

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

LAND CASE NO. 123 OF 2023

**NUI MILLS COMPANY LIMITED.....1ST PLAINTIFF
EMMANUEL NGELEJA MCHUNGA.....2ND PLAINTIFF**

VERSUS

**NMB BANK PLC.....1ST DEFENDANT
ADILI AUCTION MART LIMITED.....2ND DEFENDANT**

JUDGMENT

5th to 12th December, 2023

E.B. LUVANDA, J

In this suit Ms. Nui Mills Company Limited (First Plaintiff) and Emmanuel Ngeleja Mchungu (Second Plaintiff) are claiming against the Defendants above for a declaration that the latter are in breach of the overdraft facility executed on 03/09/2020 between the First Plaintiff and the First Defendant, a declaration that the Defendants intention/contemplation to sale the Second Plaintiff's properties located on Plot No. 807 Block "E" Tegeta CT No. 58392 and Plot No. 50 Block "A" Msongola Area, is unlawful, an order for a permanent injunction on restraining the First and Second Defendants from selling the Second Plaintiff's properties mentioned above, for an order for the First Defendant to release the

Second Plaintiff's title deed for Plot No. 50 Block "A" Msongola Area, and an order for general damages as assessed by the court.

According to the evidence presented is to the effects that on 03/09/2020 the First Plaintiff and China Commercial Bank Ltd (CCB), executed an overdraft facility of Tshs 100,000,000 for purpose of financing the First Plaintiff construction project, as per letter of offer Ref. No. CCB/CDT/CL/SEPTEMBER 2020/056/2X exhibit P1, where the Second Plaintiff consented to be a guarantor and mortgaged his landed property with CT No. 58392 located at Tegeta Plot No. 807 Block "E" valued Tshs 300,000,000 as per general information on the facility on a clause of security on the front page of exhibit P1. It was the evidence of Emmanuel Ngeleja Mchungu (PW1) that in the same September, 2020, he initiated or commenced negotiation with CCB for a separate facility of term loan, where he was directed to surrender the original title deed for due diligence, inturn he surrendered certificate of title for another property situated on Plot No. 50 Block "A" Msongola Area Illala Dar es Salaam. PW1 asserted that while negotiation for terms loan (second loan) were underway, on 11/03/2021 the Bank of Tanzania (BOT) issued a public notice reference No. FA.56/433/52/91 exhibit P2 suspending all operations of CCB and transferred all assets and liabilities to the First

Defendant with effect from 04/03/2021. It was the testimony of PW1 that while still establishing ways of repaying loan, on 21/11/2022 he was served with fourteen days notice dated 14/11/2022 exhibit P3, from the Second Defendant acting under instructions of the First Defendant as per letter exhibit P4, demanding for payment of Tshs 124,730,514.19 or otherwise his property located at Msongola Area Plot No. 50 Block "A" will be auctioned. PW1 asserted that the said property is not a security to the overdraft facility and he never mortgaged the same. On cross examination, PW1 dispelled a debt of Tshs 120 million, but acknowledge a debt of Tshs 100 million, although later on cross examination and re examination admitted and ended to acknowledge to be indebted a sum of 132 million via a letter of commitment dated 05/01/2021. On cross examination, PW1 dispelled evaluation report dated August 2020 depicting a forced sale value of Tshs 100,000,000 in respect of a house on Plot No. 807 Block "E" Tegeta.

On defence, Rabisante Boko (DW1), asserted that the Second Plaintiff mortgaged a property on Plot No. 807 Block "E" Tegeta and a positive pledge of Plot No. 50 Block "A" Msongola. DW1 asserted that a house on Plot No. 807 Block "E" Tegeta, it is forced sale value is Tshs 100,000,000/= as per a valuation report dated August, 2020 exhibit D1.

On cross examination, DW1 stated that a house on Plot No. 50 Block "A" Msongola was not mentioned in exhibit P1, and conceded that it was not mortgaged. DW1 stated that they cannot sale a property at Msongola without a court order. DW1 asserted that there is no sixty days notice.

At the final pre trial conference, the following issues were framed; One, whether there is a breach of a loan facility agreement by either party; Two, whether the intention to sell the mortgaged property Plot No. 807 Block "E" Tegeta Dar es Salaam CT No. 58392 is justifiable; Three, whether property plot No. 50 Block "A" Msongola Area Ilala was mortgaged, Finally, what reliefs parties are entitled to.

Issues number one, the same cannot detain me much. It is vivid clear from the testimony of PW1, that after the exposure and disbursement of a loan (over draft facility) of Tshs 100,000,000 he never paid even a single centre. Instead, PW1 alleged he was busy negotiating for a second loan of term loan immediately after the overdraft was disbursed, and from then he was awaiting fo finalization of the second as loan from 03/09/2020 until on 11/03/2021 when CCB was suspended by B.O.T. On cross examination, DW1 conceded to had committed himself to pay a debt of Tshs 132 million to the First Defendant. Likewise on re examination, DW1 admitted to be indebted a sum of Tshs 132 million. In that way, it goes

without much saying that the First Plaintiff is in breach of the loan facility agreement.

Issues number two. Having ruled the First Plaintiff to be in breach of the loan facility agreement, for failure to fulfill her obligation to pay the loan, sell of the collateral is a consequential and expected phenomenal. Clause 11 of offer letter exhibit P1, provide categorically that failure to pay one month instalment the Bank will recover the fund by selling the pledged collateral. However, DW1 made an reservation that they cannot sell without issuing sixty days notice.

DW1 conceded that a sixty days notice was not issued. It is the law that upon default, the mortgage (First Defendant) is under obligation to serve the mortgagor (Second Plaintiff) a sixty days notifying him the nature and extent of default. The mortgagee may only exercise the right to sale the mortgaged property upon expiry of sixty days notice, see section 127(1) and (2)(a) and (d) of the Land Act Cap 113 R.E. 2019. Therefore the intended sale of a house on Plot No. 807 Block "E" Tegeta is premature and unjustifiable.

Issue number three, the same is simple and straight forward. DW1 conceded that a house on Plot No. 50 Block "A" Msongola was not mortgaged and was honest that they cannot sale it without court order.

To my view, the answer by DW1 is a correct position of the law. However, there was no justifiable reasons as to why the Second Plaintiff surrendered it to CCB. PW1 could not tell if at all he crafted or submitted any letter or request applying for a purported second letter. PW1 failed to justify as to why he surrendered it just few days after the disbursement of the existing loan. PW1 failed to justify as to why he surrendered the original certificate of occupancy, for the alleged call for making due diligence by the CCB. PW1 could not tell why he dared to surrender or submit the original title deed orally to unspecified Bank officer.

As to what reliefs are parties entitled, in the circumstances, the only relief available to the Second Plaintiff is to regain the title in respect of a house located at Msongola Area Ilala Plot No. 50 Block A. Therefore the First Defendant is ordered to unconditionally release the same. Any claim against it, should be pursued in line of what DW1 had suggested as depicted above.

The First Defendant is also ordered to halt and refrain from exercising a right of sale of a house Plot No. 807 Block "E" Tegeta until when the procedure of exercising the right of sale is complied to the letter. The rest of the relief are denied.

The suit partly succeed. There is no order for costs.



E. B. LUVANDA
JUDGE
12/12/2023

Judgment delivered in the presence of Mr. Geodfrey Lugomo learned Counsel for Plaintiffs also holding brief for Mr. David Pongolela learned Counsel for Defendants.



E. B. LUVANDA
JUDGE
12/12/2023