

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**LAND CASE NO. 96 OF 2014**

**BARRETTO HAULIERS (T) LTD ..... PLAINTIFF**

**VERSUS**

**ECOBANK (T) LTD ..... DEFENDANT**

*Date of last Order: 21/12/2022*

*Date of Judgment: 24/02/2023*

**JUDGMENT**

**I. ARUFANI, J.**

The plaintiff filed in this court the suit at hand against the defendant claiming for various reliefs listed in the amended plaint which read as follows: -

- a. A declaration that both plaintiff and defendant entered into a contract to purchase the landed property known as Lemira Hotel on a mistake of fact as to the correct information on the title.*
- b. A declaration that the contractual obligations purported to have been entered between the plaintiff and the defendant, in as far as acquisition of the said landed property is concerned, are null and void.*
- c. An order that since the contract entered were null and void, each party should be returned to the position held prior to acquisition of the landed property and execution of the contract deeds.*

- d. *That the instalment paid by the plaintiff on the basis of the facility letter and purported mortgage deeds be reimbursed to the plaintiff.*
- e. *Payment of interest at the rate of commercial banks from the dates the amounts at (d) were paid to the date of the order for restitution.*

*In alternative*

- f. *Payment of TZS 162 million as specific damages as pleaded in paragraph 22 of the amended plaint.*
- g. *Payment of interest on the amount at (f) at the commercial banks' lending interests of 23% from the date each monthly rental instalment fell due to the date of expiry of the mortgage period.*
- h. *Payment of the decretal sum at the court rate of 7% from the date of judgment to the date of full payment.*
- i. *Payment of general damages as shall be assessed by the honourable court.*
- j. *Costs of this suit be provided for.*
- k. *Any other relief the honourable court shall deem fit to grant in law and equity in the circumstances of this suit.*

In its defence the defendant vehemently disputed the plaintiff's claims and raised counter claim in its written statement of defence to the amended plaint praying against the plaintiff for the reliefs listed hereunder: -

- a) *A declaratory order that the defendant is an equitable mortgagee over the property mortgaged in its favour by*

- plaintiff; An order that the plaintiff has defaulted in the payment of the credit facilities;*
- b) An order on the plaintiff to pay the sum of TZS 700,000,000/= on principal and TZS 127,498,318.20 interest in arrears for Tanzanian shillings account and USD 29,951 for United States dollars account;*
- c) An order that the plaintiff pays interest in the decretal amount at the compounded rate of 24% from the date of filing this counter claim to the date of judgment and further interest at the court rate from the date of judgment to the date of payment in full;*
- d) An order that in event of default on the part of the plaintiff to pay the amounts referred to in prayer (b) above to enforce the securities pledged under the facility letter;*
- e) Any other or further relief this court may deem fit and just to grant.*

The brief background of the matter as can be deduced from the pleadings and evidence adduced in the present case is to the effect that, the plaintiff entered into a term loan agreement of Tshs. 600,000,000/= with the defendant aiming at financing purchase of a building located at Kurasini area in Dar es Salaam Region known as Lemira Hotel (hereinafter may be referred as the suit or landed property). The suit property was initially owned by Esther Exaudi Swai and it was mortgaged to Barclays Bank Tanzania Limited to secure an overdraft facility extended to Lemira Enterprises Limited. After Lemira Enterprises Limited default to repay the

stated overdraft facility and Esther Exaud Sawi feared the suit property would have get unfavourable price if it would have been sold in public sale, she approached the plaintiff who was their neighbour to see if they can purchase the suit property.

The plaintiff agreed to purchase the suit property at the price of about one billion Tanzanian shillings which the plaintiff paid to the vendor in numerous ways including payment of cash and transferring of motor vehicles and trucks in lieu of cash. At that period the plaintiff was also banking with Exim Bank (T) Limited where it had overdraft facilities of TZS 100,000,000/= and US\$ 50,000. While servicing the stated overdraft facilities the plaintiff was followed by the defendant's officer who was looking for customers for their bank and discussed about the move of the plaintiff to acquire the suit property. At the end the defendant agreed to finance acquisition of the suit property and clear out all the plaintiff's outstanding overdraft facilities with Barclays Bank (T) Limited and Exim Bank (T) Limited.

Thereafter the plaintiff and the defendant entered into a facility agreement of term loan of TZS 600,000,000/= for clearing out the outstanding debt which Barclays Bank was claiming from Lemira Enterprises Limited which was TZS 501,379,926.74. They also entered into two other overdraft facilities agreements of TZS. 100,000,000/= and

USD 50,000 for clearing out the outstanding debt of the plaintiff with the Exim Bank (T) Limited and the balance to be used by the plaintiff as its working capital. Among the terms and conditions for the stated loans agreement entered by the parties were to the effect that, after the defendant cleared out the outstanding debt of the plaintiff in the Barclays Bank and obtained necessary documents, ownership of the landed property would have been transferred from the name of Esther Exaudi Swai into the name of the plaintiff.

It was also the terms and conditions of the stated facilities agreement that, after the stated landed property being transferred to the name of the plaintiff, the landed property would have been registered by the defendant as a legal mortgage for the facilities advanced to the plaintiff. The parties agreed further that, the plaintiff was required to service the term loan within 36 months expiring on January, 2015 and the other two facilities within twelve months from the date of disbursement.

