

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

LAND CASE NO.: 146 OF 2021

HASHIM IBRAHIM LEMA PLAINTIFF

VERSUS

MAXCOM AFRICA LIMITED 1ST DEFENDANT

NATIONAL BANK OF COMMERCE LIMITED 2ND DEFENDANT

MAS & ASSOCIATES CO. LIMITED & COURT BROKER ... 3RD DEFENDANT

LATIFA IBRAHIM OLOTU INTERESTED PARTY

Date of last Order: 11/10/2023

Date of Judgment: 23/11/2023

JUDGMENT

I. ARUFANI, J

The plaintiff filed the instant suit in this court to challenge the attempt of the second defendant to sale his house with certificate of title No. 90885 located on Plot No. 547 Block 45C, Kijitonyama Area, Kinondoni Municipality, Dar es Salaam Region (hereinafter referred as the suit premises). The background of the matter is to the effect that, the plaintiff mortgaged the suit premises to secure the overdraft facility of TZS 370,000,000/= advanced to the first defendant by the second defendant.

It was averred by the plaintiff that, apart from the suit premises the overdraft facility was also secured by other securities including mortgage deed over two apartments of the plaintiff located at Meru Residential Apartments located on Plot No. 565/1 Block X, Area F along Wachagga

Road in Arusha Municipality valued TZS 490,000,000/=. The plaintiff avers further that, after seeing the other securities of the overdraft facility were sufficient enough to cover the value of the overdraft facility granted to the first defendant, he requested the second defendant to release the suit premises.

It is further averred that, instead of the second defendant to release the suit premises the plaintiff was surprised to have seen the second defendant has appointed the third defendant to sale the suit premises without any notification. The plaintiff states the intention of the second and third defendants to sale the suit premises is null and void as it is no longer a security for the overdraft facility.

It was stated further that mortgage of the suit premises to secure the overdraft facility granted to the first defendant was illegal as the consent of the interested party was not sought before the suit premises being mortgaged to secure the stated overdraft facility. The plaintiff is praying for judgment and the orders as follows: -

- (a) A declaratory order that the first and second defendants have breached the facility agreement dated 11/04/2019*
- (b) An order restraining the second and third defendants to sale the plaintiff house with certificate of title No. 90885, Plot No. 547 Block 45C, Kijitonyama Area, Kinondoni Municipality, Dar es Salaam.*

- (c) *A declaration order releasing the plaintiff house with certificate of title No. 90885, Plot No. 547 Block 45C, Kijitonyama Area, Kinondoni Municipality, Dar es Salaam from the mortgage agreement.*
- (d) *An order compelling the second defendant to release and handover to the plaintiff his certificate of title No. 90885, Plot No. 547 Block 45C, Kijitonyama Area, Kinondoni Municipality, Dar es Salaam.*
- (e) *A declaration order that the intention of the second and third defendants to sale the plaintiff house is null and void.*
- (f) *General damages*
- (g) *Costs of the suit*
- (h) *Any other relief(s) may this court deem fit and just to grant.*

The defendants disputed the claims of the plaintiff and the second defendant avers that, the suit premises has never been released from being security of the overdraft facility advanced to the first defendant. It was averred further by the second defendant that their intention to sale the suit premises is not illegal because the overdraft facility advanced to the first defendant has never been fully repaid. It was also stated by the second defendant that the spouse consent of the interested party was sought and obtained before the overdraft facility being advanced to the first defendant. The issues framed for determination in the matter are as follows: -

- 1. Whether the first and second defendant breached the facility agreement.*
- 2. Whether the mortgage deed executed by the plaintiff in favour of the second defendant was discharged.*
- 3. Whether the interested party consented to the mortgaged property.*
- 4. To what reliefs are the parties entitled.*

During hearing of the matter, the plaintiff was represented by Mr. Selemani Almasi, learned advocate and while the first defendant was represented by Mr. Ahmed Lusasi, Director of the first defendant, the second and third defendants were represented by Ms. Kavola Semu, learned advocate and the interested party was represented by Mr. Godfrey Francis, learned advocate. In a bid to prove and disprove the issues framed for determination in the case the plaintiff testified himself as PW1 and tendered two documentary exhibits. On the other side the defendants together with the interested party brought to the court three witnesses and tendered three documentary exhibits in the case.

