

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

AT DAR ES SALAAM

LAND CASE NO. 73 OF 2023

VICTOR LEONARD MULOKOZI PLAINTIFF

VERSUS

BUNJU BEACH SACCOS 1ST DEFENDANT

SALUM SAID SEIF 2nd DEFENDANT

TANFIN CONSULTANT E. A. LTD 3rd DEFENDANT

Date of last Order: 20/12/2023.

Date of Ruling: 10/01/2024.

JUDGMENT

I. ARUFANI, J

The plaintiff filed in this court the present suit praying for judgment and decree against the defendants as follows: -

- a. The declaration that, the first defendant is in violation of loan agreement executed between the parties.*
- b. Permanent injunction restraining the first and second defendants or anyone else acting on behalf of the first defendant or deriving authority from the first defendant from interfering with any property, selling the same in public auction or otherwise.*
- c. That, an order that the suit property being matrimonial property cannot be disposed of in any way without the consent of the plaintiff's wife.*

d. General damages at the tune of Tshs. 100,000,000/= (Tanzania Shillings forty million only) where it includes disturbances and loss of expectation.

e. Costs of this suit.

f. Any other relief(s) this honorable court may deem fit to grant.

The brief back ground of the matter as can be grasped from the pleadings filed in the court by the plaintiff is that, the plaintiff avers in his plaint that on November, 2011 the first and second defendants entered into a loan facility agreement whereby the first defendant was required to advance to the second defendant the sum of Tshs. 59,000,000/= for supporting his various business. The stated loan facility was secured by the plaintiff's landed property registered as Plot No. 113 Block 9 with Right of Occupancy No. 355393 located at Bunju Area within Kinondoni District in Dar es Salaam (henceforth, the suit premises).

The plaintiff avers that, the suit premises is his matrimonial home and he is residing therein with his family and it worth Tshs. 350,000,000/=. He stated the said loan facility was not fully advanced to the second defendant but the documents of the plaintiff in relation to the suit premises are in the custody of the first defendant. The plaintiff stated that, despite several demands of being supplied with the stated documents but the same have not been supplied to him.

Plaintiff stated in his plaint that, later on, it came to his knowledge that the first defendant had appointed the third defendant to auction the suit premises on ground that the second defendant had defaulted to repay the outstanding balance of loan facility of Tshs. 67,850,000/=. The plaintiff stated that, during execution of the loan facility there were some irregularities including failure to obtain consent of the spouse of the plaintiff to guaranteed the said loan. The plaintiff has filed the present suit in this court claiming for the above listed reliefs. The plaintiff's claims were vehemently disputed by the first and third defendants and they urged the court to dismiss the plaintiff's suit with costs while the second defendant did not dispute the claims of the plaintiff and he prayed the same be granted.

While the plaintiff was represented in the matter by Mr. Juvenal Rwegasira, learned advocate and assisted by Mr. Heneriko Nkungu, learned advocate, the first and third defendants were represented by Mr. Michael Jeremiah Kamba, learned advocate and the second advocate was represented by Mr. George Anyosisye Timoth, learned advocate. The issues framed for determination in the matter are as follows: -

- (1) *Whether the plaintiff through his spouse mortgaged the suit property to secure the loan of Tshs. 59,000,000/=.*

- (2) Whether the auction process up to the stage it has reached adhered to the legal procedures.*
- (3) Whether there was loan agreement between the plaintiff and the second defendant.*
- (4) To what reliefs are the parties entitled.*

In a bid to prove the above stated issues the plaintiff testified in the matter himself as PW1 and brought to the court two witnesses namely, Johnerika Simon Muliza and Elmenilda Kizito who testified as PW2 and PW3 respectively. On the side of the defendants three witnesses namely Chimori Benjamin, Mary Gidion Lugemalila and Salum Said Seif testified in the matter as DW1, DW2 and DW3 respectively and tendered two documentary exhibits.

Victor Leonard Mulokozi, testified as **PW1** and told the court that, in 2010 he gave his wife **Johnerika Simon Muliza**, who testified in the matter as **PW2** the certificate of title of the suit premises which is registered in his name to use the same to get a loan from the first defendant. He said though he was not sure with the correct amount of the loan taken by PW2 from the first defendant but it was not more than Tshs. 10,000,000/=. He said on November, 2011 he saw the suit premises had been written it would have been sold by auction because of the loan of Tshs, 59,000,000/= advanced to the second defendant by the first defendant and the second defendant had defaulted to repay the same.

He said he don't know the loan of Tshs. 59,000,000/= given to the second defendant by the first defendant and he has never given his consent for the certificate of title of his house which is a suit premises in this case to be used as the security for the stated loan. He said the second defendant has never informed him his certificate of title has been used to secure the loan given to him by the first defendant. He said the first defendant has also never informed him if his certificate of title used to secure the loan of Tshs. 10,000,000/= given to PW2 who is his wife has been used to secure the loan of Tshs. 59,000,000/= given to the second defendant. He added that, he has never been served with any notice of default of repayment of the stated loan by anybody and he don't know anything about the third defendant.

When he was cross examined by the counsel for the first and third defendant, he said he allowed PW2 to use his certificate of title to take loan which was not more than ten million shillings from the first defendant but he don't remember if PW2 told him how much loan was given to her. He said there was a time he used to give PW2 money for repaying the loan but he doesn't know if PW2 completed to repay the loan. He stated his he agreed that his certificate of title was used to secure the loan given to Mary Rwambisi. He said PW2 is the one entered into the said agreement

with Mary Rwambisi but he was not involved into the stated agreement as he was not in Dar es Salaam.

