IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM

LAND APPEAL NO. 58 OF 2020
(Originating from Temeke District Land and Housing Tribunal in Land Application No.19 of 2018)

ADNAN N. MCHENI.....APPELLANT

VERSUS
EFC TANZANIA MFC LIMITED.....1ST RESPONDENT
DEBT STAR & AUCTIONEER.....2ND RESPONDENT

Date of Last Order: 22.03.2022
Date of Ruling: 25.04.2022

JUDGMENT

V.L. MAKANI, J

This is an appeal by ADNAN N. MCHENI. He is appealing against the decision of Temeke District Land and Housing Tribunal at Ilala (the **Tribunal**) in Land Application No. 19 of 2018 (Hon.Kirumbi, Chairman).

Sometimes in June 2015 the appellant herein being the guarantor to one Mohamed Juma Shomary (the **borrower**) mortgaged his house in plot TMK 025726 located at Manzini Mbagala Dar es Salaam (the **suit property**) to the 1st respondent (the **Bank**). The said mortgage was to secure the loan amount of TZS 34,000,000/= payable within 24 months. After securing the loan, the borrower disappeared, and

the Bank wanted to auction the suit property so as to recover the amount due. The appellant approached the Tribunal and prayed, among other orders, for time to sort the matter for the benefit of both the Bank and the appellant. The application was dismissed with costs. Being dissatisfied with this decision, the appellant has preferred this appeal with six grounds of appeal as reproduced hereunder:

1. *That, the tribunal failed to grant application for extension of time to recover the owed debt as the appellant is not the borrower but the guarantor, and there were efforts to get hold of the real borrower exerted by the appellant with the assistance from other quarters.*

2. *That the tribunal failed to consider the adduced evidence that there is a mixing up of records on the part of the 1st respondent, that in the cause of proceedings it was revealed that there are two distinct loans booked to the appellant (as a Guarantor). However, from the records of the appellant he did guarantee for only one loan.*

3. *That the known loan as to the understanding of the appellant was guaranteed by two guarantors, and first guarantor (not the appellant) his properties (collateral) were sold by auctioning to offset the loan liability. However, the 1st respondent does not reveal this truth.*

4. *That there are symptoms which one will adduce that there is an effort to hide the truth regarding to the true records of the debt booked to the appellant. This exercise of hiding the truth is so conspicuous as the guarantor is not mentioned by the 1st respondent, and when the appellant tried to remind him there has been a dead silence from the 1st respondent.*

5. *That the 1st respondent does not want to produce the proper chronology the main events regarding the loan, i.e., dates when the loan was disbursed; selling of the other guarantor's collateral as to how much has been realised from the sale.*

6. *That defence hearing was not done besides several orders by the tribunal for the defence to present their facts of the case, and no witness was produced before the tribunal to corroborate the 1st respondent's allegations.*

With leave of the court the appeal was argued by way of written submissions. The appellant personally drew and filed his submissions while Mr. Cleophas James, Advocate drew and filed submissions in reply on behalf of respondents.

The appellant argued that he applied to the Tribunal that he should be given more time to look for the borrower, bearing in mind that he was just a guarantor, and he could not have been monitored closely the day-to-day activities of the borrower. He said knowledge that the borrower had breached the terms of the loan agreement came to him so abruptly and he acted fast for the purpose of making consultation regarding rectification of the breach.

He argued further that the Tribunal failed to consider the evidence adduced and that there was a mix up of records on the part of the 1st

respondent, as in the cause of the proceedings it was revealed that there were two distinct loans booked to the appellant (as guarantor). However, according to the appellant, he only guaranteed one loan. The appellant referred the court to **Annexure NSR1** which he said is Land Form No.45.

The appellant went on saying that he signed the guarantee and indemnity document in respect of obligations on the 23/12/2013. That the documents were among the pre-documents before disbursement of a loan. On this appellant referred the court to **Annexure NSR2**. He said that it is vivid that the breach came before loan disbursement as other requirements such as the mortgage were not conclusively done or even initiated and this, according to the appellant, shows existence of some lies. He said to his understanding the loan was guaranteed by two guarantors. That the property of the other guarantor, namely Abas Kambangwa, was auctioned on 01/06/2014 to offset the loan liability. To support his contention, he referred the court to **Annexure NSR3** which he said is the Letter of Offer showing the presence of another guarantor. On the same basis, the appellant said that there are deliberate efforts to hide the truth of the true records of the debt in order to book the debt to the appellant's

account. That the other guarantor is not mentioned by the 1st respondent and he has several times requested for the proper records but in vain. He invited the court to look at **Annexure NSR 4** which he said is the letter to the Bank requesting for correct version of the loan.

He argued further that failure by the defence side to bring witnesses to the Tribunal to defend themselves meant that they consented to the facts as the appellant also missed the right to cross examine the defence side. The appellant prayed for the appeal to be allowed with costs.

In reply, Mr. James said that appellant has appended annexures to his submissions which is contrary to the law. That the law is clear that annexures to the submissions are not evidence. He argued the court to expunge those annexures from the records. To support his contention, counsel relied on the case of **Tanzania Union of Commercial Workers (TUICO) AFC Mbeya Cement Company Ltd vs. Mbeya Cement Company Ltd and National Insurance Corporation (T) Limited (2005) TLR 41.**

On the merit of the appeal, he said the court has no mandate of extending time for the respondent to recover the debt. He cited the case of **General Tyre East Africa Limited vs HSB C Bank PLC (2006) TLR 60** and the case of **Abeid Mwaulasi Mlowe vs NMB Bank PLC & Another, Land Case No.03 of 2019 (HC-Iringa)** (unreported). He said during trial the appellant admitted to have guaranteed one Mohamed Juma Shomari to secure the loan from the Bank. The appellant also admitted the same in cross examination and that the borrower has defaulted. That appellant failed to prove any effort to trace the borrower.