The plaintiff avers to have been given by the defendant the term loan of Tshs. 600,000,000/= which were disbursed into the plaintiff's Bank Account No. 002002540036331 on 20<sup>th</sup> January, 2012. It was averred further that, a total of Tshs. 501,379,926.74 were transferred to Barclays Bank (T) Limited on the same date to clear out the outstanding debt arising from the overdraft facilities extended to Lemira Enterprises

Limited. The plaintiff said to have started servicing the loan as per the facility agreement and the defendant was required to continue with the process of transferring the ownership of the stated landed property from its original owner into the name of the plaintiff.

Before the plaintiff finished to service the stated facilities and before the ownership of the landed property being transferred from the original owner to the name of the plaintiff it was discovered part of the hotel building was on the service road and it was demolished by TANROAD. Thereafter the plaintiff stopped servicing the loans advanced to them by the defendant and filed the present suit in this court claiming for the reliefs stated hereinabove.

The defendant denied the claim of the plaintiff and stated that, after the facilities being disbursed into the plaintiff's bank accounts and after clearing out the plaintiff's outstanding debt with the Barclays Bank (T) Limited the plaintiff made unwarranted withdrawals from the plaintiff's current account and exceeded the amount required to offset the outstanding debt the plaintiff was owing to Exim Bank (T) Limited in Tanzanian shillings and United State Dollars.

The defendant avers that, after the plaintiff failed to service the facilities advanced to them, they wrote a demand letter to the plaintiff claiming for payment of the arrears of the unpaid loan together with

interest. It is further averred by the defendant that, after the plaintiff being served with the demand letter the plaintiff instituted the instant suit in this court. The defendant is now claiming from the plaintiff the reliefs sought in its counter claim raised in its amended written statement of defence as stated at the outset of this judgment. The issues framed for determination in this matter are as follows: -

1. Whether there was breach of the terms and conditions of the facilities agreement between the parties.
2. If the first issue is found in affirmative whether any of the parties suffered damages.
3. To what reliefs are the parties entitled.

During the trial of the matter the plaintiff was represented by Mr. James Bwana, learned advocate and the defendant was represented by Mr. Albert Lema, learned advocate. By consent of the counsel for the parties hearing of the matter was done by way of witnesses written statements pursuant to Order XVIII Rule 2 of the Civil Procedure Code, Cap 33 R.E 2019 as amended by GN No. 761 of 2021.

In a bid to establish its claims the plaintiff brought to the court one witness namely Jude Barretto who testified as PW1. After his written statement of his evidence being received and adopted by the court as his evidence in chief, he tendered nine documentary exhibits in the case. On

the other side the defendant brought two witnesses to the court namely Careen Kahemba who testified as DW1 and Hope Liana who testified as DW2. After written statements of their evidence being admitted and adopted in the case as their evidence in chief, they tendered seven documentary exhibits in the case to support their evidence.

**Jude Barretto (PW1)** stated in his statement that he is the plaintiff's Managing Director. He stated after entering into the facilities agreement with the defendant they signed the facility letter dated 28<sup>th</sup> December, 2011 containing the facilities advanced to the plaintiff for clearing out their outstanding debts in the Barclays Bank and Exim Bank and the stated facilities agreement was admitted in the case as exhibit P1. He stated after entering into the facilities agreement, the plaintiff continued to service the loans as appearing in the bank statements from the defendant admitted in the case as exhibits P2 and P6.

He stated after seeing the defendant had not informed them about progress of transferring of ownership of the landed property from the original owner into the name of the plaintiff, on 28<sup>th</sup> April, 2012 they wrote a letter to the defendant complaining about the stated situation and the said letter was admitted in the case as exhibit P3. PW1 said they conducted official search in the office of the Registrar of Titles in 2014 and in 2022 and discovered the landed property is still in the name of the



original owner, Esther Exaudi Swai and the stated search reports were admitted in the case as exhibit P4 collectively.

PW1 tendered to the court a copy of a notice of demolition of the suit property issued by TANROAD and an article cut from the Guardian newspaper dated 27<sup>th</sup> January, 2014 talking about demolition of the suit property which were admitted in the case as exhibit P5 collectively. He also tendered to the court the bank statement from the defendant's bank issued on 2<sup>nd</sup> May, 2014 and it was admitted in the case as exhibit P6. In addition to that he tendered to the court the pleadings of Land Case No. 147 of 2014 which was between Esther Swai V. Barreto Haulers (T) LTD and Ecobank Tanzania LTD and were collectively admitted in the case as exhibit P7.

Another documentary exhibit tendered in the case by PW1 is a demand Notice dated 27<sup>th</sup> February, 2014 written by CRB Africa Legal going to the plaintiff's Director and it was admitted in the case as exhibit P8. The last documentary evidence tendered to the court by PW1 was a copy of lease agreement entered by Esther Exaud Swai on behalf of Lemira Enterprise Ltd and the Parents Teachers Associations of ST Joseph Cathedral High School which was admitted in the case as exhibit P9.

As for the defendant side, **Careen Kahema (DW1)** stated in her written statement which was admitted in the case as her evidence that

she is employed by the defendant as the Head of Credit Administration. She explained in her evidence how the facilities were disbursed to the plaintiff and how they were withdrawn and the outstanding debts the plaintiff owed the defendant. **Hope Liana (DW2)** stated in her written statement admitted in the case as her evidence in chief that, she is employed by the defendant as the Company Secretary and Head of Legal Department. She stated in her statement how the facilities were advanced to the plaintiff and how it was used and stated how the defendant is not liable to the plaintiff's claims and how the plaintiff is liable to their claims in the counter claim.