He said he has never signed anywhere to authorize the second defendant to be given the loan of Tshs. 59,000,000/= by the first defendant. He said he has seen the agreement entered by PW2 and the second defendant but he don't know it was about what. He said his wife has never told him if she has ever been given notice that their house would have been sold. When he was cross examined by the counsel for the second defendant, he said he has only authorized the loan given to PW2 of Tshs. 10,000,000/= and he has never been notified the suit premises is indebted because of any other loan given to any other person.

PW2 told the court that, PW1 is her husband and their house was written it would have been sold by public auction without knowing what would have caused their house to be auctioned. She said she know the first defendant and in 2014 she borrowed Tshs. 8,000,000/= from the first defendant. She said in getting the said loan she used two guarantors who were Chimori Benjamin and Leonard Rweyemamu together with certificate of title of their house registered in the name of PW1.

She said she know the second defendant but she doesn't know if he has taken the loan of Tshs. 59,000,000/= from the first defendant and

used their certificate of title as the security of the stated loan. She said on December, 2022 the third defendant informed her she had default to repay her loan. She said her outstanding debt up to know is Tshs. 6,000,000/=. She said she has never been served with the default notice of the loan of Tshs. 59,000,000/= and added their house has never been used as the security of any other loan.

When she was cross examined by the counsel for the first and third defendants, she stated her first loan to take from the first defendant was the loan of Tshs. 30,000,000/= which she was given in 2011 and the second loan was of Tshs. 8,000,000/= which was given to her in 2014. She said when she was given the second loan, she was continuing to repay the first loan and she finished to repay the first loan in 2012 and now she is continuing to repay the second loan of Tshs. 8,000,000/=. She said she know Mary Rwambisi as she lent Tshs. 30,000,000/= to her relative. She said after her relative ran away she found money to repay the loan of Mary Rwambisi.

She said they gave Mary Rwambisi their certificate of title as a collateral for the stated loan. She said as she was member in the first defendant sacco she borrowed Tshs. 10,000,000/= from the first defendant and PW1 gave her Tshs. 20,000,000/= and used them to repay

the debt of Mary Rwambisi as she wanted to sale their house. She said after paying the debt of Mary Rwambisi at Azania Bank the first defendant told her their certificate of title was supposed to remain in their custody and she handed their certificate of title to the first defendant. She said PW1 consented their certificate of title to be used as the security of the stated debt.

She said after paying Tshs. 20,000,000/= to the first defendant she was given Tshs, 31,000,000/= which was written in the form which has her signature, signatures of the members of the loan committee, signatures of the guarantors and the signature of her husband. She said she didn't talk about the stated loan in her evidence in chief as she was not asked about the same and it has already been paid. She denied to have written any letter to the first defendant about the loan of Tshs. 59,000,000/=.

She said her guarantors in the loan of Tshs. 31,000,000/= were Theobald Sabi and Leonard Rweyemamu. She said that, although she repaid the loan of Tshs. 31,000,000/= but their certificate of title was not returned to them because the debt of Tshs. 6,000,000/= which accrued from the loan of Tshs. 8,000,000/= had not been repaid. She said she doesn't remember if she has ever entered into agreement with the second

defendant that if the debt would have not been repaid their house would have been auctioned. When she was cross examined by the counsel for the second defendant, she stated that, their certificate of title has never been used to take loan from any other institution than the first defendant.

Elmenilda Kizito who testified as **PW3** told the court she is the ten cell leader of Bunju Kilungule Area. She said on January, 2023 she received a phone call which informed her that the house of PW1 would have been sold by public auction and asked if she any information about the said auction. She said after going to the house pf PW1, she found there was an advertisement written on the wall of the house that the house would have been sold by public auction.

She said when she asked PW1 about the stated advertisement he told her he don't know the person written the stated advertisement thereon. PW3 said as the suit premises is within her area, she advised PW1 and his family to go to the Ward Tribunal. She said where there is a move of auction a house located within their area because of debt they used to be informed before the auction being conducted. She said they were not informed about the auction of the house of PW1 and they were not shown any newspaper where it was advertised the house of PW1 would have been sold by auction.

When she was cross examined by the counsel for the first and third defendants, she said the phone call informed her the house of PW1 had been advertised it would have been auctioned was made to her by one George who is the neighbor of PW1 and informed her PW1 was not at home. She said when PW1 came back he told her he doesn't know what caused his house to be advertised it would have been auctioned. She said she was informed by the family of PW1 that their house had never been involved in any debt of loan taken from any anywhere.

She said if the information of the house of PW1 had been taken to their Street Government she would have been informed. She said auction of the house of PW1 was supposed to be advertised in the newspaper. She said when she asked her Street Chairman one Stambuli Mohamed he told her he had no any information of the house of PW1 to be sold by auction. She said PW1 was given a letter of going to the Ward Tribunal by their Street Chairman. She said she know PW2 as she lives in her area but she is not her close friend (shoga).

She said before auction of the house of PW1 they were supposed to be served with fourteen days' notice of auctioning the house of PW1 but they were not served with the stated notice. She said the auction has not been conducted because there was an order issued on January, 2023 by

Bunju Ward Tribunal to restrain the auction. She said the dispute before the court is why the house of PW1 was advertised it would have been auctioned without following the required procedures. She said she was never informed the certificate of title of the house of PW1 was handed to the first defendant. She stated further that, she doesn't know if PW1 and his family took a loan from the first defendant. When she was cross examined by the counsel for the second defendant she said if there is no information taken to their office the auction did not follow the required procedures.

