2**). In a bid to establish their defence case, the 1<sup>st</sup> Defendant paraded one witness; Mr. Mbwezeleni Kambangwa (**DW1**), and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants also paraded one witness; Paulo William who testified as **DW2**. The 1<sup>st</sup> Defendant filed a witness statement of Mbwezeleni Kambangwa.

It is needful, though, to mention that the following exhibits were adduced in support of her testimony The Plaintiff's side tendered one documentary exhibit; a National Identification and Motor vehicle licence (Exh.P1 collectively) and a Certificate of Death dated 10<sup>th</sup> October, 2018. On his side,

the 1<sup>st</sup> Defendant tendered seven documentary exhibits to wit; Witness Statement (Exh.D1), Credit Facilities Agreements dated 18<sup>th</sup> May, 2017, 05<sup>th</sup> January, 2018, and 21<sup>st</sup> February, 2018 collectively were admitted as exhibit D2. Facility Agreement dated 9<sup>th</sup> July, 2019 (Exh.D3), Mortgage Deed dated 18<sup>th</sup> May, 2017, 26<sup>th</sup> February, 2018, 10<sup>th</sup> July, 2018, and copies of Certificate of Occupancies collectively were admitted and marked as exhibit D4. Spousal Consent dated 10<sup>th</sup> July, 2019 (Exh.D5), Notice of Default dated 30<sup>th</sup> March, 2020 (Exh.D6) and a Bank Statement (Exh.D7).

After the trial, the Advocates from both parties were allowed to address the Court by way of written submissions. Both learned Advocates complied with the court order and their final submissions were considered in articulating this Judgment.

Mr. Ndibalema was the first one to kick the ball rolling leading PW1 to express the facts. PW1 testified to the effect that she is residing in Yombo Vituka. PW1 stated that Kelvin Raphael Mzelela is her husband they are blessed with 2 children. PW1 testified that in 2017, Kelvin informed her husband that he planned to take a loan to develop Mohagashi Company. PW1 testified that she did not approve her husband's proposal to use the

matrimonial properties as a security which is located at Yombo Vituka. She testified that they have two houses located in Yombo Vituka.

PW1 went on to testify that she was astonished to hear the announcement made by the Court Broker to sale of their matrimonial houses and she was informed that the Mohagashi Company and Kelvin are in debt. PW1 testified that her husband told her that the Mohagashi Company took the loan to a tune of Tshs. 500,000,000/=. PW1 testified to the effect that the signature on the spousal consent was forged PW1 claimed that the signature appearing in the document is not her signature and the document is not properly dated it bears on the year 2018. PW1 urged this court to compare the signatures with her NIDA ID or motor vehicle licence and find that the signatures are different. To support her testimony she tendered a Spousal Consent, National Identification Card, and Motor Vehicle License.

When PW1 was cross-examined by Mr. Claudio, she testified to the effect that she is the legal wife of Kelvin but she did not tender any marriage certificate and did not tender any document or certificate of occupancy to prove that the suit property is a matrimonial house. She said that the title is with the Bank (1<sup>st</sup> Defendant). Paragraph 6 of the Plaintiff. PW1 said that she did not approve the loan and she is not aware of the debt because it was



between Kelvin and Mohagashi Company and ECO Bank. PW1 testified that she did not approve both loans. She testified that the signature appearing on spousal consent is forged and she did not report the matter to the police.

PW2, Abas Mfaume Sakapala testified to the effect that Kessy Abubakar Sagabali his father and passed away on 13<sup>th</sup> September, 2017 and he was a close friend of Kelvin Raphaeli Mzelela. He testified that the two had a business together called Mohagashi Invest Co. Ltd. He testified that the Bank informed him that they serviced the loan. PW2 testified that the documents show that the Certificate of Title was collected in November, 2021 and Kessy Abubakar Sakapala signed the document on 10<sup>th</sup> January, 2018 while by that time he was not alive. He said that the said document might have been a forgery and his signature is appearing in another document but the Bank never called him to sign the document.

When PW2 was cross examined by Mr. Claudio, he testified that he is a witness and has not tendered any document to prove that his father was one of the partners in Mohagashi Company. He said that he did not report to the police that the documents were forged and has not tendered any document to prove that Mohagashi Company paid the loan.

