

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

AT DAR ES SALAAM

LAND CASE NO.199 OF 2023

HASNAIN GULAM HUSSEIN..... PLAINTIFF

VERSUS

AZANIA BANK LIMITED.....1ST DEFENDANT

MARK AUCTIONEERS AND COURT

BROKERS COMPANY LIMITED.....2ND DEFENDANT

SMX LIMITED.....3RD DEFENDANT

BY WAY OF COUNTER CLAIM

AZANIA BANK LIMITED.....COUNTER CLAIMANT

VERSUS

SMX LIMITED.....1ST DEFENDANT

PRIME PROPERTIES LIMITED.....2ND DEFENDANT

HASNAIN GULAM HUSSEIN.....3RD DEFENDANT

HASNAIN GULAM HUSSEIN AS PERSONAL LEGAL

REPRESENTATIVE OF LATE FATIM MOHAMED.....4TH DEFENDANT



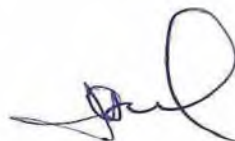
JUDGMENT

7th & 22nd April, 2024

L. HEMED, J.

On 28th May 2013 the defunct Bank M(Tanzania) Limited entered into loan agreement with **SMX LIMITED**, the 3rd Defendant in the original suit, for provision of a term loan of USD 1,000,000.00. The Plaintiff in the original suit, **Hasnain Gulam Hussein** together with the 2nd Defendant in the Counter claim namely **Prime Properties Limited**, guaranteed the said loan facility.

The securities for the loan, the Plaintiff mortgaged his two office premises known as Office No.5 Kadry Complex, 1st Floor, located on Plot No.1036/102 & 37/102, Flur 11, Samora Avenue Road (0.059) undivided shares, Samora Avenue/Morogoro road, comprised under Certificate of Title No.47882 registered in the name of the Plaintiff's name. He also pledged as security for the loan Office No.6 Kadry Complex, located on Plot No. 1036/102 & 37/102, Flur 11, Samora Avenue Road, (0.072) undivided shares, Samora Avenue/Morogoro Road, comprised under Certificate of Title No.47882, registered in the name of the plaintiff, Hasnain Gullam



Hussein as a personal legal representative of the late Fatim Mohamed (the suit properties).

On the other hand, the 2nd Defendant in the Counter Claim, also mortgaged its 3 bedroom bearing Apartment No.A 112, 11th floor, Fayrouz Apartments, located on Plot No.108, Kitonga Street, Ilala Municipality, Dar es Salaam, comprised under Certificate of Title No.77330/1/40. She as well pledged Apartment No.B71, 7th floor, Fayrouz Apartments located on Plot No.108, Kitonga Street, Ilala Municipality, Dar es Salaam, comprised under Certificate of Title No.77330/1/40. Both apartments are under the name of Prime Properties Limited.

The Plaintiff alleged that on 2nd January 2020, the 2nd Defendant, **MARK AUCTIONEERS AND COURT BROKERS COMPANY LIMITED**, acting under the instruction of the 1st Defendant, advertised through the Guardian Newspaper, for sale of the disputed properties to recover the defaulted loan. The Plaintiff is before this Court challenging the intended sale on the ground that he was never issued with the statutory notice as guarantor.

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It was further alleged that the 1st Defendant has already sold the properties of **PRIME PROPERTIES LIMITED**, the co-guarantor, (the 2nd Defendant in the Counterclaim) to realize the alleged outstanding loan. The plaintiff averred that since the 1st Defendant has sold the co-guarantor's properties which can realize the entire loan amount, then the plaintiff's properties cannot be sold purportedly to realize the amount that has been fully satisfied. The Plaintiff in the original suit is thus praying for judgment and decree jointly and severally against the defendants as follows:-

" a) A declaratory order that intended sale of the Plaintiff's properties described as Office No.5 Kadry Complex, 1st Floor, located on Plot No.1036/102 & 37/102, Flur 11, Samora Avenue Road (0.059) undivided shares with Certificate of Title No. 47882 and Office No.6 Kadry Complex, located on Plot No.1036/102 & 37/102, Flur 11, Samora Avenue Road, (0.072) undivided shares with Certificate of Title No.47882 in null and void.

b) A declaratory order that after the sale of the co-guarantor's properties described as Apartment No. 112, 11 Floor, Fayrouz Apartments located on Plot No.108 Kitonga Street, Ilala Municipality, Dar es Salaam with Certificate of Title No. 77330/140 and



Apartment No.1371, 7th Floor, Plot No.108, Kitonga Street, Ilala Municipality, Dar es Salaam with Certificate of Title No. 77330/1/10 realized and satisfied in fully the loan amount.

c) Discharge of the Plaintiff's properties as the guaranteed credit facility has been realized and satisfied in fully the loan amount.

d) Costs of the suit; and

e) Any other reliefs..."