Chimori Benjamain who testified as **DW1** told the court that, he is the Chairman of the first defendant from 2019. He said he knows PW1 and his wife, PW2 together with the debt of Tshs. 59,000,000/= which is averred in the plaint of the plaintiff. He explained the procedures of getting loan from their sacco and said PW1 is not their member but their member is PW2. He said PW2 joined their sacco on 16th January, 2011.

He said the suit premises was about to be auctioned because of another debt of Tshs. 31,000,000/= of Mary Rwambisi. He said PW2 went to their sacco to ask for their assistance and after some discussion they agreed PW2 should have been allowed to join their sacco. He said PW2 joined their sacco and on 17th June, 2011 she deposited Tshs.

18,000,000/= into their bank account maintained at Azania Bank and said when PW2 was depositing the stated sum of money PW1 was present. He said PW2 took to them the valuation report of the house conducted by Imack (T) Ltd on February, 2011 which shows the force value of the house was Tshs. 97,000,000/=.

He said PW2 signed the form of seeking for the loan of Tshs. 31,000,000/= from the first defendant which had the interest of 15% straight line and it was supposed to be paid within two years at the total amount of the loan plus interest to be paid would have been Tshs. 40,300,000/=. He said PW2 was supposed to pay Tshs. 1,670,000/= per month. He said the sought loan was deposited into the bank account of Mary Rwambisi and after PW2 being handed over the certificate of title of the suit premises which has number 109891 she handed the same to the first defendant and it was kept in the custody of Azania Bank by the first defendant.

DW1 said on August, 2011 PW2 deposited into their sacco's account Tshs. 2,000,000/=: on September, 2011 Tshs. 400,000/=: 200,000/= and Tshs. 200,000/=. He went on saying on October, 2011 she deposited Tshs. 200,000/= and Tshs. 200,000/=: on February, 2012 she deposited Tshs. 300,000/= and on 27th February, 2012 she deposited the last

instalment of Tshs. 300,000/=. He said the total amount deposited by PW2 to the first defendant in repaying the loan advanced to her is only Tshs, 2,000,000/= and from there she didn't make any other deposit. He said from there PW2 used to request to be given time of repaying the debt.

He said on May, 2012 the second defendant wanted to get loan from the first defendant but he failed to get it because he had no collateral for securing the same. He said the second defendant talked to PW2 so that they can allow him to use their certificate of title on agreement that he would have assisted them to repay their debt which was due. DW1 said the balance of PW2 in the first defendant was Tshs. 18,000,000/= and she had paid Tshs. 2,000,000/= and the second defendant had a balance of Tshs. 9,500,000/= in the account of the first defendant.

DW1 said the second defendant used the certificate of title of PW1 to get the loan of Tshs. 59,000,000/= which was disbursed to him on June, 2012. He said the second defendant and PW2 took to them various documents which were spouse consent given by PW1, document written to the Commissioner for Lands by PW1 and the agreement entered between the second defendant and PW2 to allow the second defendant to use the certificate of title of PW1 to take the stated loan. He said those

documents shows PW1 and PW2 guaranteed the second defendant to take the stated loan. He said the document taken to them had the signatures of PW1 and PW2 but they were not endorsed by anybody from their sacco.

He said the second defendant repaid the loan but later on, he defaulted to repay the loan given to him and caused the debt to increase. He said they tried to make follow up to the second defendant to settle his debt without success. He said they engaged advocate Mrindoko to make follow up of their debt from the second defendant and the stated advocate wrote a letter to the second defendant requiring him to settle his debt with the first defendant. The letter written to the second defendant by advocate R. Mrindoko was admitted in the case as exhibit D1.

He said after the stated follow up the second defendant paid part of his debt and failed to pay the debt in full. DW1 said in 2016 and 2017 they engaged advocate Kambo and JKT Suma to make follow up of the remaining debt without success. He said in 2018 and 2019 they took their debt to the PCCB without success and last year the Registrar of the Cooperative Societies gave them the third defendant to assist them to collect their debts from their debtors who one of them is the third defendant.

DW1 said the certificate of title of PW1 is in their sacco because of the loan of Tshs. 59,000,000/= given to the second defendant by the first defendant which has not been repaid to date. He said when the third defendant was making follow up of their debt, they reported to the Chairman of Kilungule Street and the stated Chairman gave them a person of taking the third defendant to the house of the second defendant.

When DW1 was cross examined by the counsel for the plaintiff he said that, the first defendant is registered by the Registrar of Cooperative Societies. He said he has not adduced any document to show how much money was paid to the first defendant by PW2 and how much money was supposed to be paid by PW2. He said PW1 and PW2 signed the loan form used to grant PW2 the loan in 2011. He said PW1 and PW2 signed the form used to grant loan to PW2 and the form was also signed by their son namely Vitus but he doesn't know what was his age when he signed the stated form.

He said the debt of PW2 was Tshs. 31,000,000/= and not Tshs. 40,000,000/=. He said when the loan given to the second defendant is added with the interest it makes the total debt owed by the second defendant to the first defendant to be Tshs. 76,000,000/=. DW1 said when PW2 was given the loan in 2011 and 2014 he was not the Chairman

of the first defendant. He said when PW1, PW2 and the second defendant were entering into the agreement of the second defendant to use the certificate of title of PW1 in securing his loan of Tshs. 59,000,000/= he was not the Chairman of the first defendant. He said he has not brought to the court the stated agreement. He said their claim is not about the loan of Tshs. 31,000,000/= given to PW2 but the loan of Tshs. 59,000,000/= given to the first defendant which was secured by the certificate of title of PW1.