The plaintiff **Hashim Ibrahim Lema** testified as **PW1** and told the court he was Non-Executive Director of the first defendant and the interested party, Latifa Ibrahim Olotu is his wife. He said on 11th April, 2019 the first and second defendants entered into an overdraft facility agreement whereby the second defendant advanced to the first defendant

the sum of TZS 370,000,000/= as a working capital. He said the stated overdraft facility was supposed to last for twelve months and its copy which is titled Multi Option Facility Commercial Agreement was admitted in the case as exhibit P1. He said the stated overdraft facility was secured by the suit premises which he mortgaged in favour of the second defendant. He went on saying that, apart from the suit premises the overdraft facility was also secured by his two apartments namely No. D7 and D8 located at Meru Residential Apartment and personal together with corporate guarantees from the first defendant.

He said on 5th July, 2019 the first defendant wrote a letter to the second defendant which was received by the second defendant on 12th July, 2019 requesting the second defendant to release the suit premises from being security of the overdraft facility advanced to the first defendant. He said the stated letter was written after seeing the overdraft facility advanced to the first defendant was small compared to the number and value of the securities offered to the second defendant to secure the stated overdraft facility. Copy of the stated letter was admitted in the case as exhibit P2.

PW1 said on August, 2019 he was told by the second defendant that they had received their request and told him they were on the process of releasing the suit premises. He said after getting the stated information

he proceeded with his activities until August, 2021 when he was informed by his friend that he has seen an advertisement in Raia Mwema newspaper showing his house would have been sold by auction by the third defendant under the instruction given by the second defendant because the first defendant had defaulted to repay the overdraft facility obtained from the second defendant. He said after getting the stated information he came to the court to lodge the instant suit in the court.

He said he didn't involve his wife, the interested party in the suit that he was offering their house as mortgage, for the loan advanced to the first defendant. He said he was not personally served with any notice informing him the first defendant had defaulted to repay the loan and his suit premises would have been sold. He prayed the court to grant him the reliefs sought in his plaint.

When he was cross examined by the counsel for the second defendant, he said the suit premises was used as a security for the other loan facilities advanced to the first defendant by the second defendant. He said he signed another mortgage deed with the second defendant in 2012. He said although the notice for default of repayment of the overdraft facility was addressed to his name but it did not reach him.

He said apart from being Non-Executive Director of the first defendant he is also one of the shareholders of the first defendant. He

said he don't know if his wife signed any document in relation to the mortgage of the suit premises and said he know the loan issued through exhibit P1. He said he has not brought to the court any letter showing the suit premises was released by the second defendant.

He said the overdraft facility agreement was supposed to come to an end in 2020 but to date the second defendant is still holding the certificate of title of his suit premises. When he was cross examined by the counsel for the interested party, he said he married the interested party in 2003 and they acquired the suit premises in 2010 and they are living in the suit premises. He said his wife gave consent for the suit premises to be mortgaged to the second defendant for the term loan and overdraft facility advanced to the first defendant in 2012 and not the overdraft facility agreement executed in 2019.

Ahmed Salum Lusasi testified as **DW1** and said he is the Director of the first defendant. He said in 2019 their company applied for loan facility from the second defendant under the category of overdraft facility of TZS 370,000,000/=. He said they used four securities or collaterals for the stated overdraft facility which were the suit premises, two apartments located at Arusha within Plot No. 565/1 Block X, Meru Residential Apartments namely, Apartments No. D7 and D8 and they signed personal guarantors guarantees.

He said after being given the overdraft facility the plaintiff followed them and told them he was in need of his certificate of title he mortgaged in favour of the second defendant as a security for the loan granted to the first defendant by the second defendant. He said after receiving the stated request they wrote a letter to the second defendant requesting the suit premises be released as the other securities were enough to secure the overdraft facility granted to the first defendant. He said their letter was written on 5th July, 2019. He said in 2021 the plaintiff issued a notice of suing the first defendant together with the second and third defendants.

When he was cross examined by the counsel for other defendants, he said that, apart from the overdraft facility advanced to the first defendant in 2019, the first defendant had received another loan facility from the second defendant issued in 2012. He said he don't remember if the suit premises was mortgaged for the other loan facility advanced to the first defendant. He said the guarantors of the overdraft facilities were Engineer Juma Rajabu, Lucy Kanza and Hashim Lema. He said the loan advanced to the first defendant was for the duration of one year which ought to have come to an end on March, 2020.