The 3rd Defendant filed the written statement of defence but was struck out on 11th September 2023 due to her none appearance during the 1st pretrial conference. The 2nd Defendant in the original suit did not filed written statement of defence and was not appearing despite being duly served. In that regard, the matter proceeded *ex parte* against the 2nd and 3rd defendants in the original suit.

On her part, the 1st Defendant in the original suit, who is the successor of the rights and liabilities of the said defunct Bank M(Tanzania) Limited disputed all claims and raised a counter claim against, **SMX LIMITED, PRIME PROPERTIES LIMITED, HASNAIN GULAM**



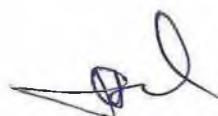
HUSSEIN and HASNAIN GULAM HUSSEIN AS PERSONAL LEGAL REPRESENTATIVE OF LATE FATIM MOHAMED.

The Counterclaimant alleged that on 2nd February 2018 the 1st Defendant in the counterclaim defaulted to make timely payment of the term loan of USD 1,000,000. It was also alleged that the 2nd, 3rd and 4th defendants in the counterclaim entered into agreement with the Counter Claimant that in event the 1st Defendant in the counterclaim fails to repay the loan, they would indemnify the counter claimant in full the whole outstanding loan together with interest. The Counter Claimant prays for Judgment and Decree jointly and severally against the defendants in the counter claim as follows:-

"i. A declaratory Order that the 1st, 2nd, 3rd and 4th defendants in a Counter claim are in breach of the Loan agreement.

ii. A declaratory Order jointly and severally to Defendants in a Counter Claim to pay USD 1,760,840.65 plus interests and penalties as will be to the date of payment.

iii. A Declaratory order to sale Land and Properties over, first Office No.5 Kandry



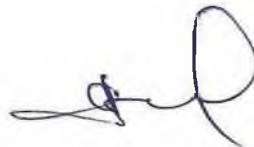
Complex, 1st Floor Located on Plot No. 1036/102 and 37/102, Flur II, Samora Avenue Road (0.059) Undivided shares) (sic) with Certificate of Title No.47882 in the name of Hasnain Gulamhussein at Samora Avenue/Morogoro Road Street Dar es Salaam and Secondly Office No. 6 Kandry Complex, 1st Floor Located on Plot No. 1036/102 and 37/102, Flur II, Samora Avenue Road (0.072) Undivided shares) with Certificate of Title No.47882 in the name of Hasnain Gulamhussein as a personal legal representative of Late Fatim Mohamed at Samora Avenue/ Morogoro Road Street Dar es Salaam.

iv. interest of on the debt at a commercial rate of 21% from the date of filing the Counterclaim until the date of judgment.

v. interest on the outstanding debt of USD 1,760,840.65 at Court rate.

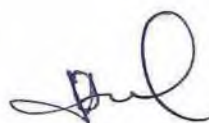
vi. Costs of the Counterclaim

vii. Any other relief(s) this Honourable Court deems fit and just to grant."



The defendants to the counterclaim filed the joint written statement of defence disputing all the claims. They prayed for the dismissal of the counter claim. Following the failure of mediation, the matter was called on 6th November 2023 for final pretrial conference where the following issues were framed to guide the trial-

1. Whether the Plaintiff in the original suit has discharged his obligation in the guarantee Agreement of the loan of USD 1,000,000 issued to the 3rd Defendant in the original suit.
2. Whether the Defendants in the Counter Claim are indebted to the plaintiff/counterclaimant in the Counterclaim the amount of USD 1760,840.65.
3. Whether the intended sale of the suit property is lawful.
4. To what reliefs are the parties entitled.

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The matter was heard *viva voce*. During hearing, the Plaintiff was represented by **Mr. Deogratius Ogunde**, learned advocate, while the 1st Defendant enjoyed the service of **Ms. Neema Mmbaga**, learned advocate. At the end of the trial, the learned advocates filed final submissions, which has been useful in composing this Judgment.

To prove the case, the Plaintiff called only one witness, **Hasanain Gulam Hussein**, who testified as PW1. On the other hand, the 1st Defendant in the main suit and the counter claimant in the counter claim called one **Raphael Aristides Bishota**, who testified as DW1. The 1st Defendant tendered in evidence banking facilities letters dates 28/03/2013 and 14/03/2016 (**Exhibit – D1 collectively**), Mortgage Deed and Guarantee & Indemnity (**Exhibit D2 collectively**) as well as a Demand Notice dated 17/06/2019 (**Exhibit D3**).