When he was cross examined by the counsel for the second defendant, he said the certificate of occupancy used to secure the loan granted to the second defendant was not registered to the Ministry of Land. He said before granting the loan to the second defendant there were legal documents which were prepared which includes mortgage deed and spouse consent. He said he don't know if the spouse consent given for the certificate of PW1 to secure the loan given to the second defendant was registered. He said when he entered into the office of the second defendant had already defaulted to repay his loan from 2013 and the process of claiming for the same was continuing.

Another witness testified for the first defendant is **Mary Gidion Lugemalila** who testified as **DW2** and told the court she is the member

of the first defendant from the year 2011. She said she is also the member of the Board of the first defendant. She explained the procedure of being a member of the first defendant as explained by DW1 and said she know PW2 as she is member in their sacco. She said PW2 sought to be granted loan of Tshs. 31,000,000/= from their sacco for the purpose of paying the debt which was causing their house to be auctioned by Majembe Auction Mart.

DW2 said after considering the application of PW2 and managed to meet the qualification of being granted the stated loan, she was granted the stated sum of money which she paid to one Mary Rwambisi. She said after Mary Rwambisi being paid the stated amount of money, she handed over the certificate of title of PW1 to PW2 and PW2 handed the same to their chairman who by that time was the late Matembele and it was kept in the custody of Azania Bank. DW2 said the stated transactions were conducted at Azania Bank. She said after PW2 being given the loan she started repaying the loan given to her and she paid Tshs. 2,000,000/= and paid another Tshs. 2,000,000/=.

DW2 said that, thereafter PW2 went to their sacco with a prayer of her debt to be paid by the second defendant and went to prepare their agreement. Thereafter, the loan of the second defendant was increased

and given Tshs. 59,000,000/= which was secured by the certificate of title of PW2 which was in their custody. She said in 2014 PW2 applied for another loan which she doesn't remember the amount given to her and said this second loan had no security. She said the second loan given to PW2 has not been paid in full.

DW2 said the second defendant filled the form of applying for the loan given to him and the stated form was admitted in the case as exhibit D2. She said according to exhibit D2 the second defendant was given the loan of Tshs. 59,000,000/= and said he has paid part of the loan. She said they tried to make follow up of the payment of the unpaid balance and the second defendant said he had problem of his industry of producing drinks sachets had been closed because of the change of the Government policy. DW2 said she don't know if the second defendant was served with a letter or notice of demanding him to repay the loan. She said the security or collateral filled in exhibit D2 for the stated loan were house and two motor vehicles. She said that, according to the agreement entered by the second defendant and PW2, the certificate of title of PW1 would have been used as a security of the loan given to him.

When DW2 was cross examined by the counsel for the plaintiff she said when PW2 applied for the loan of Tshs. 31,000,000/= from the first

defendant she was the member of the board of the first defendant. She said when PW2 was handing over the certificate of title to Mary Rwambisi she was not present but they were informed about that event by DW1 when they were in the Board Meeting. She said the information was in writing but she has not brought the said document to the court as evidence. She said the prayer of the debt of PW2 to be paid by the second defendant was made in writing and said the house of PW1 was used as a security for the loan given to the second defendant.

She said it is not stated in exhibit D2 the house mentioned therein is the house of the plaintiff. She said the members of the loan committee ought to sign the form of the loan given to the second defendant. She said the loan of Tshs. 8,000,000/= given to PW2 was secured by Tshs. 18,000,000/= deposited to the first defendant by PW2. She said the second defendant has taken several loans from the first defendant but he has only the loan of Tshs. 59,000,000/= which has not been repaid in full. She said she don't know the second defendant was using which security. She said saving is not used to pay the debt unless the member writes a letter to require his or her debt to be repaid by his or her saving.

When she was cross examined by the counsel for the second defendant, she said their constitution provides at article 12 that, before

the security issued for the loan is sold, the shares of and savings of the member shall be used first to pay the debt. She said she has not seen the advertisement of selling the house of PW1 but she heard the house of PW1 would have been sold because of the debt of the second defendant. She said PW1 issued his house as a collateral for the loan issued by the first defendant. She said PW1 has never gone to apply for loan from the first defendant but PW2 has applied for and received loan from the first defendant.

The second defendant, **Salum Said Seif** testified as **DW3** and told the court that, he has never used the certificate of PW1 as a security for his loan he received from the first defendant. He said he is the founder member of the first defendant and said he has borrowed money seven times from the first defendant. He said he borrowed Tshs. 40,000,000/= from the first defendant and said he has already repaid Tshs. 31,000,000/=. He said changes of the Government Industrial Policy caused his industry to be shut down and caused him to fail to service his loan.

He said after failing to service his loan the first defendant was required to take his saving, his shares and those of his guarantors. He said himself has shares of Tshs. 1,000,000/= and saving of Tshs.

12,500,000/=. He said each of his guarantors who are PW2 and DW1 have shares of Tshs. 1,000,000/= but he doesn't know their savings. He said members of the first defendant does not require security or collateral to get loan from the first defendant as they use their shares and saving to secure the loan.

He said he saw advertisement of selling the house by auction but the advertisement showed the house is his property while the house is the property of PW1 as he has no house at the area where the house of PW1 is located. He said their procedure requires before a property being sold the borrower be given notice of default, something which he has not been given by the first defendant. He prayed the court to order the certificate of title of PW1 to be returned to him and be declared he has never borrowed money from the first defendant by using the certificate of title of the house of PW1.