He stated further that, he does not remember if at the end of the stated period the overdraft facility advanced to the first defendant by the

second defendant had been repaid. He said exhibit P2 was signed by him and Lucy Kanza and it was received by Fatma Hassan who was an employee of the second defendant. He said it is not written anywhere in exhibit P2 that Fatma Hassan was an employee of the second defendant. He said they didn't receive any answer from the second defendant in respect of the stated letter and said they were told by the bank officers that they were processing their request.

He said clause 6 of exhibit P1 states the mortgaged suit premises could have been used whenever the loan has not been repaid and it could have been used in any other additional loan secured by the stated mortgaged premises. He said exhibit P1 was executed in 2012 and the consent of the interested party namely Latifa Ibrahim Olotu was obtained as she signed the spouse consent on 18th December, 2012. He said he don't remember if they have requested for the bank statement of their loan from the second defendant. He also said they didn't see the advertisement of auctioning the suit premises.

He went on saying that, in 2012 the first defendant was given two loan facilities which its total value was TZS 650,640,000/= and one of the securities for the stated loan was the suit premises. He said he think the wife of the plaintiff consented their matrimonial house to be mortgaged as the security of the overdraft facility granted to the first defendant. He

said they have never heard any problem from the second defendant in relation to the overdraft facilities granted to the first defendant.

He said he signed the agreement of both loan facilities of 2012 and that of 2019 as the Director of the first defendant. He said clause 6 was for the additional loan but the overdraft facility was not additional loan facility but a new loan. He said the loan of 2019 was different from that of 2012 that is why they issued other securities. He said they were directed by the second defendant to write a letter of requesting the suit premises to be released from being security of the overdraft facility granted to the first defendant.

James Simba testified as **DW2** and told the court he is an Assistant Manager of Business Support and Corporate Recovery Department of the second defendant. He said he know PW1 as a mortgagor who mortgaged the suit premises to the second defendant as the security for the overdraft facility granted to the first defendant by the second defendant. He said he also know the interested party is the wife of PW1 who gave her consent for the suit premises to be used as a security for the overdraft facility granted to the first defendant.

He said there are various documents showing the loan facilities granted to the first defendant was secured by the suit premises. He said the stated documents include the title deed over the suit premises,

mortgage deed and the spouse consent of the wife of the plaintiff signed on 18th December, 2012 which were admitted in the case exhibit D1 collectively. He said the title deed of the suit premises was used to secure various loan facilities disbursed to the first defendant as shown in the bank statement and an affidavit supporting its authenticity which were admitted in the case as exhibit D2.

He explained how the overdraft facility was disbursed to the first defendant and shows the amount disbursed and how it was withdrawn, the amount repaid by the first defendant and the outstanding debt until 30th September, 2021 which he said it was TZS 511,571,760.64 and it was stopped under the regulations of the Bank of Tanzania. He said the second defendant communicated with the plaintiff to know how they would have paid the outstanding debt but he failed to repay the debt. He said after the plaintiff failed to pay the outstanding debt, they issued to the plaintiff a sixty days' notice which was admitted in the case as exhibit D3.

He said exhibit D3 was sent to the plaintiff through his registered mail as agreed by the parties in the mortgage deed. He said after sending the demand notice to the plaintiff the outstanding debt was not repaid. He said after the plaintiff failed to repay the loan; they handed the suit premises to the third respondent to auction the suit premises. He said the

auctioneer was required to issue notice of auctioning the suit premises and thereafter the plaintiff came to the court with present suit.

He said the claims of the plaintiff that he demanded the suit premises to be released is not true as the stated request was neither received nor accepted by the second defendant. He said the plaintiff was issued with sixty days' notice as required by the law and advertisement of auctioning the suit premises was done in the newspaper as required by the law. He said the wife of the plaintiff consented the suit premises be used as a mortgage for the overdraft security granted to the first defendant and prayed the suit be dismissed with costs.

When DW2 was cross examined by the counsel for the defendant he said all the procedure of issuing loan was observed when the loan was disbursed to the first defendant by the second defendant. He said the plaintiff mortgaged his two houses to secure the loan advanced to the first defendant and one of them is the suit premises. He said he don't know the value of the suit premises. He said the spouse consent used to secure the loan disbursed to the first defendant was signed in 2013 and said the overdraft facility was secured by the mortgage deed of 2013.