The first Defendant on his side called one witness; Mr. Mbwezeleni Kambangwa who filed a witness statement in court and had an opportunity to tender his documents. In his statement, he testified to the effect that he is working with the Bank and in 2020 the 2<sup>nd</sup> Defendant in the Plaint took a loan from our Bank. To substantiate his testimony he referred this court to Credit Facilities (Exh.D1) and Exh.D2) He testified that they mortgaged the suit premises located in Yombo within Dar es Salaam Region. He testified that in 20202, Kelvin Mzelela was married to Flora Celestina Kaimukilwa. DW1 testified that the attached Certificate of Title is in the name of Kelvin.

DW1 went on to testify that the first loan was taken in 2014 and the Variations prove that there was a previous loan taken in 2014. He added that the other document was issued in 2017 and the Bank facility shows that Flora Celestine gave her consent. He testified that the spousal consent was signed on 10<sup>th</sup> July, 2019. He went on to testify that Kelvin took various loans. DW1 testified that the property was secured by two mortgaged properties and one mortgaged was signed in January, 2018. He testified that exhibit P2 is a Certificate of Death of Abubakar dated 13<sup>th</sup> September, 2017, and at the time of signing the document, Abubakar was not alive. He testified that there was a restructuring of the loan and the security was the same.

The first Defendant did not end there, he testified that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants took a loan to the tune of Tshs. 400,240,000/=, on 12<sup>th</sup> July, 2017 the 3<sup>rd</sup> Defendant took a loan to a tune of Tshs. 676,000,000/= and on 17<sup>th</sup> January, 2018 he took a loan to the tune of Tshs. 288,000,000/= all were deposited in this account. He went on to state that the Bank wants to sell the house because the borrower received the loan and the suit premises were used as mortgaged properties to guarantee the loan which they took from the bank.

DW2, Paulo William testified that the 2<sup>nd</sup> Defendant applied for a loan from ECO Bank to a tune of Tshs. 1,120,000,000/= and the said loan was secured by three Certificate of Titles; two Certificate of Titles related to properties located at Yombo Vituka and one Certificate Titles is in the name of Kessy Abass Abubakar, located a Mtoni Kijichi. He added that they took a loan without any spousal consent. DW2 testified that they managed to repay the loan and the Bank returned one Certificate of Occupancy. DW2 testified that in 2019, they managed to restructure the loan, hence, they applied for another loan to the tune of Tshs. 776,900,000/=. He testified that the 3<sup>rd</sup> Defendant informed the Loan Officer that his wife has not approved the said

loan but the Loan Officer told him that he will work on it. DW2 testified that the company business was dropping, thus we were not able to re-service the loan. DW2 testified that in 2020 they managed to pay the whole loan but at the moment they are required to pay only penalties and interest.

Having heard the testimonies of all parties and considering the final submission of the Plaintiff and 1<sup>st</sup> Defendant, I am in a position to confront the issues framed for determination of the present dispute between the parties. The first issue that was drawn at the Final Pre-Trial conference was, as shown above, *whether the Plaintiff in the main suit issued a spousal consent to the restricted facility issued in the years 2018 and 2019.*

In civil proceedings, the burden of proof lies with the one who alleges. See the case of **Govardhan P. Thakase v Janaradhan G. Thakase**, 2005 AIHC 1276. The Plaintiff is the one who alleges the existence of fact thus, she PI must prove that she has an interest in the mortgaged property. I have taken time to scrutinize the pleadings and the Plaintiff's evidence and I noted the Plaintiff simply testified that the 1<sup>st</sup> Defendant is his husband. The question which immediately comes to the fore at this juncture is whether the Plaintiff was a legal wife of the 3<sup>rd</sup> Defendant. The issue can only be answered in the affirmative if the Plaintiff had an interest in the suit premises. The facts and

evidence, in this case, show that the Plaintiff did not prove if she has interest in the suit premises.

Additionally, I have scrutinized the Plaintiff's testimony and noted that the Plaintiff has failed to describe the matrimonial property in paragraph 5 of the Plaintiff. The **suit premises** was described in the following words:-

*“...an order for permanent injunction against the 1<sup>st</sup> and 4<sup>th</sup> Defendants from selling and or disposing the **suit premises situated at Yombo Vituka**”. [Emphasis added].*

A glance at PW1 reliefs, she prayed for this court to order a permanent injunction against the 1<sup>st</sup> and 4<sup>th</sup> Defendants from selling and disposing of the suit premises. During examination in chief, the Plaintiff termed the suit premises as a matrimonial property, without mentioning the Plot, Block and Certificate of Title numbers. Likewise, the learned counsel for the Plaintiff in his final written submission simply stated that the premises is situated at “Yombo with CT No....” without mentioning the Plot and Certificate of Title numbers. Examining the Plaintiff, the same does not contain a description the property sufficient to identify it.