In determining this matter, I will be guided by the principle that he who alleges must prove. This principle is embodied in section 110(1) of the Evidence Act, [Cap.6 R.E 2019], thus:-

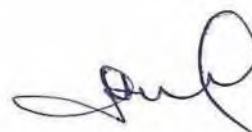
"... Whoever desires any court to give judgement as to any legal right or liability dependent on the



existence of facts which he asserts must prove that those facts exist."

Let me start with the 1st issue on ***whether the Plaintiff in the original suit has discharged his obligation in the guarantee Agreement of the loan of USD 1,000,000 issued to the 3^d Defendant in the original suit.*** PW1 testified to be the Director of the 3rd Defendant (**SMX LIMITED**), told the Court that in the year 2013, the 3rd Defendant applied for a loan of USD 1,000,000 from the defunct Bank M(Tanzania) Limited. He testified to have guaranteed the said loan by pledging the suit properties as security. According to PW1, the Bank never disbursed the applied loan to the borrower. He told the Court that AZANIA BANK who have taken over from Bank M (Tanzania) Limited have decided to auction the two properties without issuing notice to the guarantors.

Evidence of DW1 was to the effect that the amount of USD 1,000,000 was disbursed to the 3rd Defendant on 28th May 2013 upon the execution of the Loan Agreement. According to DW1, the said loan was to be repaid within 24 months. However, the testimony of DW1 revealed that the 3rd Defendant defaulted to service the loan. To substantiate it he tendered the



Loan Facility of USD 1,000,000 (exhibit D1), Guarantee and indemnity documents (exhibit P2) and the Notice of Default (exhibit D3).

I must start by saying that the Plaintiff in the original suit is not the borrower rather the guarantor of the loan of USD 1,000,000 advanced to the 3rd Defendant. He pledged the suit properties as security to the said loan. In his testimony, the Plaintiff has asserted that the said amount was not disbursed to the 3rd Defendant. I have gone through the Plaintiff to find if the Plaintiff pleaded to allege that the amount of USD 1,000,000 was never disbursed to the 3rd Defendant, I found none. I have observed from the Plaintiff that the Plaintiff challenges the intended sale of the suit properties on the ground that no notice was served to him prior to the intended sale. In other words the allegations that the money borrowed by the 3rd Defendant was not dished out is not part of the Plaintiff. It is settled that parties are not allowed to depart from their pleadings by raising new claims which are not founded in pleadings or inconsistent to what is pleaded. The Court has, from time to time, refused to place reliance on evidence not founded on pleadings. The Court of Appeal of Tanzania in **Barclays Bank (T) Ltd v. Jacob Muro**, Civil Appeal No.357 of 2019 had this to say:



"We feel compelled, at this point, to restate that time-honored principle of law that parties are bound by their own pleadings and that any evidence produced by any of the parties which does not support the pleaded facts or is at the variance with the pleaded facts must be ignored."

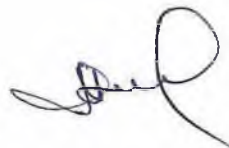
(Emphasis added)

The principle in **Barclays Bank (T) Ltd v. Jacob Muro (supra)**, was echoed and insisted by the CAT in **Yara Tanzania Limited vs. Ikuwo General Enterprises Limited**, Civil Appeal No.309 of 2019. In the instant case, the facts concerning disbursement of the amount of USD 1,000,000 have not been pleaded in the Plaintiff, therefore, evidence adduced by PW1 regarding disbursement of the loan has to be ignored. Evidence adduced by DW1 unequivocally shows that the 3rd Defendant was advanced the amount of USD 1,000,000 as loan. It is also on record that the 3rd Defendant defaulted in servicing the said loan as it never paid even a single instalment. According to exhibit D2, the Plaintiff guaranteed the said loan. Section 78 of the Law of Contract Act, [Cap 345 R.E 2019] provides thus:-



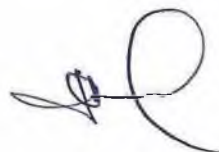
"A "contract of guarantee" is a contract to perform the promise or discharge the liability, of a third person in case of his default and the person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor"; and guarantee may be either oral or written." (Emphasis added)

By signing the Guarantee document (Exhibit D2), the Plaintiff became the surety to the loan agreement between the defunct Bank M (Tanzania) Limited and the 3rd Defendant in the original suit. According to the above provision, the Plaintiff is under obligation to honour the promise of the principal debtor by paying debt advanced to her creditor in case of default by the principal debtor. In the case of **International Commercial Bank(T) Ltd v.Yusuf Mulla and Shahidi Mulla**, Commercial Case No. 108 of 2018, this Court held that the liability of a guarantor depends on that of the principal debtor. In order to sustain a claim against a guarantor, a creditor is required to show that the principal debtor is obliged to it and has defaulted in repaying the debt or that the guarantor has accepted liability for the debt.