He said the first defendant defaulted to repay the overdraft facility and they were served with the default notice. He said the dispute before the court is about the overdraft facility disbursed to the first defendant by

the second defendant in 2019 and secured by the mortgage deed executed in 2013. He said the first defendant was given term loan facility of TZS 280,640,000/= and overdraft facility of TZS 370,000,000/= and said it is only the term loan facility of TZS 280,640,000/= which was fully repaid. He said the contract of renewing the overdraft facility is in their custody. He said he don't know if the plaintiff requested the mortgaged property to be released. He said the plaintiff's property at Arusha has the value of TZS 490,000,000/= and it is still in their custody.

Latifa Ibrahim Olotu testified as **DW3** and told the court she is the wife of the plaintiff and they married each other in 2003 and managed to acquire the suit premises in 2010. She said in 2012 PW1 requested her to give her consent for the suit premises to be mortgaged for the overdraft facility of TZS 650,000,000/= advanced to the first defendant by the second defendant and she consented to the stated request. She said the overdraft facility was to last for one year and recognized exhibit P1 which she said it has her photograph and her signature.

She said she came to discover their house was about to be sold this year when PW1 was shifting from his office to a new office after see a piece of newspaper showing their house was about to be sold. She said when she asked PW1 about the stated advert, PW1 told her they would have talked to her later on. She said later on PW1 told her it is true that

their house was about to be sold because of the overdraft facility of TZS 370,000,000/= advanced to the first defendant by the second defendant and the first defendant had defaulted to repay the same.

DW3 said that, when she asked PW1 why he didn't inform her about that, he had no answer of giving her. She said when she asked PW1 what steps he had taken in relation to the stated advert he told her he had taken a case to the court to restrain the stated attempt. She said to have asked for the documents of the case and after getting them she went to her lawyer who advised her to apply to be joined in the suit to defend her interest in the suit premises. She prayed the court to declare that she was not involved in the overdraft facility of 2019 and prayed the suit premises be released from the securities used to secure the loan advanced to the first defendant.

When she was cross examined by the counsel for the defendants, she said she gave her consent to the overdraft facility of TZS 650,000,000/= advanced to the first defendant in 2012. She said when she signed the spouse consent deed, she was not shown other documents and said she signed the consent deed before a lawyer but she doesn't remember her name. She said from when she signed the consent deed, she didn't make follow up to know whether the overdraft facility was repaid and where is the certificate of title of the suit premises.

She said although there is her name and signature resembling her signature in exhibit D1 but it is not her signature and denied to know the stated exhibit. She said PW1 is owning a company known as Lubros Holding Company and said she is one of the Directors of the stated company together with PW1 and other people. She said she has no any problem with PW1 and said she saw exhibit P1 for the first time in this year.

After receiving evidence adduced in the case by all parties the counsel for the parties prayed for leave of filing their final submission in the case and although the stated prayer was granted, it is only the interested party who filed her final submission in the matter. It was stated in the final submission of the interested party that, as the defendants disputed the claims of the plaintiff the parties are required by section 110 (1) of the Evidence Act to prove the averments made in the case. It is submitted further that the interested party agreed to have given consent for the loan given to the first defendant which its agreement was signed on 18th December, 2012 and denied to have given her consent to the overdraft facility granted in 2019.

Having heard the evidence from both sides and after going through the final submission filed in the court by the interested party the duty of the court is to determine the issues framed in the case. However, before

going to the determination of the framed issues the court has found proper to start by having a look on the principles of law governing determination of civil disputes. The position of the law as stated in the final submission of the interested party and provided under sections 110 and 111 of the Evidence Act, Cap 6 R.E 2002 is very clear that, the burden of proof in civil cases lies on the person alleging existence of certain facts. The principle of law provided in the above cited provisions of the law was well articulated by the Court of Appeal in the case of **Godfrey Sayi V. Anna Siame as Legal Representative of the late Mary Mndolwa**, Civil Appeal No. 114 of 2014, CAT at Mwanza (unreported) where it was that: -

"It is cherished principle of law that, generally, in civil cases, the burden of proof lies on the party who alleges anything in his favour. We are fortified in our view by the provisions of sections 110 and 111 of the Law of Evidence Act [Cap 6 R.E. 2002] which among other things states: -

110. Whoever desires any court to give judgment as of any legal right or liability depending on existence of facts which he asserts must prove that those facts exist.