Under Order VII Rule 3 of the Civil Procedure Code Cap. 33, the Plaintiff is bound where the subject matter of the dispute is an immovable property to describe the property sufficient to identify it. For ease of reference, I reproduce Order VII Rule 3 hereunder:-

*“3. Where the subject matter of the **suit is immovable property, the plaintiff shall contain a description of the property sufficient to identify it and, in case such property can be identified by a title number under the Land Registration Act, the plaintiff shall specify such title number.**”* [Emphasis added].

Therefore, the failure of the Plaintiff to prove is she is the legal wife of the 3<sup>rd</sup> Defendant and failure to describe the suit premises left a lot to be desired. This Court is uncertain whether the Plaintiff has a genuine interest in the suit premises. The Plaintiff is the one who has lodged her case before this court thus the court cannot adopt a speculative explanation. In the case of **Rosetta Cooper v Gerlad Nevil and another** [1961] EA 63, the court held that:-

*“It is not open for the court to adopt a speculative explanation without any evidence to support it.”*

It is trite law that where allegations are based on a capricious or fictional set of facts the trial court should attach no weight to it. This unadventurous principle of evidence is in consonance with the provisions sections 110 and 111 of the Evidence Act, Cap. 6 [R.E 2019]. The legendary authors of Sarkar on Sarkar's Laws of Evidence, 18 Edn., M.C. Sarkar, S.C. Sarkar, and P.C. Sarkar, published by Lexis Nexis, posted the following commentaries at page 1896:-

*"... the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof. It is an ancient rule founded on the consideration of good sense and should not be departed from without strong reason... The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden...."* [Emphasis added].

This position has been cemented by a plethora of authorities from the Court of Appeal of Tanzania and some of the cases include; **Gabriel Simon Mnyele v R**, Criminal Appeal No. 437 of 2007, and **Agatha Mshote v Edson Emmanuel & Others**, (Civil Appeal No. 121 of 2019) TZCA 323; July, 2021 TANZLII.

Guided by the above excerpts, I hold an imperturbable view that the Plaintiff has failed to persuade the Court that she has an interest in the suit landed property. Considering the fact that the 3<sup>rd</sup> Defendant did not even bother to appear in court to tell the court if the Plaintiff is his legal wife. This implies that the Plaintiff is not a legal wife of the 3<sup>rd</sup> Defendant.

The Plaintiff might think that as long as there is spousal consent then she has an automatic right to raise her claims, it is not so simple, the spousal consent by itself cannot stand as a shield because the 3<sup>rd</sup> Defendant made the bank believe that it was a spousal consent, now he wants to rely on the spousal consent to defeat the Plaintiff's valid claims. The law does not permit the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to benefit from their own wrong or breach. In the case of **Abu Chiaba Mwatech Enterprises Ltd v Equatorial Commercial Bank Ltd** [2021 eKLR the Court cited with approval the case of **Abu Chiaba Mohamed v Mohamed Bwana Bakari & 2 Others** [2005] eKLR, the Court held that:-

*"...no man can be allowed to rely on his own wrong to defeat the otherwise valid claim of another man... he cannot be allowed to take advantage of his wrong...the law will not and cannot permit such a party to rely on his own wrong to defeat an otherwise valid petition."*



Applying the above authority in the instant suit it is clear that this court cannot entertain the 3<sup>rd</sup> Defendant's false.

In the light of the above findings, I am constrained to agree with the Plaintiff and her counsel that the Plaintiff had valid claims over the suit premises. Therefore, I proceed to dismiss the Plaintiff's case without costs.

Next for consideration is the second issue *whether the Defendants in the Counter Claim are indebted*. Before determining of this issue, I would like to set the records clear that PW2 in his testimony testified that Kessy Abubakar Sakapala passed away, and to support his testimony he tendered a death certificate (Exh.P2) for that reason, I find it is not proper for the Plaintiff in the Counter Claim to file a case against a deceased person. Therefore, I proceed to expunge the name of Kessy Abubakar Sakapala from the Counter Claim and court records.