DW2 prayed various exhibits tendered by the plaintiff's witness and admitted in the case as the plaintiff's evidence be adopted as the defendant's evidence and the prayer was granted. The facilities letter admitted in the case as exhibit P1 was adopted and marked exhibit D1; the bank statements admitted in the case as exhibits P2 and P6 were adopted and marked exhibit D2 collectively and exhibits P8 was adopted and marked exhibit D3. Another documentary exhibit tendered by DW2 is a letter of undertaking written to the defendant by the plaintiff's Managing Director dated 28<sup>th</sup> December, 2011 which was admitted in the case as exhibit D4.

She also tendered to the court a debenture dated 3<sup>rd</sup> January, 2012 and certificate of registration of a charge which were admitted in the case as exhibit D5 collectively. She went on tendering to the court the copy of judgment delivered in Land Case No. 147 of 2014 which was between Esther Swai V. Barreto Hauliers and Ecobank Tanzania Limited and emails dated 1<sup>st</sup> March, 2013, 27<sup>th</sup> June, 2013 and 13<sup>th</sup> June, 2013 which were admitted in the case as exhibit D6 collectively. She also tendered to the court the copies of the photographs of the suit property and were admitted in the case as exhibit D7.

After the parties adduced their evidence the counsel for the parties prayed and allowed to file in the court their final submissions. I commend the counsel for the parties for their industrial and illuminating submissions which will assist the court in determine the present suit. To avoid making this judgment unnecessarily long I will not reproduce what is stated in their submissions but I will refer to them in the course of determine the issues framed in the matter. I will start with the first issue which the counsel for the plaintiff stated in his final submission is the main issue of contention between the parties in the suit. The stated issue asks whether there was any breach of the terms and conditions of the facilities agreement entered by the parties.

The court has found PW1 stated in his evidence and the counsel for the plaintiff stated in his submission that the term and condition which the plaintiff is alleging was breached by the defendant is the obligation of the defendant to transfer ownership of landed property from the name of the previous owner to the name of the plaintiff and registered the same as a legal mortgage for the facilities given to the plaintiff by the defendant. The counsel for the plaintiff stated in his submissions that, the stated obligation was not expressly provided in the facilities agreement entered by the parties which was admitted in the case as exhibit P1 but it can be impliedly seen on the conducts of the parties to the facilities agreement.

On the other side DW1 and DW2 stated in their evidence that the defendant did not breach the alleged term and condition. The counsel for the defendant argued in his submission that there was no such a term and condition in the facilities agreement entered by the parties. He stated the duty of the defendant was to facilitate transfer of the ownership of the property from the previous owner to the plaintiff. He submitted further that the plaintiff is the one breached the facilities agreement by failure to supply to the defendant the documents which were being required for transfer of ownership of the landed property from the original owner into the name of the plaintiff. He added the plaintiff breached the facilities

agreement for failure to repay the facilities given to them by the defendant.

The court has found as argued by the counsel for the parties and as it can be deduced from the evidence of the witnesses testified in the suit at hand there was no express term or condition entered in the parties' facilities agreement which states it was an obligation or duty of the defendant to transfer ownership of the landed property from the previous owner into the name of the plaintiff. However, the counsel for the plaintiff stated in his submission the stated obligation can impliedly be inferred from the conduct of the parties to the facilities agreement.

The court is in agreement with the counsel for the plaintiff that a term and condition of a contract can impliedly be inferred from the conduct of the parties to a contract where such term and condition is intended by the parties to be in their contract but was not included in their formal contract. The stated finding of the court is getting support from section 9 of the Law of Contract Act, Cap 345, R.E 2019 which states a proposal or acceptance made in words is said to be express promise and the proposal or acceptance made otherwise than words is said to be implied.

The stated position of the law can also be seeing in the case of **Robert Scheltens V. Sudesh Varma & Others**, Civil Appeal No. 203

The first part of the document discusses the importance of maintaining accurate records of all transactions. It emphasizes that every entry should be supported by a valid receipt or invoice. This ensures transparency and allows for easy verification of the data.

In the second section, the author outlines the various methods used to collect and analyze the data. This includes both manual data entry and the use of specialized software tools. The goal is to ensure that the data is both accurate and easy to interpret.

The third part of the document provides a detailed breakdown of the results. It shows that there is a significant correlation between the variables being studied. This finding is supported by statistical analysis and is consistent with previous research in the field.

Finally, the document concludes with a series of recommendations for future research. It suggests that further studies should be conducted to explore the underlying causes of the observed trends. This will help to develop more effective strategies for addressing the issues at hand.

of 2019 CAT at DSM (unreported) cited in the submission of the counsel for the plaintiff and in the case of **Joseph O. Kanyoma V. Niko Insurance (T) Ltd**, Com Case No. 15 of 2006, HC Com. Division at DSM (unreported) where it was stated in the latter case that: -

*"It is trite law that the terms of any contract may be oral, written or combination of both. What is openly said or written are called express terms. **But there are exceptions when the court implies certain terms into the contract even though neither party specifically mentioned them.** Implied terms may either be express in a statute or by the court."* [Emphasis added]

The question to ask here is whether the parties intended it would have been an obligation of the defendant to transfer ownership of the landed property from the previous owner into the name of the plaintiff. The court has found that, as rightly argued by the counsel for the plaintiff the duty to prove the defendant had the stated obligation as provided under section 110 of the Evidence Act, Cap 6 R.E 2019 and stated in the case of **Agatha Mshote V. Edson Emmanuel & Others**, Civil Appeal No. 121 of 2019, CAT at DSM (unreported) is on the side of the plaintiff who alleges it was the duty of the defendant to perform the stated duty.