When DW1 was cross examined by the counsel for the plaintiff he said that, he has a wife whose name is Amina Sudi and said he had another wife whose name was Jesca Wilson Mbwambo. He said he doesn't remember exhibit D1 and he has come to see the same for the first time in the court. He said he remember to have borrowed Tshs. 40,000,000/= from the first defendant and said for the money he borrowed he was not

required to have security for the purpose of being given the stated loan. He said when he borrowed the money, he filled the form and it was in 2012.

He said exhibit D2 is his form as it has his name and he filled the same on 15th November, 2011 praying to be given loan of Tshs. 40,000,000/= but it is indicated in the form he borrowed Tshs. 59,000,000/=. He said his security for the stated loan was his saving and other properties he mentioned in the form which would have been sold if he would have failed to repay the loan. He said the plots of land he has mentioned in his loan form are at Bukoba and he mentioned two motor vehicles which he didn't mentioned their registration numbers.

He denied to have taken the debt of PW2 and said PW2 just guaranteed him to take the loan. He said he doesn't know if PW2 is indebted to the first defendant and said his saving in the first defendant's sacco until when he borrowed the money was Tshs. 12,500,000/=. He said his current debt with the first defendant is Tshs. 1,900,000/= and said it can be cleared or settled by using the shares and savings he has at the first defendant sacco and said he is ready to pay his debt. He said his loan had the interest of Tshs. 6,000,000/= and he was required to pay

the loan plus interest within two years. He said he has never sat with the first defendant to see how his debt can be settled.

When he was cross examined by the counsel for the plaintiff, he said he has never used a house to secure any of the seven loans he borrowed from the first defendant. He said he doesn't know the agreement entered by PW2 to borrow Tshs 59,000,000/= from the first defendant. He said he got the information of the house which was being sold by auction in the piece of newspaper sent to him by WhatsApp. He said the house listed in exhibit D2 is not published or advertised it would have been sold by auction. When he was cross examined by the counsel for the second defendant, he said he doesn't know why the house of PW1 was advertised it would have been sold.

After hearing the evidence from both sides, the counsel for the parties prayed and allowed to file in the court their final submissions and I commend them for filing in the court their final submissions within the time given by the court. However, to avoid making this judgment unnecessarily long, I will not reproduce what is submitted in their submissions in this judgment. Nevertheless, I will be referring to their arguments and authorities cited in their submissions in the course of determination of the issues framed in the dispute between the parties.

The court has carefully considered the evidence adduced in this case by both sides as summarized hereinabove and painstakingly considered the final submissions filed in the court by the counsel for the parties. The court has found before going to determination of the issues framed in the suit it is proper to state at this juncture that, as rightly stated in the submission of the counsel for the first and third defendants the position of the law as provided under section 110 (1) and (2) read together with section 112 of the Evidence Act, Cap 6 R.E 2019 requires that, whoever desires any court to give judgment in his or her favour to prove the facts he has alleged are in existence. The stated position of the law was emphasized in the case of **Abdul Karim Haji V. Raymond Nchimbi Alois & Another**, Civil Appeal No. 99 of 2004 (unreported) where it was stated by the Court of Appeal that: -

"... it is elementary principle that he who alleges is the one responsible to prove his allegations."

It was also stated by the Court of Appeal in the case of **Anthony M. Masanga V. Penina (Mama Gesi) & Another**, Civil Appeal No. 118 of 2014 that, the party with legal burden also bears the evidential burden on the balance of probabilities. That being the position of the law the court has found the parties have legal and evidential burden to prove what they have alleged in their pleadings. While being guided by the position of the

law stated hereinabove the court has found in order to have a proper sequence of determination of the issues framed in the matter it is proper to start with the third issue which states whether there was loan agreement between the plaintiff and the second defendant.

The court has found in order to say there was a loan agreement between the mentioned parties there must be evidence adduced in the court to prove existence of the stated agreement. The court has found there is no scintilla evidence adduced in the matter to establish there was loan agreement entered by the plaintiff and the second defendant. The court has found the only evidence adduced in the matter purporting to establish there was loan agreement entered by the plaintiff and the second defendant is the evidence adduced in the court by DW1 and DW2 which stated PW1 consented his certificate of title to be used to secure the loan of Tshs. 59,000,000/= given to the second defendant by the first defendant.

The court has found the stated evidence of DW1 and DW2 that there was a loan agreement between the plaintiff and the second defendant was strongly denied by the plaintiff and the second defendant who said they have never entered into such a loan agreement. Since it is the evidence of DW1 and DW2 expected to established there was a loan

agreement entered by the plaintiff and the second defendant, then as provided under section 115 of the Evidence Act, Cap. 6 R.E 2019 the first defendant had burden of proving existence of the stated loan agreement as the stated fact is within the knowledge of the first defendant. Having found there is no evidence adduced in the matter to establish there was a loan agreement entered by the plaintiff and the second defendant the court has found the third issue is supposed be answered in negative that there is no established loan agreement entered by the plaintiff and the second defendant in the instant suit.

Back to the first issue which states whether the plaintiff through his spouse mortgaged the suit property to secure the loan of Tshs. 59,000,000/=, the court has found it was said the stated loan was given to the second defendant by the first defendant. The court has found DW1 and DW2 said in their testimony that the certificate of occupancy of the plaintiff in respect of the suit property was mortgaged by PW1 through PW2 to secure the stated loan. DW1 and DW2 stated in their testimony that, the suit property was mortgaged to secure the stated loan after PW2 failed to repay the loan of Tshs. 31,000,000/= given to her to settle the debt of the relative of PW2 was owing Mary Rwambisi.

