

IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
LAND CASE No. 76 OF 2022

ROSE ALOYCE MALLYAPLAINTIFF

VERSUS

KCB BANK TANZANIA LIMITED.....DEFENDANT

JUDGMENT

15th March 2023 & 28th April 2023

L.HEMED, J.

The dispute at hand stems from the mortgage facility. The plaintiff in this Court attempts to challenge the defendant's intention to sale the suit landed properties which she pledged as security for the loan.

Briefly, the background of the matter is that, sometimes in 2018 the plaintiff, **ROSE ALOYCE MALLYA** successfully applied and secured loan from the Defendant, **KCB BANK TANZANIA LIMITED** to the tune of TZS 1,000,000,000/= for purposes of financing her business. The agreed loan was to be repaid in 36 instalments, payable in 36 months at the rate of TZS 35,000,000/= with an interest of 18%.

The said loan was secured by the Plaintiff's landed properties, situated at Plot No.26 Block "B", Kijitonyama Area within Kinondoni Municipality, Dar es Salaam held under Certificate of Title No.41791 and Plot No.3 Block "25A", Kinondoni Area within Kinondoni Municipality, Dar es Salaam, held under certificate of Title No.97632. It was alleged that, at all the material times since the execution of the loan facility, the plaintiff had been smoothly servicing her loan as agreed until 2020 when she faced economic difficulties caused by various reasons, COVID 19 pandemic inclusive.

Following the said difficulties, sometime in May 2021, the plaintiff approached the defendant requesting her to restructure the loan. Upon successful discussion, on 17th May 2021, parties agreed to restructure the outstanding loan and capitalize the arrears into a single term loan facility of TZS 1,001,212,632. In the restructured Agreement, the loan was to be repaid within 240 months at a monthly installment of TZS 15,000,000/=. The security of the restructured loan facility remained the same properties (the suit properties).

The plaintiff serviced the restructured loan facility for three months, that is from June up to August, 2021. On 1st and 21st September, 2021 she was served with notices for payment of TZS 30,402,739.73 and 19,816,748.61 respectively, being the facility' arrears.

She visited the defendant on 24th September, 2021 to inquire on the demand notice issued to her and she was informed orally that her name was mistakenly entered in the list of longtime defaulters due to the previous facility taken by her in 2018. She also alleged that the defendant requested her to pause the service of the loan facility until the defendant notify her; to pave way for the defendant to remove her name on the system of defaulters.

On 2nd February 2022 she was served with a sixty day's default notice from the defendant claiming the outstanding balance of the credit facility of TZS 1,071,494,755.78 and the arrears of loan being TZS 58,191,241.48. The Notice demanded the plaintiff to pay the outstanding arrears of the loan within the period of 60 days or else the properties pledged as security would be sold. The plaintiff, being aggrieved by the said notice knocked the gates of this Court seeking for the following reliefs against the defendants; -

" (a) For an order ...declaring that the defendant has breached the terms and conditions of the loan facility agreement.

(b) ... for permanent injunction restraining the defendant and its agent from disposing of the loan facility agreement.

(c) An order of the court declaring that the intended sale or any kinds of disposition of the plaintiff's mortgaged properties by the defendant is null and void.

(d) General damages as assessed by the Court.

(e) Cost of the suit."

The defendant disputed all the claims vide the Written Statement of Defence, which was presented for filing on 13th May 2022. The defendant also raised a Counter Claim against the plaintiff that she had defaulted servicing of the loan facility. In the said Counter Claim the defendant prays for the following reliefs:-

a) Judgement and decree be entered in favour of the plaintiff for the sum of Tshs 1,077,974,469,83 (Tanzania Shillings One Billion Seventy seven Million Nine Hundred Seventy four thousand Four hundred Sixty Nine Cent Eighty Three.

b) An order for attachment and sale of the mortgaged property situated at plot Number

Block No. 25a at Kinondoni Area Dar es Salaam to recover the outstanding sum.

c) Payment of interest at Court's rate of 12% from the date of Judgement until the date of full payment

d) General Damages for breach of contract.

e) Costs of this suit

f) Any other relief that the court may deem fit and just to grant."