The court has come to the stated view after seeing it was stated in the above cited case that, it is trite law that he who alleges has the burden





of proof in terms of section 110 of the Evidence Act. It was also stated in the same case that the standard of proof in civil cases is on balance of probability, that means the court will sustain the evidence which is more credible than the other in respect of the fact required to be proved.

While being guided by the position of the law stated hereinabove the court has found it was stated at paragraph 20 of the evidence of PW1 and argued by the plaintiff's counsel in his submission that, it was an agreement of the parties that after the defendant cleared out the plaintiff's debt at the Barclays Bank, the defendant would have received all documents relating to the title deed of the landed property from the Barclays Bank. Thereafter, the defendant would have processed the transfer of ownership of the landed property from the name of the original owner into the name of the plaintiff. It was also in agreement of the parties that the certificate of title of the landed property would have been registered by the defendant to form the first ranking legal mortgage for the loan advanced to the plaintiff.

It is also stated in the evidence of PW1 and argued in the submission of the counsel for the plaintiff that, it was agreed by the parties that, the costs of transferring the title deed and registration of the mortgaged property would have been borne by the plaintiff through the money which would have been deposited in the current account of the plaintiff. The

The first part of the document discusses the importance of maintaining accurate records. It emphasizes that proper record-keeping is essential for ensuring the integrity and reliability of the data. This section also outlines the various methods used to collect and analyze the information, highlighting the challenges faced during the process.

The second part of the document provides a detailed overview of the experimental procedures. It describes the setup of the study, the selection of participants, and the specific tasks they were required to perform. The authors also discuss the ethical considerations that guided the research and the steps taken to ensure the safety and well-being of all involved.

The third part of the document presents the results of the study. It includes a series of tables and figures that illustrate the findings. The authors analyze the data and discuss the implications of their results, comparing them to previous research in the field. They also identify the strengths and limitations of the study and suggest directions for future research.

Finally, the document concludes with a summary of the key findings and a discussion of their broader significance. The authors emphasize the importance of the research and its potential applications in various fields. They also provide a list of references and contact information for those interested in further details.

counsel for the plaintiff submitted the stated conducts show that, impliedly the actual work of transferring ownership of the landed property from the original owner to the name of the plaintiff and registration of the same as the first rank legal mortgage for the facilities advanced to the plaintiff would have been done by the defendant.

The court has also found it is stated at paragraph 18 of the evidence of PW1 that, after clearance of the plaintiff's debt with the Barclays Bank, the title deed of the landed property was transferred to the defendant. The stated evidence was not disputed in whatsoever by the defendant's witnesses. The court has also found it is also stated at paragraph 8 (ii) of the evidence of DW2 that, the defendant engaged an advocate namely C. L. S. Benne of Mawenzi Advocate Chambers to process transfer of ownership of the landed property from the original owner into the name of the plaintiff.

The court has found it is also the testimony of DW2 in the same paragraph of her testimony that, the defendant made several efforts to contact the plaintiff by phone and visit the plaintiff's office with a view of meeting the plaintiff's Directors for the purpose of obtaining from them some documents required for transfer of ownership of the landed property into the name of plaintiff. Some of the stated documents were said to be the current annual returns from the plaintiff and current land rent receipt

from the vendor of the landed property. It was stated the defendant failed to get the stated documents as the plaintiff's Directors were nowhere to be found and the plaintiff's offices were closed.

The court has found the stated evidence and submission from the counsel for the plaintiff established clearly that, although it was not expressly stated in the facilities agreement admitted in the case as exhibit P1 that it was the duty of the defendant to transfer ownership of the landed property from the original owner into the name of the plaintiff but the above stated conducts of the defendant towards transfer of the landed property into the name of the plaintiff established clearly that, there was an implied term that it was an obligation and duty of the defendant to transfer ownership of the landed property from the original owner into the plaintiff's name and to register the same as the first rank legal mortgage for the loans given to the plaintiff.

The court has come to the stated finding after seeing that, if it was not an obligation of the defendant to perform the stated duty, it wouldn't have done all the activities stated hereinabove of finding a lawyer of transferring ownership of the landed property into the name of the plaintiff. It wouldn't have bothered to find the plaintiff's Directors for the purposes of getting the documents they wanted from them for the

purposes of enabling transfer of the ownership of the landed property into the name of the plaintiff.

Having find it was an implied term of the parties' agreement that it was an obligation of the defendant to process transfer of ownership of the landed property from the original owner into the name of the plaintiff, the question to ask here is whether the defendant breached the stated duty or term as alleged by the plaintiff. The court has found that, in order to say the defendant breached the alleged implied term it must be established the defendant was availed by the plaintiff with everything which were needed for effecting the stated transfer of the landed property into the name of the plaintiff.

It is the finding of this court that, the costs of effecting transfer of the landed property from the original owner into the name of the plaintiff as stated at the paragraph relating to the legal fees in exhibit P1 had been taken care of by the money disbursed into the plaintiff's current account. However, the court has found DW2 stated at paragraph 8 (ii) of her testimony that the defendant failed to process the stated transfer because they failed to get some documents which were current annual returns from the plaintiff, receipts for payment of current land rent from the vendor of the landed property for initiating the stated transfer of ownership of the landed property into the name of the plaintiff. DW2

stated the Directors of the plaintiff were also required to facilitate the vendor of the landed property to sign Land Forms No. 29 and 30 which would have been used in the stated exercise.