111. The burden of proof in a suit lies on that person who would fail if no evidence at all were given on either side."

Together with the position of the law stated in the above quoted excerpt it is to the view of this court proper to state here that, the standard

of proof in civil cases as provided under section 3 (2) (b) of the Evidence Act and restated in number of cases which one of them is the case of **Anthony M. Masanga V. Penina (Mama Mgesi) and Another**, Civil Appeal No. 118 of 2014, CAT at Mwanza (unreported) is on preponderance or balance of probability. While being guided by the above stated principles of the law the court has found its task is to determine whether the plaintiff and the interested party have managed to discharge the duty laid on their shoulders of proving their allegations to the required standard of the law.

I will start with the first issue which asks whether the first and second defendants breached the facility agreement. The court has found as stated in the evidence adduced in the case by both sides the facility agreement which the plaintiff is complaining was breached by the first and second defendants is the one titled Multi Option Facility Commercial Terms which was admitted in the case as exhibit P1. The court has come to the stated finding after seeing there is no other facility agreement adduced in the case or stated to the court was breached by the first and second defendants.

The court has found the stated facility agreement was executed by the parties on 11th April, 2019 and the first defendant was offered an overdraft facility worth TZS 370,000,000/= which its duration was twelve

months. As stated by PW1 the stated overdraft facility was secured by various securities which one of them was the suit premises which its mortgage deed was admitted in the case as exhibit D1. The court has found the allegation by the plaintiff that the first and second defendants breached the facility agreement is based on his complaint that the second defendant initiated an attempt of selling the suit premises without giving him any notice of their intention to sale the suit premises.

The court has found the plaintiff stated that, although DW2 said the plaintiff was served with sixty days' notice of the first defendant's default of repaying the overdraft facility and exhibit D3 shows it was addressed to him but the stated notice did not reach him. The court has considered the stated evidence of the plaintiff and after going through exhibit D1 it has found clause 22 of the stated exhibit states that, any demand or notice required to be served to the mortgagor shall be sufficiently served if it is sent by post in a stamped envelop addressed to the mortgagor.

The court has found the post receipt attached to exhibit D3 shows on 25th March, 2020 the plaintiff was served through post the sixty days' notice of default of repayment of the overdraft facility granted to the first defendant by the second defendant. The court has found that, although the plaintiff denied to have received the stated notice but as they agreed in the afore mentioned clause that service of notice by post shall be

sufficient service if it is sent by post in a stamped envelope addressed to the mortgagor and there is a post receipt showing the notice was sent to the plaintiff through post he cannot be heard to claim he was not served with any notice of default of repayment of the overdraft facility granted to the first defendant and secured by his suit premises.

Another complaint by the plaintiff is that the second defendant refused to return to him the certificate of title of the suit premises which was issued in favour of the second defendant as a mortgage for the overdraft facility advanced to the first defendant. PW1 said that, after seeing the other securities issued to the second defendant which includes the two apartments located at Meru Residential Apartments styled as Apartments D7 and D8 together with unlimited personal and corporate guarantees signed issued in favour of the second defendant were enough to secure the overdraft facility, he requested the suit premises be released from being security for the overdraft facility.

The letter for requesting the plaintiff's suit premises to be released from being security for the overdraft facility was written to the second defendant by the first defendant and it was admitted in the case as exhibit P1. The court has found that, although the stated letter shows it was endorsed by one Fatma Hassan who PW1 and DW1 said she was an employee of the second defendant but DW2 said the named person was

not their employee. The court has also found that, even if it will be accepted the named person was an employee of the second defendant but there is no evidence adduced in the case to show the stated request was accepted by the second defendant.

The court has found further that, PW1 and DW1 said after the letter being served to the second defendant, they were told the second defendant was working on their request but the stated certificate of title was never returned either to the plaintiff or to the first defendant. The court has found DW2 said the second defendant has never received the request alleged was made by the plaintiff and the first defendant to the second defendant. The stated evidence shows the request by the plaintiff and the first defendant that the suit premises be released was never processed and granted.