During hearing, the plaintiff was represented by **Mr. Geoffrey Lugomu** learned advocate while **Mr. Antipas Akam** learned counsel represented the defendant. At the commencement of hearing, the following issues were framed for as guidance in the determination of the matter:-

- 1. Who between the parties breached the terms of the mortgage facility/ contract?*
- 2. Whether the intended sale of the mortgaged landed property Plot No 26 Block B Kijitonyama, Kinondoni Municipal and Plot No 3 Block 25 A Kinondoni Area, Kinondoni Municipality Dar es Salaam lawful?*

3. To what reliefs are the parties entitled.

The plaintiff was the only witness who adduced evidence as PW1. She testified that in the year 2019, she applied for a secured loan from the defendants to the tune of Tshs 1,000,000,000/= for financing her business. According to her testimony, the loan was to be repaid within 36 months at monthly installments of Tshs 35,000,000/=. The agreed interests was 18% per month.

According to PW1, the plaintiff's business did not go well due to Covid 19 pandemic thus she could not manage to repay the loan as agreed. She approached the defendant to negotiate restructure of the loan facility. In May 2021 the bank (defendant) agrees to restructure the monthly installments to the tune of Tshs 15,000,000/= per month (*Exhibit P1*”).

She further told the Court that, after the agreed restructure, the plaintiff started repaying the loan facility at the restructured installments, where she paid in May, June, July and August 2021. On 1st September 2021, she received a notice (*Exhibit P2*) from the defendants claiming for payment of Tshs 30,402,739.73/= as loan facility arrears. She was also, as per default notices (*Exhibit P3*), required to pay Tshs 19,816,748.61/= and Tshs 58,191,241.48/= as loan facility arrears. Following the said notices, she decided to institute the suit at hand.

On the part of the defence, one **Hamimu Kibwana Gamba**, a loan Manager at KBC Bank was called and testified as (DWI). He told the court that in May 2019 the plaintiff opened an account with the defendant through which she was advanced a loan of Tshs.1,000,000,000/=. He further stated that the repayment of the said loan was not done according to the contract. He told the Court that the Bank restructured the facility twice, in 2020 and on 17th May 2021. The said restructure intended to give the plaintiff an easier way of repaying the loan from Tshs 35,000,000/= per month to Tshs 15,000,000/=. He told the Court that despite the said efforts, the said loan could not be paid well as per the facility, he tendered the bank statement - Exhibit DI.

According to the Bank Statement (Exhibit D1) even after the restructure to Tshs 15,000,000/= per month, the plaintiff could not service of the loan. DW1 stated further that the Plaintiff serviced the loan for only two months, May and June 2021. It was also the testimony of DW1 that the plaintiff pledged the house on Plot No.3 at Kinondoni, Certificate of Title No.97632 registered in the name of Rose Bujiku Mallya, and the house on Plot No.26 at Kijitonyama with Certificate of Title No.41791 in the name of Rose Bujiku Mallya, as security for the loan. He finally prayed the court to

allow the defendant to exercise the right of sale to recover the money advanced to the plaintiff.

Having gone through evidence adduced by the parties let me state at the outset that in determining this matter will be governed by section 110(1) of the Evidence Act, [Cap.6 RE 2019] that a party who wishes to be given legal right following the existence of facts, must prove that those facts exists. Also the principle that the person whose evidence is heavier must win as was propounded in **Hemed Said vs Mohamed Mbilu** [1984] T.L.R 113 will apply in this matter.

The 1st issue was on *who between the parties breached the terms of the mortgage facility*. This issue was framed based on what was alleged in the Plaint and in the Counter Claim. The plaintiff leveled blames to the defendant for issuing default notices while the defendant alleged that the plaintiff breached the credit facility for failure to service it as agreed.