The court has found PW1 stated at paragraph 21 of his testimony that the defendant had all the documents at its disposal but failed to process transfer of ownership of the landed property into the name of the plaintiff. The court has found that, although PW1 said the defendant had all documents require for the transfer of ownership of the landed property into the name of the plaintiff but it was not established the documents mentioned hereinabove which the defendant stated were needed for enabling transfer of ownership of the landed property into the name of the plaintiff were among the documents which were at the disposal of the defendant. The court has found the mentioned documents would have not been among the documents transferred to the defendant by the Barclays Bank so as to say the defendant had all the required documents at their disposal and failed to transfer ownership of the landed property into the name of the plaintiff.

The court has also been of the view that, as rightly stated by DW2 at paragraph 8 (ii) of her evidence it was not an implied duty of the defendant alone to transfer ownership of the landed property from the original owner into the name of the plaintiff. To the view of this court and

as stated in the evidence of DW2 and as argued by the counsel for the defendant it was also an implied duty for the plaintiff to facilitate transfer of ownership of the stated landed property into its name by availing to the defendant all what was needed for the stated transfer of ownership of the landed property into the name of the plaintiff to be performed by the defendant.

The court has been of the settled view that, even if it will be taken as stated by PW1 in his evidence that the plaintiff signed all the documents given to them by the defendant to sign but as the plaintiff has not adduced any evidence to establish the documents the defendant stated were needed from them were among the documents they signed or handed to the defendant so that it can be said were at the disposal of the defendant, it cannot be said the plaintiff has established the defendant breached the alleged implied term of the facility agreement of transferring ownership of the landed property from the original owner into the name of the plaintiff.

The court has found it is argued in the submission of the counsel for the plaintiff that there is no evidence to prove the defendant find and failed to get the plaintiff's Directors for the purpose of obtaining from them the documents they stated were needed for processing transfer of ownership of the suit land into the name of the plaintiff. It is further stated

in the submission of the counsel for the plaintiff that, the defendant's Relations Manager namely Themistocrouse Michalis who was assigned to work on the documents stated were needed for the stated transfer and who was knowing the plaintiff from the inception was not called to testify in the case to show he communicated with the plaintiff's Directors and failed to get them.

The court has found it is true that the stated witness was important witness to tell the court how he traced the plaintiff's Directors for the purpose of obtaining the stated documents but failed to get them. The court is also in agreement with the position of the law stated in the cases of **Chacha Matiko @ Magige V. R**, Criminal Appeal No. 295 of 2019, CAT at Mwanza and **Ecobank Tanzania Limited V. Future Trading Company Limited**, Civil Appeal No. 82 of 2019, CAT at DSM (both unreported) cited in the submission of the counsel for the plaintiff that, where a witness who is in a better position to explain some missing link in the party's case is not called and there is no sufficient reason for not being called the court may draw an adverse inference against the party failed to call the stated witness.

However, the court is of the view that, in order for the court to draw an adverse inference for failure to call a witness who is seems to be a material witness in a case it must be established there is missing evidence



which would have linked the missing part of the party's case. The court has found it cannot invoke the stated principle of law in the case at hand to draw an adverse inference against the defendant to find as the mentioned witness was not called to testify in the case then automatically the defendant failed to establish the plaintiff's Directors were not traced to supply to the defendant the documents were required for transfer of ownership of the landed property into the name of the plaintiff.

The court has come to the stated view after seeing there is nothing making it to find the evidence of DW2 in respect of the stated situation is not linking the defendant's case or what was stated by the mentioned witness in her evidence is not credible. The court has also found it has not been established the witness who was not called to give his evidence is available but the defendant failed to bring him to the court. Since it has not been stated anywhere in the evidence adduced in the case that the stated witness is available and the defendant has failed to call him while is available the court has found it cannot be proper for it to invoke the principle of drawing adverse inference against the defendant for failure to call the said witness.

The court has arrived to the stated finding after seeing as provided under section 143 of the Evidence Act cited in the submission of the counsel for the plaintiff what matters in proving a particular fact is not

number of witnesses called to testify in a case but credibility of the evidence adduced in a case. The court has found it was stated in the case of **Goodluck Kyando V. R.** [2006] TLR 363 that, every witness is entitled to credence and have his testimony accepted unless there is good and cogent reason for not believing such witness. After considering the evidence of DW2 and the circumstances of the present case the court has failed to see good or cogent reason making it to fail to believe the evidence of DW2 that the plaintiff's Directors were found for the purpose of supplying the documents required for transfer of ownership of the landed property into the name of the plaintiff without success.

The court has found the counsel for the plaintiff stated in his submission the evidence of DW2 in respect of the issue of the Directors of the plaintiff to be found without success is a hearsay evidence as DW2 was told by Michalis that he traced the Directors of the plaintiff without success and as provided under section 62 of the Evidence Act oral evidence must be direct. Although the court is agreement with the counsel for the plaintiff that oral evidence as stated in the above cited provision of the law is required to be direct evidence but it cannot be said what was said to the court by DW2 is a hearsay which cannot be believed by the court.

The court has found as stated in the case of **Vuyo Jack V. DPP**, [2018] TLR 387 the court is required to consider the evidence of DW2 in relation to the evidence of other witnesses testified in the case. The court has found that, although the counsel for the plaintiff argued there is no evidence showing the plaintiff's Directors were traced through phone call or local leaders of the area where the plaintiff's office is located but that is not enough to make the court to find the evidence of DW2 that the plaintiff's Directors were traced by their Relation Manager without success is not credible evidence.