DW1 and DW2 stated in their testimony that, after PW2 failed to repay the loan given to her by the first defendant to settle the stated debt of Mary Rwambisi, she prayed the suit property be used to secure the loan given to the second defendant by the first defendant so that the second defendant can assist PW2 to repay the balance of the loan given to her by the first defendant and she had failed to repay the same. The court has found what was said was done by PW2 and the second defendant of praying the debt of PW2 to be paid by the second defendant is governed by a doctrine known as doctrine of novation. The stated doctrine was well expounded in the case of **MS Musilanga Engineering Vs. P. F. Nyakutonya Nyamgesera & Another**, [1986] TLR 115 where it was stated that: -

"The doctrine of novation recognizes that one party to a contract can release the other and substitute a third person when then undertakes to perform the released persons obligations."

Under the stated doctrine PW2 could have agreed with the second defendant to enter into the stated arrangement of her obligation to repay the unpaid loan to be paid by the second defendant as stated by DW1 and DW2. The court has found that, although PW1, PW2 and DW3 denied to have entered into the stated agreement and said the suit property was not mortgaged to secure the loan given to the second defendant by the

first defendant but their denial is not tallying with what is pleaded in the plaint filed in the court by the plaintiff and what is stated in the written statement of defence of the second defendant.

The court has come to the stated finding after seeing that, as rightly argued by the counsel for the first and third defendants what is pleaded at paragraph 5, 6 and 7 of the plaint is different from what was said to the court by PW1, PW2 and DW3. For clarity purpose the said paragraphs of the plaint states as follows: -

5. That, sometimes in November, 2011 the 1st defendant and the 2nd defendant executed a Business Loan Facility for a sum of TZS 59,000,000/= operative for 12 months, expiring in 2012 in favour of the aforementioned 1st defendant.

6. The main object of the loan was a working capital, whereby the 2nd Defendant deals with various business including producing local liquor within Tanzania.

7. That, land property in dispute registered as Plot No. 113 Block 9 with Right of Occupancy No. 355393 located at Bunju in Kinondoni District Dar es Salaam Region which bears the name of the plaintiff was pledged as security for the said loan. The said land is a matrimonial home where the plaintiff and his family reside and it worth more than Tshs. 350,000,000/=.

The wording of the above quoted paragraphs of the plaint shows clearly that the suit property was pledged in favour of the first defendant

to secure the loan of Tshs. 59,000,000/= given to the second defendant by the first defendant. The court has found that, although it has been found in the third issue that there is no loan agreement entered by the plaintiff and the second defendant but as said to the court by DW1 and DW2 the suit property was pledged to secure the stated loan through PW2 who handed over the certificate of occupancy of the suit property to the first defendant to secure the loan given to the second defendant on agreement that the second defendant would have paid the debt of PW2 to the first defendant.

The court has come to the stated finding after seeing that, although PW2 said she paid the loan of Tshs. 31,000,000/= given to her by the first defendant and the debt which she has not finished to repay is only the debt of Tshs. 8,000,000/= but she didn't give clear and sufficient evidence to establish when she finished to repay the stated loan of Tshs. 31,000,000/=. To the contrary the court has found the evidence of DW1 and DW2 established clearly that the stated loan of Tshs. 31,000,000/= was not paid in full by PW2 but it was joined in the loan of Tshs. 59,000,000/= given to the second defendant by the first defendant.

The court has also found the allegations of the plaintiff as averred at paragraphs 8 and 9 of the plaint is not that the plaintiff didn't mortgaged

the suit property to secure the loan given to the second defendant, but is that the entire loan was not disbursed to him and during acquisition of the stated loan there was procedural irregularity as the plaintiff's spousal consent was not obtained to guarantee the said loan. The court has found although the loan was not supposed to be disbursed to him but to the second defendant, but what is averred in the aforementioned paragraphs of the plaint is not disputed by the second defendant in his written statement of defence. The court has found the second defendant states at paragraphs 3, 4, 5, 6 and 6 of his written statement of defence that all of what is averred in the mentioned paragraphs of the plaint are noted and required the first defendant to prove the same to the contrary.

As the plaintiff and the second defendant have stated categorically in their pleadings that the suit property was pledged to secure the loan of Tshs. 59,000,000/= given to the second defendant, they cannot be allowed to depart from what is pleaded in their pleadings and come out with a different story of their case which is not stated in their pleadings. The court has come to the stated finding after seeing that, as rightly argued by the counsel for the first and third defendants it is a cardinal principle of law as stated in the case of **Agatha Mshote V. Edson Emmanuel**, Civil Appeal No. 121 of 2019, CAT at DSM (unreported) that, parties are bound by their own pleadings and they are not allowed to

depart from their pleadings to change their case from what was originally pleaded.

The court has found the counsel for the plaintiff and the second defendant challenged the legality of the suit property alleged was mortgaged to secure the loan of Tshs. 59,000,000/= given to the second defendant on various grounds. The counsel for the plaintiff stated in his final submission that the plaintiff's house was not mortgaged in accordance with the requirement of the law provided under section 64 (1) and (2) of the Land Act, Cap 113 R.E 2019 which states that, in order for a contract of a mortgage to be enforceable in any proceeding is required to be in writing and signed by the parties to whom the contract is ought to be enforced.