According to exhibit P1, the restructured loan facility, in clause 11 paragraphs 8.1.3, the plaintiff had the obligation to pay the loan in monthly instalment of Tshs 15,000,000/= for 240 months starting from 20th May 2021 to 30 May 2041. Evidence adduced by PW1, the Plaintiff, is to the effect that she paid the restructured amount for three months, that is in May, June, July

and August, 2021. From the testimony of the plaintiff, she stopped servicing the loan in August, 2021 after having been told by the defendant to stop servicing the loan until further notice. However, there was no documentary proof that the defendant had instructed her to stop servicing the loan.

Even when cross-examined by Mr. Akam, learned advocate, PW1 admitted that she received two letters from the defendant reminding her to repay the loan but she could not heed. Evidence adduced by DW1 and the restructured loan facility tendered (Exhibit D1) shows that the plaintiff was to repay her loan in monthly instalments of Tshs 15,000,000/=. The plaintiff paid only in May and June 2021 and that she is still indebted the amount of Tshs.1.19 Billion. In the first issue, the court was invited to determine as to who between the parties breached the loan facility. In the case of **Abdallah Yussuf Omar vs The People's Bank of Zanzibar and Another** [2004]

T.L.R 399, the Court of Appeal of Tanzania had this to say:

" By failing to repay any of the instalments due until May 2002, when he was served with a demand notice, the appellant was in breach of the loan repayment terms and the bank was entitled to exercise its power of sale of the mortgaged property."

In the present case, the plaintiff by her own testimony told the Court that she stopped repaying her loan in August 2021. It is thus obvious that the Plaintiff was the one in breach of the Credit facility. I am holding so because breach of contract occurs when one party in a binding agreement fails to deliver according to the terms of the agreement. In the instant suit the plaintiff is the one who failed to deliver according to the terms in the Loan Agreement, as the bank statement (Exhibit P1) shows that the plaintiff did not repay in **March, April, May, June, July, August, September, October** and **November** 2022. In **National Bank of Commerce Limited vs Stephen Kyando T/A ASKY Inter-trade**, Civil Appeal No.162/2019, the Court of Appeal of Tanzania at page 35 of the typed Judgment held that;

"According to law, where one instalment in a series of instalments is breached in terms of repayment, the entire contract is breached."

From evidence on record, it is obvious that the plaintiff is the one who breached the loan facility by failure to repay the loan as agreed.

Let me turn now to the 2nd issue on whether the intended sale of the mortgaged landed property Plot No 26 Block B Kijitonyama, Kinondoni Municipal and Plot No 3 Block 25 A Kinondoni Area, Kinondoni Municipality Dar es Salaam is lawful. Having answered the 1st issue in affirmative that the plaintiff breached the terms and condition of the loan facility, the defendant is entitled to the remedies available on breach. Paragraph 12.2. of the loan facility reads as follows:-

“12.2 If an event of Default occurs and at any time thereafter if such event is continuing, the Bank may issue notices to the Borrower.”

The plaintiff defaulted to pay the loan as per the agreement as a result the defendant issued notices as was adduced by DWI and substantiated by Exhibits P2 and P3. Section 132 (1) of the Land Act, [Cap.113 R.E 2019] provides thus:-

"A mortgagee may, after the expiry of sixty days from the date of receipt of a notice under section 127 sell the mortgaged land."

From the aforesaid provision, where the borrower defaults the loan agreement, the lender is entitled to exercise its right of sale after having issued the sixty days notice to the borrower. In the present suit, evidence has

proved that the plaintiff had breached the loan agreement; it was thus justifiable for the defendant to exercise the right of sale upon expiry of the sixty days' notice.

The last issue was on the reliefs parties are entitled to. In **Hemedi Saidi v. Mohamedi Mbilu** [1984] T.L.R 113, it was held that the person whose evidence is heavier than that of the other is the one who must win. In the present case the Plaintiff has failed to prove her claims as were presented in the Plaint. In that regard she is entitled to fail in the instantaneous case for having presented weaker evidence compared to that of the defendant. The defendant is entitled to recover the loan advanced to the plaintiff.

In the final analysis, I find no merits in the suit. I hereby dismiss it entirely with costs. It is ordered.

DATED at **DAR ES SALAAM** this 28th April 2023.