The court has come to the stated finding after seeing DW2 said in her testimony that they found the plaintiff's Directors for the purpose of getting the documents required from them for facilitation of transfer of ownership of the landed property into the name of the plaintiff without success. The court has found there is nothing material in the evidence adduced in the matter by both sides showing the plaintiff's Directors were available at the time the defendant was looking for them so as to discredit the evidence of DW2. Since there is nothing material in the evidence adduced in the case moving the court to find the evidence of DW2 cannot be believed so as to say there is a gap which was supposed be linked by the evidence of Michalis who was not called to testify in the court, the court has found there is no merit in the argument made in the submission

of the counsel for the plaintiff that the court is required to draw an adverse inference against the defendant.

The court has found the counsel for the plaintiff argued further in his submission that, the duration taken by the defendant to engage the external lawyer to start the process of transferring ownership of the title deed reflects ineptitude, ineffectiveness and lack of good faith on the part of the defendant to execute the terms of the facilities agreement. The court has found although it is true that the facilities agreement was executed on 28<sup>th</sup> December, 2011 and the external lawyer was engaged on 1<sup>st</sup> March, 2013 which is a period of more than one year from when the term loan agreement was executed but it was not stated anywhere in exhibit P1 the transfer of the stated title deed was supposed to be done and completed within which period of time. The above stated view of this court is borrowing a leaf from the case of **Aida Nunes V. John Mbiyo Njonjo & Another**, [1962] 1 EA 88 where it was stated that: -

*"When time has not been made the essence of a contract, ... one of the parties cannot avoid the contract on the ground of unreasonable delay by the other party until notice has been served making time the essence."*

The court has found the term loan agreement for purchasing the landed property and transferring of ownership of the landed property into the name of the plaintiff as stated in exhibit P1 was supposed to last for

36 months from the date of disbursement of the loan and the disbursement of the loan was done on 20<sup>th</sup> January, 2012, the period which was supposed to end on January, 2015. That being the duration of the term loan agreement the court has found it cannot be said the defendant breached his duty of transferring the title deed into the name of the plaintiff without proof of the alleged ineptitude, ineffective and lack of good faith simply because of the delay to engage the external lawyer after passing of the stated period of time. The court has come to the stated view after seeing the evidence of DW2 shows the defendant stated the cause of the delay or failure to transfer ownership of the landed property into the name of the defendant was lack of the documents which were required to be supplied to them by the plaintiff.

The argument by the counsel for the plaintiff that the defendant did not show that they attempted to transfer the title deed and failed because of the lack of the mentioned documents has been found by the court is not enough to prove the defendant breached the implied duty placed on their side. The court has found the counsel for the plaintiff argued further that, exhibit P1 allowed the defendant to do all acts that plaintiff might not have done including to pay annual land rent by using the money in the current account of the plaintiff to accomplish transfer of the ownership of the landed property into the name of the plaintiff.

The court has considered the stated argument and come to the finding that, as stated by DW2 it was not only the receipt for current land rent which was been needed from the plaintiff. The defendant was also looking for current annual returns from the plaintiff, passport size photographs of the Directors of the plaintiff together with Land Forms No. 29 and 30 signed by the original owner of the landed property which the defendant would have not managed to get the same without involving the Directors of the plaintiff.

It is also stated in the submission of the counsel for the plaintiff that, although it was stated the defendant failed to contact the Directors of the plaintiff as stated hereinabove but the defendant was issued with demand letter dated 27<sup>th</sup> February, 2014 (exhibit D3) demanding for payment of all the loaned money plus interest. The court has been of the view that, although it is true that it was admitted by DW2 that the plaintiff was successfully served with the stated demand letter but as stated by DW2 the stated demand letter was served to the plaintiff by their external lawyer. The court has found as the plaintiff was served with the stated demand letter by the defendant's external lawyer on 27<sup>th</sup> February, 2014 and Michalis was looking for the required documents from the plaintiff in the period of 2012 and 2013 it cannot be said the defendant did not trace

the plaintiff's Directors for the purpose of getting the required documents and failed to get them.

The court has found DW2 stated in her testimony that transfer of ownership of the title deed from the original owner to the plaintiff was also hindered by the encumbrance filed in the Land Registry by the original owner of the landed property after filing in the court the case which its pleadings and judgment were admitted in the case as exhibit D6. Therefore, by taking into consideration the fact that the defendant was not availed by the plaintiff with some documents which were required for processing transfer of ownership of the title deed from the original owner to the plaintiff and the undisputed fact that the original owner of the landed property filed encumbrance in the Land Registry to restrict transfer of ownership of the landed property the court has found it cannot be said the defendant breached the implead term or condition for failure to transfer the ownership of the landed property into the plaintiff's name.

The court has found the plaintiff averred in the amended plaint and it is stated in the evidence of PW1 that, the defendant failed to transfer ownership of the landed property from the original owner into the name of the plaintiff because it was discovered part of the hotel building was constructed within the road reserve area and as such there cannot be a lawful mortgage and the plaintiff is not obliged to service a mortgage

which is not in existence. The court has found it is true that after the parties executed the term loan and the facilities agreement and while the parties were in the process of performing their obligations as per the terms and conditions of the agreement it was discovered the hotel building was on the road reserved area and thereafter the building was partly demolished by the TANROAD. The stated situation of the matter is supported by exhibits P5 and D7.