He stated further that, it is also a requirement of the law as provided under section 113 (4) of the Land Act that, for a mortgage of land to take effect is supposed to be registered in the prescribed register. If it is not registered the mortgagee shall not be able to exercise any of his remedies under that mortgage. He submitted that, non-observance of the stated requirements of the law does not only invalidate the mortgage, rather it renders the mortgage created to be unenforceable and inoperative.

After considering the afore stated submissions of the counsel for the plaintiff and after going through the plaint and the evidence adduced in the matter by both sides the court has found there is nowhere stated the plaintiff is alleging his house was illegally mortgaged to secure the loan given to the second defendant on ground of either not being in writing or registered in the prescribed register. The court has found the illegality alleged by the plaintiff as stated at paragraph 9 of the plaint is that there was procedural irregularity in acquisition of the loan as the plaintiff's spouse consent was not obtained to guarantee the said loan and not that the mortgage of the suit property was not made in writing or registered in the prescribed register.

The court has found the position of the law as stated in number of cases including the case of **Nyanza Road Works Ltd. V. Yassin Mrisho & 4 Others**, Misc. Application No.8 of 2019, CAT at Mwanza (unreported) is very clear that submission is not evidence and cannot be used to introduce a new issue which is not raised in the pleadings filed in the court. To raise a new issue of illegality in the final submission which was not raised in the pleadings filed in the court by the parties or raised in the evidence adduced in the matter it is to the view of this court not proper.

The court has also found that, as the allegation of the mortgage of the suit property to secure the loan given to the second defendant to be not in writing or registered was not pleaded in the pleadings filed in the court by the parties it cannot be said framing of the first issue contemplated it would be decided basing on illegalities which were not raised in the pleadings filed in the court by the parties. The stated view of this court is getting support from the observation made in the case of **Interfreight Forwarders (U) Ltd V. East African Development Bank**, [1990-1994] 1 EA 117 where it was stated that: -

"Thus, issues are formed on the case of the parties so disclosed in the pleadings and evidence is directed at the trial to the proof of the case so stated and covered by the issues framed therein. A party is expected and is bound to prove the case as alleged by him and as covered in the issues framed. He will not be allowed to succeed on a case not set up by him and be allowed at the trial to change or set up a case not stated except by an amendment of the pleadings."

The court has found the question of registration of the suit property as a mortgage for the loan given to the second defendant by the first defendant was asked by the counsel for the second defendant when he was cross examining DW1 and he said the same was not taken to the Ministry of Land for registration. The court has found as rightly argued by

the counsel for the first and third defendants in his final submission, the position of the law in relation to the registration of a mortgage created by cooperative societies is well stated under section 59 (2) of the Land Registration Act, Cap. 334 R.E 2019 which states as follows: -

"Where a mortgage is created by a cooperative society registered under the Co-operative Societies Act such mortgage shall not be registered under the provisions of this Act unless and until it is proved to the satisfaction of the Registrar that it has been registered in accordance with the provisions of the Cooperative Societies Act."

From the wording of the above cited provision of the law it is crystal clear that, requirement of registration of a mortgage created by a cooperative society registered under the Co-operative Societies Act for the purpose of complying with the requirements of the law provided under section 64 of the Land Act requires the Registrar of Titles to be satisfied the cooperative society is registered in accordance with the provisions of the Co-operative Societies Act. If the stated requirement has not been established the requirement provided under section 64 of the Land Act cannot be implemented.

Although, DW1 said in his testimony that the first defendant is registered in accordance with the provision of the Co-operative Societies Act and stated further that the mortgage was not taken to the Registrar

of Title for registration as required by the law but as the claims of the plaintiff in his plaint is not based on non-registration of the mortgaged property, the court has found the stated argument cannot be used to find the suit property was not mortgaged to secure the loan given to the second defendant by the first defendant which is the issue requires determination of this court.

The court has also found the counsel for the second defendant argued that, the consent of the plaintiff for the suit property to be mortgaged to secure the loan given to the second defendant was not obtained before the suit property being mortgaged to secure the stated loan as required by section 114 (1) (a) and (b) of the Land Act. The court has found that, although it is a requirement of the law as provided under the cited provision of the law that before mortgage of a matrimonial home a spousal consent must be obtained but there is a contradiction about whose spousal consent was not obtained before the suit property being mortgaged to secure the stated loan.

The court has found while it was stated by PW1 and the counsel for the second defendant argued in his final submission that the consent which was not obtained before the suit property is mortgaged to secure the stated loan is the consent of the plaintiff but the plaintiff avers at

paragraph 9 of the plaint that it is the consent of his spouse which was not obtained before the suit property being mortgaged to secure the stated loan. The stated contradiction caused the court to find the evidence of PW1 that his consent was not given before mortgaging the suit property to secure the loan given to the second defendant is not reliable. The court has found the stated evidence of PW1 and the argument of the counsel for the second defendant is not reliable because it is different from what is pleaded in the plaint of the plaintiff.

Basing on all what has been stated hereinabove the court has found the evidence of DW1 and DW2 that the plaintiff's suit property was mortgaged through his spouse to secure the loan of Tshs. 59,000,000/= given to the second defendant by the first defendant is more plausible and more reliable compared to the evidence of PW1, PW2 and DW3 who simply denied creation of the stated mortgage while what they have denied is not supported by what is stated in the pleadings filed in the court by the plaintiff and the second defendant.