The question to ask here is whether the stated circumstances amounted to breach of the facility agreement alleged by the plaintiff. The court has failed to see how the stated circumstances can be said is a breach of the facility agreement involving the plaintiff on one side and the first and second defendants on the other side. The court has come to the stated finding after seen there is nowhere in the facility agreement admitted in the case as exhibit P1 or in the mortgage deed admitted in the case as exhibit D1 or any other agreement entered by the parties

which shows the certificate of title of the plaintiff issued as a security for the overdraft facility advanced to the first defendant by the second defendant would have been returned to the plaintiff and it was not return so as to establish the first and second defendants breached the agreement they entered.

Since the agreement for the plaintiff to mortgage the suit premises as a security for the overdraft facility granted to the first defendant was reached freely by the parties, the court has found it cannot force the parties to vary the terms and conditions of their agreement by ordering the second defendant to release the suit premises which was used as a security for the overdraft facility granted to the first defendant which as stated by DW1, DW2 and as appearing in exhibit D2 has not been fully repaid. It is because of the above stated reasons the court has found the first issue framed for determination in the matter has not been substantiated by the evidence adduced in the instant case and it is hereby answered in negative.

Coming to the second issue it asks whether the mortgage deed executed by the plaintiff in favour of the second defendant was discharged. The court has found the mortgage deed executed by the plaintiff in favour of the second defendant as the security of the overdraft facility granted to the first defendant which was admitted in the case as

exhibit D1 was executed on 18th December, 2012. The court has found the stated mortgage deed was issued for two types of the loan. One was the term loan of TZS 280,640,000/= which was for purchasing building for office use at Meru Arusha and another one was the overdraft facility of up to TZS 370,000,000/= which was for being used as a working capital.

Although the mortgaged deed was executed on 18th December, 2012 but as said by DW2 and as stated at paragraph 6 of exhibit D1, the mortgage deed was required to remain in force as continuing security covering the principal amount plus interest thereon and any other additional amount that may be granted to the first defendant who was a borrower. The evidence adduced in the case and specifically exhibit P1 which is the one used to grant the first defendant the overdraft facility of TZS 370,000,000/= shows that, although it was issued on 11th April, 2019 but it stated categorically that it would be secured by the existing security and new security listed in Part A and B of the schedule 1 of exhibit P1. One of the existing securities listed in Part A of the schedule 1 is the suit premises.

Since the suit premises was listed in the schedule 1 of exhibit P1 as one of the existing securities which would have been used to secure the overdraft facility advanced to the first defendant, the court has found

there is no way it can be said the mortgage deed has ever been discharged. To the contrary the court has found the mortgage deed is still one of the securities of the overdraft facility of TZS 370,000,000/= granted to the first defendant by the second defendant. In the premises the second issue is answered in negative that the mortgage deed executed by the plaintiff in favour of the second defendant has never been discharged.

As for the third issue which was framed from the written statement of defence filed in the court by the interested party the court has found it asks whether the interested party consented to the mortgaged property. The court has found the interested party together with PW1 said the consent of the interested party was not sought and obtained before the overdraft facility of TZS 370,000,000/= being granted to the first defendant on 11th April, 2019. The interested party said she only gave her consent for the suit premises to be mortgaged for the term loan and the overdraft facility advanced to the first defendant in 2012.

The court has found the requirement of spousal consent to be sought and obtained for purposes of disposition of a matrimonial home by way of sale, lease and mortgage is provided in our laws. The stated requirement is provided under section 59 (1) of the Law of Marriage Act, Cap 29, R.E 2019 which states as follows: -

"Where any estate or interest in the matrimonial home is owned by the husband or the wife, he or she shall not, while the marriage subsists and without the consent of the other spouse, alienate it by way of sale, gift, lease, mortgage or otherwise, and the other spouse shall be deemed to have an interest therein capable of being protected by the caveat, caution or otherwise under any law for the time being in force relating to the registration of title to land or of deeds".

Reading the above provision of the law, it is clear that the spouse cannot alienate matrimonial home by way of sale, gift, lease, mortgage, or otherwise without the consent of the other spouse while the marriage subsists. The court has found the similar requirement is also provided under section 114 (1) (a) and (b) of the Land Act, Cap 113 R.E 2019 which provides that, mortgage of a matrimonial home shall be valid only if the document or form used in applying for such mortgage is signed or assented by the borrower and any spouse of the borrower living in that matrimonial home.