The court has found the plaintiff relied on the stated circumstances of the matter to state the parties herein entered into agreement of purchasing the landed property basing on mistake of facts or the incorrect information about the landed property. The court is in agreement with the submission by the counsel for the defendant that a mutual mistake in a contract occurs when the parties to a contract are both mistaken about the same material fact within their contract. The court is also in agreement with the counsel for the defendant and the position of the law stated in the case of **Kabula Mabula V. Kija Masuke & Another**, Land Appeal No. 7 of 2022, HC at Shinyanga (unreported) that a party who was not a party in the contract entered on mutual mistaken of facts by the parties entered into the stated contract cannot be held liable to whatever term in such a contract.



While under guidance of the stated position of the law the court has been of the view that as rightly argued by the counsel for the defendant the contract which the plaintiff is alleging was entered on mutual mistaken of facts that the hotel building is on the road reserved area is the contract entered by the plaintiff and Esther Exaudi Swai and not the contract entered by the plaintiff and the defendant. The court has come to the stated finding after seeing the contract of purchasing the building was entered by the plaintiff and the mentioned vendor. The defendant herein came to enter into contractual relationship with the plaintiff to enable the plaintiff to pay the debt which the plaintiff owed to Barclays Bank arising from the process of buying the stated hotel building from the original owner.

Under the stated circumstances and as stated in the case of **Kabula Mabula** (supra) the defendant cannot be held liable for the mistake of facts found in the contract entered by the plaintiff and the vendor of the hotel building. The court has found as rightly argued by the counsel for the defendant if the stated mistake of facts was in existence the plaintiff is the one who was responsible under the principle of caveat emptor or buyer beware to investigate the stated mistake and not the defendant. The stated finding is getting support from the case of **Mirambo Mabula V. Yohana Maiko Sengasu & Another**, Civil Appeal No. 71 of 2020,

CAT at DSM (unreported) cited in the submission of the counsel for the defendant where it was stated that: -

*"The principle presupposes a buyer to take necessary steps to investigate on the title or ownership of the property before completing the purchase to ensure that the property is in good faith and without any encumbrance."*

In the light of the above stated position of the law and all what have been stated hereinabove the court has come to the finding that, the defendant cannot be held responsible for the mistake of the plaintiff to enter into contract of purchasing the hotel building which part of it was found by TANROAD was on the road reserve and thereafter demolished. To hold so will amount to punish the defendant for the omission done by the plaintiff as the buyer of the hotel building who was required to investigate and be satisfied the ownership of the land where the hotel building is constructed is free from any problem or encumbrance.

The court has found the plaintiff is claiming for a total of TZS 162,000,000/= from the defendant being loss of the rent it was expecting to get from leasing the hotel building to the Parents Teachers Association of St. Joseph Cathedral High School to be used as hostel for the students of the mentioned school for 36 months. The court has found it was stated in exhibit P1 that, the proceeds from the rental agreement between Lemira Enterprises Limited and the mentioned tenant would have been

channelled to the defendant to repay the loan given to the plaintiff by the defendant after the title to the property being transferred into the name of the plaintiff.

The court has found, as right argued by the counsel for the defendant there is no evidence adduced in the case to prove termination of the stated tenancy agreement was caused by the act of the failure of the defendant to transfer ownership of the hotel building into the name of the plaintiff as argued by the counsel for the plaintiff and not any other reason. It is also the finding of this court that, even if it will be said the evidence available in the case has managed to establish termination of the tenancy agreement was caused by the alleged failure of the defendant to transfer ownership of the landed property into the plaintiff's name but as it has already been found the defendant is not the sole cause of failure to transfer ownership of the landed property into the plaintiff's name, then the defendant cannot be held liable for payment of the stated anticipated loss.

Turning to the claim raised in the counter claim by the defendant that the plaintiff breached the terms of the facility agreement by failure to repay the term loan and two facilities given to them by the defendant, the court has found the evidence adduced in the court by PW1, DW1 and DW2 together with exhibit P1 shows clearly as stated at the outset of this

judgment that, the plaintiff was given by the defendant the stated term loan and the stated two facilities. The court has found the evidence of PW1, DW1 and DW2 together with exhibits P2 and P6 is very clear that the plaintiff stopped repaying the term loan and facilities advanced to them before completing to repay the same in full.

The court has found while exhibit P1, P2 and D6 shows the plaintiff was given Tshs. 600,000,000/= for paying the debt of purchasing the landed property and Tshs. 100,000,000/= together with US\$ 50,000 for paying the debt of overdraft facilities advanced to the plaintiff by Exim Bank and the balance to be used by the plaintiff as its working capital but PW1 stated at paragraphs 35 and 36 of his statement that, the overall payment made by the plaintiff towards payment of the stated loan facilities until 6<sup>th</sup> September, 2013 was TZS 182,292,636.82 for the purchase of the landed property and US\$ 46,512.80.

The court has found PW1 said after the plaintiff paid the stated sum of money, they stopped repaying the remaining part of the loan facilities after seeing the defendant had failed to transfer ownership of the title deed of the landed property from the original owner into the name of the plaintiff. The court has found DW1 stated at paragraph 6 of her evidence that the total outstanding amount as on 27<sup>th</sup> February, 2014 was Tshs. 874,025,204.65 and US\$ 29,951 but DW2 stated at paragraphs 7 and 9

of her evidence the total outstanding amount until 20<sup>th</sup> March, 2014 was Tshs. 621,060,749.45 and US\$ 29,951.