In the instant case, it is not in dispute that the 1st Defendant in the original suit took over from the defunct Bank M Tanzania PLC. Therefore, the 1st Defendant is the creditor of the 3rd Defendant (Principal debtor) and the Plaintiff (surety). According to exhibits D1 and D2, the obligation of the Plaintiff as guarantor was to ensure that the principal debt and interest is paid in full within the agreed time. The fact that the said loan has not been paid to date, then the 1st issue has to be answered in the negative that the Plaintiff in the original suit has not discharged his obligation in the guarantee agreement to the loan issued to the 3rd Defendant, SMX Limited.

The 2nd issue was on ***whether the Defendants in the Counter Claim are indebted to the plaintiff/counterclaimant in the Counterclaim the amount of USD 1760, 840.65.*** In the counter claim, the counterclaimant has alleged that the defendants in the counterclaim are indebted the sum of USD 1,760,840.65. DW1 testified that the defendants in the counterclaim have never serviced the loan of USD 1,000,000 which was advanced to the 1st Defendant in the counterclaim. However, DW1 tendered exhibit D3 which shows that the outstanding amount by 17th June 2019 was USD 1,165,829.39. DW1 was not able to remember the exactly figure of the current amount. In that regard, the

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counterclaimant was not able to substantiate the amount of USD 1,760,840.65 alleged in the Counterclaim. Nevertheless, there is ample evidence on record showing that the defendants in the counterclaim are indebted to the counterclaimant the amount of USD 1,000,000 plus interests which has never been paid. According to exhibit D3, by 17th June 2019, the defendants in the counter claim were indebted the amount of USD 1,165,829.39. To answer the 2nd issue, the defendants in the counterclaim are indebted to the counterclaimant to the tune of USD 1,000,000 plus interest which by 17th June 2019 was USD 1,165,829.39.

Let me turn to the 3rd issue on ***whether the intended sale of the suit landed properties is lawful***. This issue emanated from the allegation of the Plaintiff in the original suit that the 1st Defendant thereto is intending to auction the suit landed property. He alleged that he saw an advertisement of the purported sale in the Guardian News Paper of 2nd January 2020. However, the Plaintiff never tendered the said copy of the said newspaper to substantiate his allegation. I have noted from the defence of the 1st Defendant in the original suit that she denied to have issued a notice to the public to sale the suit property. DW1 in his testimony told the Court that the 1st Defendant was doing valuation of the said

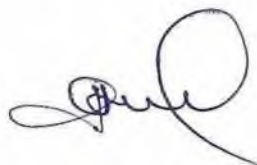


collaterals to establish the current value. I have also examined exhibit D3 and found that it was a mere demand notice for payment of the outstanding amount of USD 1,165,829.39 which was due by 17th June 2019. In exhibit D3, the 3rd Defendant, SMX LIMITED was required to pay the said amount within 21 days, otherwise, legal proceedings against her would have been instituted.

It is the Plaintiff who alleged that the 1st Defendant is intending to sale the disputed properties. Under section 110(1) of the Evidence Act (supra) it was his duty to prove that allegation the intended sale. From evidence on record, the Plaintiff has failed to prove the 3rd issue. There was no intended sale of the mortgaged properties.

The last issue was on ***reliefs the parties are entitled to***. The plaintiff in the original suit has failed to prove that his obligation in the guarantee Agreement of the loan of USD 1,000,000 issued to the 3rd Defendant has been discharged. He has also failed to prove that the 1st Defendant intended to auction the mortgaged properties.

With regard to the counterclaim, the counter claimant has managed to prove that the defendants in the counter claim defaulted to pay the loan



of USD 1,000,000 plus interests advanced to the 1st Defendant and guaranteed by 1st, 2nd, 3rd and 4th defendants. I have gone through the testimony of DW1 and found that he was unable to substantiate amount of 1,760,840.65. I am holding so because when giving evidence, DW1 stated not to remember the exactly figure of the current defaulted amount. However, according to exhibit D3, by 17th June 2019, the amount due was USD 1,165,829.39.

From the foregoing, I proceed to make the following orders:

1. The original suit is dismissed with costs.
2. The counter claim is granted to the extent that-
 - i. The defendants in the counter claim have defaulted in payment of the loan and thus they have breached the loan agreement;
 - ii. The Counterclaimant is entitled to recover the outstanding amount from the mortgaged properties; and
 - iii. The Counterclaimant is entitled to costs of the counterclaim.

Order accordingly.

DATED at DAR ES SALAAM this 22nd April 2024.




L. HEMED

JUDGE