The court has found as appearing in exhibit D1, it is not in disputed that the consent given by the interested party for the loan facilities advanced to the first defendant by the second defendant was given in 2012 when the first defendant was applying for the term loan and the overdraft facility totalling 650,640,000/=. The dispute is whether the consent given by the interested party in 2012 extended to cover the

overdraft facility of TZS 370,000,000/= granted to the first defendant by the second defendant on 11th April, 2019 as stipulated in exhibit P1.

The court has found DW2 told the court in his evidence that, as stated at clause 6 of the mortgage deed admitted in the case as exhibit D1, the consent given by the interested party in 2012 continued to cover other loan facilities advanced to the first defendant including the overdraft facility granted to the first defendant on 11th April, 2019. The aforementioned clause 6 of exhibit D1 states as follows: -

"This mortgage shall remain in force as continuing security covering for the principal amount, interest thereon and any additional amount that may be granted to the borrower by the lender, notwithstanding any intermediate settlement, and, this mortgage shall be and remain of full force, virtue and effect as a continuing security and covering mortgage on each and every sum in which the mortgagor may now or hereafter become indebted to the mortgagee from any cause whatsoever to the amount of the principal amount, interest thereon and the addition amount."

The wording of the above quoted clause shows clearly that the mortgage of the plaintiff's suit premises to secure the loan facility advanced to the first defendant by the second defendant was intended to cover the term loan and overdraft facility granted to the first defendant by the second defendant in 2012 together with the additional amount

granted to the first defendant. Reading of exhibit P1 which is a facility letter used to offer to the first defendant the impugned overdraft facility of TZS 370,000,000/= on 11th April, 2019 it shows at its first paragraph that, the second defendant was confirming to continue to offer to the first defendant various facilities on terms and conditions contained in exhibit P1. The stated letter was making reference to another facility letter dated 13th April, 2018 which was stated it had been amended or varied from time to time.

The stated exhibit P1 shows the overdraft facility granted to the first defendant was secured by the securities which were in existence and one of them was the suit premises together with other new securities which included the Apartments located at Arusha. Since the interested party gave her consent for the suit premises to be mortgaged for the overdraft facility granted to the first defendant in 2012 and it was agreed the stated mortgaged property would have continued to be security for the additional amount granted to the first defendant, the interested party cannot be heard to say she didn't give her consent for the suit premises to be used as the security for the overdraft facility granted to the first defendant on 11th April, 2019.

The court has also come to the above finding after seeing that, the way various facilities were granted to the first defendant from 2012 when

the interested party gave her consent for the suit premises to be used as a security for the facilities granted to the first defendant shows the consent given by the interested party was intended to cover even the overdraft facility granted to the first defendant on 11th April, 2019. The stated finding is supported by the fact that, although the duration of the term loan and overdraft facility disbursed to the first defendant in 2012 was one year but the interested party has not stated why she did not make follow up to know why the mortgaged property had not been discharged until when the process of auctioning the suit premises started. In the premises the court has found the third issue is supposed to be answered in affirmative that the interested party consented the suit premises to be mortgaged as the security for the overdraft facility granted to the first defendant in 2012 plus any additional amount which included the impugned overdraft facility granted to the first defendant in 2019.

Coming to the last issue which is about the reliefs the parties are entitled the court has found that, the evidence adduced in the matter by the plaintiff and the interested parties have failed to establish all issues framed in the case in their favour as required by section 110 and 111 of the Evidence Act. That being the position of the matter the court has found the only relief which can be granted by the court is the one sought by the defendants that the claims by the plaintiff and the interested party

be dismissed for being unsubstantiated. Consequently, the claims of the plaintiff and the interested party are hereby dismissed in their entirety and the costs to follow the event. It is so ordered.

Dated at Dar es salaam this 23rd day of November, 2023.




I. Arufani.
JUDGE
23/11/2023

Court:

Judgment delivered today 23 day of November, 2023 in the presence of Mr. Selemani Almasi, advocate for the plaintiff and also holding brief for Mr. Godfrey Francis, advocate for the interested party, Mr. Robert Mosi, advocate for the second and third defendants and in the absence of the first defendant. Right of appeal to the Court of Appeal is fully explained.




I. Arufani.
JUDGE
23/11/2023