Mr. James further said that the appellant as a guarantor was duty bound to ensure repayment of the loan by the borrower. That he was aware of the terms and condition of the loan facility and as a guarantor he cannot deny the liability in case of default by borrower. That the liability does not change when borrower is not party to the suit. Counsel relied on the case of **Kilanya General Suplies Limited & Another vs. CRDB Bank Limited & 2 Others, Civil Appeal No.1 of 2018 (CAT) (unreported).** According to Mr. James it was the Tribunal's observation that the appellant also failed to join the borrower as the necessary party.

On the second ground of appeal Mr. James submitted that there was no mix up of records. He said the Tribunal considered the evidence on records and that the appellant admitted to have guaranteed Mohamed Juma Shomari and that the loan was TZS 34,000,000/= but he failed to disclose the amount in the second loan. That it was the duty of the appellant to prove the said allegation under section 110 of the Law of Evidence Act, Cap 6 RE 2019.

On the third and fourth grounds of appeal, Counsel said that it was the duty of the appellant to prove his allegation at the Tribunal that the loan was guaranteed by two guarantors and further that he ought to have joined the other guarantor. However, he said, the appellant failed to disclose the name of the said guarantor.

On the fifth ground of appeal, Counsel said that despite ex-parte hearing, the appellant was duty bound to prove the facts before the Tribunal in terms of section 110 of the Evidence Act. He prayed for the appeal to be dismissed with costs.

In his rejoinder, the appellant reiterated what was stated in the main submissions.

The main issue for consideration is whether this appeal has merit, and before I go to the merits of the appeal, I wish to address the issue of the annexures that were appended to the submissions by the appellant an issue that was also raised Mr. James.

It is trite law that appending annexures to submissions is improper and cannot be considered as part of the evidence. In the case of **Modestus Rogasian Kiwango vs Hellen Gabriel Minja, Civil Appeal No.72 of 2019 (HC-DSM),** my sister Hon.Masabo, J had this to say:

> *"As stated earlier, the appellant has appended several documents to the submission including a copy of a clan meeting and copy of marriage certificate between him and the said Agnes Onael. It is trite law that annexures should not be appended to submissions save where the said annexure is an extract of a judicial decision or text book..."*

In the present appeal, the appellant has annexed Land Forms, Letter of Offer and a letter to the Bank requesting to clear the outstanding loan. None of them belongs to the category of extract of judicial notice or that of a textbook. In other words, the annexures to the submissions are improper and this court will not give them due regard. In any case, even if the annexures were to be permitted, they still would not have assisted the appellant because they were

introduced for the first time at the appeal stage which is also not proper. The law states that nothing can be taken on board at the appeal stage that which was not addressed at the trial court/tribunal (see **Hotel Travertine & 2 Others vs. NBC [2006] TLR 133**)

As for the merit of this appeal, it should be noted that the main prayer by the appellant at the Tribunal was for an order of extension of time so that he could sort out the loan issues with the Bank. And all the six grounds of appeal raised by the appellant revolve around this issue. The appellant did not dispute the fact that he guaranteed the said loan to the borrower. Only that he needed time to amicably sort out the issues with the Bank. Now does the Tribunal have the power to extend the loan payment period once the borrower is in default? The loan agreement is a contract which binds the parties, and the Tribunal was not party to the said agreement. Therefore, the Tribunal has no mandate to interfere in anyway with the terms contained and conditions contained therein including extending time for repayment of the debt due by either the borrower or guarantor as the case may be. In the cited case of **Abeid Mwaulasi Mlowe** (supra) the court observed that:

".... the parties had entered in to the loan agreement in which they agreed on the terms and conditions pertaining to the loan agreement. Each party was bound to abide to the agreed terms and conditions of the agreement, failure to do so is a breach of contract, the other party is entitled to enforce what has been agreed."

The situation applies to the present appeal where the appellant at the Tribunal admitted that he guaranteed the suit property as a security for the loan to one Mohamed Juma Shomari who defaulted in the repayment of the loan. He also admitted that, in case of default the mortgaged property would be auctioned by the Bank to recover the amount due. In such circumstances, the Tribunal had no power whatsoever to extend the repayment period to the appellant. In other words, the Tribunal could not have varied the terms of the contract between the borrower and the guarantor. The extension or variation of repayment schedule could only be done by the parties' consent and in this case the appellant and the Bank. The Tribunal therefore was not in a position to extend the time so that the contract could be varied, or for the repayment plan to be rescheduled. In my considered view therefore the Tribunal's decision not to extend the terms of the contract was proper.

The appellant also raised the issue that they were two guarantors and the property of the other guarantor had already been sold to recover the loan. This issue was raised at the Tribunal but there were no documents to support this argument and the Tribunal said so in its judgment. Presenting the documents to prove this fact at the appeal stage is in my considered view an after thought, and as said above, new proof or arguments which were not presented at the Tribunal cannot be raised at the appeal stage.

In the result, I do not find any fault in the Tribunal's decision. Consequently, I find this appeal without any merit and it is hereby dismissed with costs.

It is so ordered.

V.L. MAKANI
JUDGE
25/04/2022