The court has been of the view that, even if the illegalities raised in the submissions of the counsel for the plaintiff and the counsel for the second defendant would be found have any merit, then as stated earlier in this judgment the stated illegalities would have not made the court to

find the suit property was not mortgaged to secure the loan given to the second defendant by the first defendant. Its effect would simply render enforcement of remedies provided under the stated mortgage to be void and not that the suit property was not mortgaged to secure the loan of Tshs. 59,000,000/= given to the second defendant by the first defendant. In the premises the court has found the first issue is supposed to be answered in affirmative that the plaintiff through his spouse mortgaged the suit property to secure the loan given to the second defendant by the first defendant.

Coming to the second issue which states whether the auction process up to the stage it has reached adhered to the legal procedures, the court has found PW1, PW2, PW3 and DW3 said the required procedures where not adhered. The legal procedures stated by the mentioned witnesses where not adhered is non service notice of default to repay the loan given to the second defendant as the borrower of the money, to PW1 as a mortgagor, to PW2 as the person issued the title deed of the suit property to the first defendant and to the Local Government Authority before advertising to sale the suit property by auction.

The court has found that, as rightly argued by the counsel for the plaintiff and the counsel for the second defendant our laws requires before

a mortgagee exercise his right of getting remedies provided in a mortgaged property on ground of failure of the borrower to repay the loan issued to him or her to issue a default notice to the borrower and the mortgagor. That can be found under section 127 (1) of the Land Act which requires a mortgagor to issue sixty days' notice to the mortgagor before exercising any remedy provided under the mortgage deed. After expiration of the period of the sixty days' notice, another notice of fourteen days is required to be issued to the mortgagor before exercising the right of a mortgagee to sale the mortgaged property by auction.

The stated requirement of the law as rightly argued by the counsel for the plaintiff and the second defendant can be found under section 12 (2) and (3) of the Auctioneers Act, Cap 227, R.E 2019. The aim of issuing the stated notices was stated in the case of **Godebertha Lukanga V. CRDB Bank Ltd & Others**, Civil Appeal No. 25/17 of 2017 CAT (unreported) is to afford the mortgagor sufficient time to arrange for redemption of the mortgage. It was stated in the above quoted case that, compliance with the requirement to issue the stated fourteen days' notice provided under section 12 (2) of the Auctioneers Act is mandatory and not a mere procedure.

The court has found the evidence adduced in the case by both sides is very clear that there is no sixty days' notice issued to the plaintiff or his wife (PW2) about the default of the second defendant to repay the loan given to him by the first defendant before advertising to sale the suit property by auction. The court has come to the stated finding after seeing that, although DW1 said they engaged advocate R. Mrindoko who wrote a letter to the second defendant about his default to repay the loan which was admitted in the case as exhibit D1 but there is no evidence adduced to the court to prove the stated letter was ever served to the second defendant and to the plaintiff who was copied the stated letter.

The court has found that, as the plaintiff and the second defendant denied to have been served with any notice of default to repay the loan given to the second defendant, the first defendant was required to adduce evidence to the court which would have proved the stated letter was served and received by the second defendant and the plaintiff who was copied with the stated letter. The court has found further that, although the stated letter shows it was written on 16th February, 2013 but it gave the second defendant only thirty days to repay the loan and not the sixty days' notice provided under the above cited provision of the law.

It is also the finding of the court that, the fourteen days' notice required by the law to be issued under section 12 of the Auctioneers Act or any other law before a property mortgaged as a security for a loan to be sold by auction was not issued to the general public and the mortgagor as required by the law. The court has found as stated in the case of the **Registered Trustees of Africa Inland Church Tanzania V. CRDB PLC**, Commercial Case No. 7 of 2017, HC Commercial Division at DSM (unreported) cited in the submission of the counsel for the second defendant, failure to observe the requirement of serving the stated sixty days' default notice and failure to issue the fourteen days' notice to the general public and to the mortgagor as required by section 12 (2) and (3) of the Auctioneers Act before the first and third defendants executed their intention of selling the suit property by auction denied the plaintiff his statutory right of an opportunity to rescue the suit property.

The above stated finding caused the court to agree with the submissions by the counsel for the plaintiff and the second defendant that, up to the stage the process of selling the suit property by auction has reached has not adhered to the legal procedures because the statutory notices required to be issued before advertising to sale the mortgaged property by auction were not issued. In the premises the

second issue is answered in negative that up to the stage the auction process has reached the legal procedures have not been adhered to.

Coming to the last issue which is about the reliefs the parties are entitled the court has found as indicated at the outset of this judgment the plaintiff is praying for various reliefs against the defendant. The court has considered the first relief of declaring the first defendant is in violation of the loan agreement executed by the parties and find that, as it has been found the first and third defendants have not adhered to the legal procedures for auction process, the stated relief deserve to be granted as prayed. As for the rest of the reliefs the court has found that, as the legal procedures for auctioning the suit property have not been adhered to, they cannot be granted.

To the contrary the court is declaring the intended sale of the house of the plaintiff mortgaged to secure the loan given to the second defendant by the first defendant by auction is illegal for failure to adhere to the laid down legal procedures. As the second defendant stated in his evidence, he is ready to settle his debt, the first defendant is required to follow the laid down legal procedures to claim for their debt from the second defendant before auctioning the house of the plaintiff which is a

suit property in the present suit. The court has also found it is appropriate to make no order as to costs in the present suit. It is so ordered.

Dated at Dar es Salaam this 10th day of January, 2024




I. Arufani
Judge
10/01/2024

Court:

Judgment delivered today 10th day of January, 2024 in the presence of the plaintiff in person and in the presence of Mr. Michael Jeremiah Kamba, learned advocate for the first and third defendants and in the absence of the second defendant. Right of appeal to the Court of Appeal is fully explained.




I. Arufani
Judge
10/01/2024