The second issue revolves around paragraph 11 of the Amended Written Statement of Defence and paragraph 12 of the Amended Counter Claim. The business relationship between the Plaintiff, first and second Defendants started in 2017 when the 1<sup>st</sup> Defendant applied for a credit facility of Tshs. 1, 120, 000,000.00/= , the said credit facility terms were

varied vide a facility agreement dated 5<sup>th</sup> January, 2018 and 21<sup>st</sup> February, 2018. The Plaintiff alleged that they had a separate agreement with the 1<sup>st</sup> Defendant vide a Credit Facility Agreement dated 9<sup>th</sup> July, 2019 and the Bank approved the restructuring of the loan.

The legal mortgage was a property known as Plot No. 2531 Block 'A' Yombo Vituka within Temeke Municipality with Certificate of Title No. 144188 in the name of the 2<sup>nd</sup> Defendant and Plot No. 2531 Block 'A' Yombo Vituka within Temeke Municipality with Certificate of Title No. 143509 in the name of the 2<sup>nd</sup> Defendant.

The Plaintiff in the Counter Claim is claiming for outstanding amount that has to be paid by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to a tune of Tshs. Nine Hundred Forty Million One Hundred Twelve Thousand Eight Twenty Seven (Tshs. 941,112,827). The Bank claimed that they extended a loan to the 1<sup>st</sup> Defendant and guaranteed by the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> 5<sup>th</sup>, and 6<sup>th</sup> Defendants vide two Credit Facilities. To substantiate their claims the Plaintiff in the Counter Claim tendered Credit Facility Agreement dated 5<sup>th</sup> January, 2018 (Exh.D2) and Credit Facility Agreement dated 9<sup>th</sup> July, 2019 (Exh.D3).

The 7<sup>th</sup> Defendant when she was cross-examined by Mr, Msando admitted that her husband secure a loan and DW3 testified to the effect that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are not in debt. In his final submission, Mr. Desidery strongly disputed the Plaintiff's claims. He stated that the claims are tainted with a lot of irregularities. Kelvin Raphel Mzelela, 2<sup>nd</sup> Defendant was the main witness in this Counter Claim since he was the one who signed the Credit Facilities and he represented the 1<sup>st</sup> Defendant.

The evidence reveals that the Certificate of Title bears the name of the 1<sup>st</sup> Defendant in the counter claim, Kelvin Raphael and Samweli Gati guaranteed the Credit Facility (Exh.D3). The Credit Facility (Exh.D2) was guaranteed by Samweli Gati, Kelvin Raphael, Abasi Mfaume Sakapala and Kessy Abubakar Sakapala. On 30<sup>th</sup> March, 2020, the Plaintiff issued a Notice to pay Kelvin Raphael Mzekela. The Plaintiff proved that the Bank reminded the 2<sup>nd</sup> Defendant to service his debts taken on 5<sup>th</sup> January, 2018, and approved restructuring loan dated 19<sup>th</sup> July, 2019. To substantiate his testimony DW1 tendered a Notice of Default dated 30<sup>th</sup> March, 2020 (Exh.D6).

For the aforesaid findings, it is clear that the 2<sup>nd</sup> Defendant was notified that he has defaulted to pay the principal and interest the outstanding amount to a tune of Tshs. 720, 544, 293.66. Also the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were informed that failure to pay the said amount within 60 days from the date of receiving the notice, the Bank will exercise any of the mortgagee's remedies accordingly to the law. It is evident that the outstanding amount of the facilities by 12<sup>th</sup> February, 2021 was to a tune of Tshs. 941, 112, 827 and the Defendants failed to dispute the outstanding amount.

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not appear to defend their case and instead, Paulo (DW2) obtained a Power of Attorney to represent them in the suit. DW2 before commencing of the hearing of the case, filed a Written Statement of Defence and there is an annexure attached to the Written Statement of Defence, whereby Kelvin Raphael Mzelela a Managing Director of the 1<sup>st</sup> Defendant authorized Paul Rweyemamu to represent them in the present case. However, an annexure attached to the Written Statement of Defence is not evidence, DW2 was required to tender it court as an exhibit in order to form part of his testimony. This was well articulated in the case of **Total Tanzania Ltd v Samwel Mgonja**, Civil Appeal No.70 of 2008, the Court of Appeal of Tanzania held that:-

*“As annexures attached to the plaint or written statement of defence are not evidence (see **God Bless Jonathan Lema v. Mussa Hamisi Mkanga and 2 Others and Sabry Hafidhi Khaifan v. Zanzibar Telecom Ltd (Zantel) Zanzibar (supra)**)... In line with what we have held in our previous decisions, we are enjoined to follow suit. **We are therefore satisfied that the learned trial Judge erred in law by acting and relying on annexures TTL 2 and SMA 2 which were not admitted in evidence as exhibits. We find merit on the first ground of appeal.**” [Emphasis added].*

Applying the above authority, it is certain that this court cannot rely on the said Power of Attorney as evidence, therefore I proceed to expunge DW2 evidence from the court record.