Despite the fact that the figure given by DW1 in relation to the total outstanding amount in Tanzanian Shillings Account is different from the amount stated by DW2 but the court has found there is no dispute that the plaintiff decided to stop repaying the loan advanced to it before finishing to repay the total loan amount given to it plus interest while there is no any clause in the facility agreement authorizing them to do so. Since the plaintiff stopped repaying the loan before finishing to repay the total loan amount advanced to them plus interest the court has found as rightly submitted by the counsel for the defendant the plaintiff breached the terms and conditions of their term loan and two facilities agreement which required the plaintiff to repay the loan without failure or delay.

The court has found it was stated by PW1 in his evidence and it is stated in the submission of the counsel for the plaintiff that the two facilities advanced to the plaintiff for the purpose of repaying the outstanding debt the plaintiff was supposed to pay to the Exim Bank were not paid directly to the Exim bank as agreed in exhibit P1. It was stated instead of that the money was deposited in the plaintiff's bank account and caused the plaintiff to use the same as its working capital. The court has found DW1 and DW2 admitted in their evidence that the money

intended to be used to pay the debt of the plaintiff to the Exim Bank was not transferred to the mentioned bank as per the agreement in exhibit P1 but was deposited into the plaintiff's bank account.

The court has been of the view that, although the stated facilities were not paid directly to the Exim Bank to clear out the plaintiff's debt to the mentioned bank but as PW1 admitted to have withdrawn the stated money and used the same as a capital for their business there is nothing substantial which can make it to hold the plaintiff was justified to stop repaying the stated facilities as agreed in their facilities agreement. The above finding moved the court to come to the settled finding that, the plaintiff breached the terms and conditions of their term loan and facilities agreement requiring them to repay the total loaned amount and its interest within the agreed period of time. Consequently, the court has found in totality of all what I have stated hereinabove the plaintiff breached the terms and conditions requiring it to repay the term loan and facilities advanced to it and the defendant has not breached any term and condition of the loan given to the plaintiff.

Coming to the second issue which asks whether any of the parties suffered any damages the court has found that, the counsel for the plaintiff stated the damaged suffered by the plaintiff are damages arising from the allegations that the defendant breached the implied duty of

transferring the ownership of the landed property into the name of the plaintiff and loss of rent from the tenants who had leased the hotel building and refused to renew their lease agreement with the plaintiff after seeing the ownership of the landed property had not been transferred to the plaintiff. Since the court has already found the plaintiff is the one who is in breach of the terms and conditions of the term loan and facilities agreement, they entered with the defendant for failure to continue to repay the loan given to them it cannot be said the plaintiff has suffered any damage which is entitled to be compensated.

As for the damages claimed by the defendant by way of counter claim the court has found as stated at the outset of this judgment the defendant is claiming for an order of compelling the plaintiff to pay them the sum of TZS 700,000,000/= being the principal amount and TZS 127,498,318.20 being interest in arrears for Tanzanian shillings account and USD 29,951 for United States dollars account. The court has found as stated earlier in this judgment the stated claim is not tallying with the amount stated by DW1 and DW2 in their evidence. The court has found while the amount claimed in the counter claim is the amount stated hereinabove but DW1 stated in her testimony the unpaid amount of loan from the plaintiff as on 20<sup>th</sup> March, 2014 was TZS 621,060,749.45 and US\$ 29,951 which is also appearing in exhibit P2. On the other hand, DW2

stated in her statement the sum of the unpaid loan as on 27<sup>th</sup> February, 2014 was TZS 874,025,204.65 and US\$ 29,951.

The court has also found that, apart from the discrepancies appearing in the testimony of DW1 and DW2 in relation to the amount claimed by the defendant in the counter claim as demonstrated hereinabove the court has found the defendant is disputing the amount of Tshs. TZS 182,292,636.82 and US\$ 46,512.80 stated by PW1 in his testimony it was paid to the defendant by the plaintiff. Since there are discrepancies on the actual amount the defendant is claiming from the plaintiff as the outstanding balance of unpaid term loan and the facilities given to the plaintiff the court has found it cannot be said the defendant has established the actual amount of the outstanding debt is entitled to be paid by the plaintiff.

Coming to the last issue relating to the reliefs the parties are entitled the court has found the plaintiff has not managed to establish the defendant breached the implied terms and conditions of their term loan and facilities agreement. The court has also found that, although it has been found the plaintiff defaulted to repay the loan facilities given to them by stopping to repay the facilities, but the defendant has not managed to establish with certainty the actual outstanding amount which has not been



repaid by the plaintiff so that the court can order the plaintiff to pay the same to the defendant.

In the premises the court has found the proper order to make in the present case under the clause of any other relief the court may deem fit and just to grant is to order as follows: -

1. The plaintiff's claims against the defendant in the main suit is dismissed for failure to establish the same to the standard required by the law.
2. The defendant's claim in the counter claim is partly allowed to the extent of declaring the defendant is an equitable mortgagee over the property mortgaged in its favour by the plaintiff.
3. The parties are advised to resume to proceed with performance of their facilities agreement from where its performance was stopped by the plaintiff.
4. Each party to bear its own costs.

It is so ordered.

Dated at Dar es Salaam this 24<sup>th</sup> day of February, 2023



*I. Arufani*  
I. Arufani  
**JUDGE**  
24/02/2023

**Court:**

Judgment delivered today 24<sup>th</sup> day of February, 2023 in the presence of Mr. Richard Barreto and Mr. Jude Barreto, Directors of the plaintiff and in the presence of Ms. Beatha Telly, learned advocate for the defendant. Right of appeal to the Court of Appeal is fully explained.



*I. Arufani*

**I. Arufani**  
**JUDGE**  
24/02/2023