The evidence on record reveals that Kesy Abubakar Sakapala passed away, however, this ground cannot take out the liability of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to pay their debts. I am saying so because Kelvin Raphael Mzelela was aware of the death of his partner and even PW2 was aware but he proceeded to sign the facilities and they purposely included the name of the deceased in their documents. They did not bother to inform the Bank about the demise of Kesy Abubakar Sakapala. There is no document

tendered in court to prove that the Bank was informed that Abubakar passed away.

The 2<sup>nd</sup> Defendant cannot benefit from his own fault/ wrongs. See the cases of **Leila Jalaludia Haji Jamal v Sharifa Jalaludia Haji Jamal**, Civil Appeal No. 55 of 2003, **Chain Food International Company Limited v Rena Calist and Alpha Choise Limited**, Land Case No. 49 of 2015 (unreported). The 1<sup>st</sup> and 2<sup>nd</sup> Defendants in the Counter Claim were important witnesses to defend their case. Also, Samweli Gati signed the Credit Facilities but was not called to testify in court. In the circumstances, this court is entitled to draw an adverse inference against that failure. I find comfort in this stance in the holding of this court in **Hemedi Saidi v Mohamedi Mbilu** [1984] TLR 113, in which, quoting from the headnote, it was held:-

*“Where, for undisclosed reasons, a party fails to call a material witness on his side, the court is entitled to draw an inference that if the witnesses were called they would have given evidence contrary to the party's interests.”*

Applying the above authority in the instant case, failure of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to testify and call a material witness in court and defend their case means they are aware that they defaulted to pay the principal and

interest the outstanding amount to the tune of Tshs. 940,112,827 as stipulated in the Counter Claim.

In the case at hand, the Plaintiff in the Counter Claim has prosecuted his case successfully and, certainly, has incurred costs in this endeavour. There are costs involved in the suit that the Defendants must shoulder. I find no sufficient reason why the 1<sup>st</sup> and 2<sup>nd</sup> Defendants should be deprived of the same. For the aforesaid reasons, the Plaintiff's prayers in the Counter Claim are granted in the following manner:-

1. *The 1<sup>st</sup> and 2<sup>nd</sup> Defendants in the Counter Claim are ordered to pay the outstanding amount of Tanzania Shillings Nine Hundred Forty Million One Hundred Twelve Thousand Eight Twenty-Seven (TZS 940,112,827) being repayment of the Outstanding Credit Facilities dated 05<sup>th</sup> January, 2018 and 09<sup>th</sup> July, 2019.*
2. *The 1<sup>st</sup> and 2<sup>nd</sup> Defendants are ordered to pay interest on the total outstanding amount as stipulated at the rate of 19% per annum computed and accruing from 12<sup>th</sup> February 2021 to the date of Judgment.*
3. *The 1<sup>st</sup> and 2<sup>nd</sup> Defendants are ordered to pay interest on the decretal amount mentioned in Paragraphs (a) and (b) above at the Court's rate of*

*7% per annum, computed from the date of the judgment to the date of payment in full.*

In the alternative, upon failure to pay the debt, I order for the realization of the mortgaged properties identified as; Mortgaged landed property in Plot No. 2529, Block "A", Yombo Vituka Area Temeke Municipality with Certificate of Title No. 144188 and Landed Property in Plot 2531, Block "A", Yombo Vituka Area within Temeke Municipality with Certificate of Title Number 143509.

4. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants to bear the costs of the case in the Counter Claim.

Order accordingly.

DATED at DAR ES SALAAM this 31<sup>st</sup> August, 2022.



*AZ*  
A.Z.MGEYEKWA

**JUDGE**

31.08.2022

Ruling delivered on 31<sup>st</sup> August, 2022 in the presence of Mr. Desidery Ndibalema, learned counsel for the Plaintiff, Mr. Claudio Msando, learned



counsel for the 1<sup>st</sup> Defendant and Mr. Paul appeared for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.



  
A.Z.MGEYEKWA

JUDGE

31.08.2022

Right to appeal full explained.