IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., LEVIRA, J.A. And MWAMPASHI, J.A.)

CIVIL APPEAL NO. 273 OF 2019

PRIME CATCH (EXPORTS) LIMITED.....1st APPELANT
NADIR AZIZAL JESSA, also known as
NAIR AZIZ HAIDERALI JESSA.....2nd APPELLANT
FIROZ HAIDERALI JESSA.....3nd APPELLANT
SALIM HAIDERALI JESSA.....4th APPELLANT
ZULFIKAR HAIDERALI JESSA.....5th APPELLANT

VERSUS

DIAMOND TRUST BANK TANZANIA LIMITED.....RESPONDENT

[Appeal from the Judgment and Decree of the High Court of Tanzania, Commercial Division at Dar es Salaam]

(Sehel, J.)

dated the 15th day of May, 2017

in

Commercial Case No. 93 of 2016

.....

JUDGMENT OF THE COURT

27th September & 4th October, 2022

LEVIRA, J.A.:

This appeal is against a summary judgment and decree entered by the High Court (Commercial Division) at Dar es Salaam (the trial Court) in Commercial case No. 93 of 2016 dated 15th May 2017. In that decision, the trial court allowed all the respondent's claims against the appellants and ordered as follows:

> *1. Judgment in favour of the plaintiff against all the defendants jointly and severally for*

payment of USD 237,389.27 plus Tshs. 466,591,656.33;

2. *Interest at a rate of 12% per annum on aforesaid sum of USD 237,389.27 and Tshs. 466,591,656.33 from 28th day of June, 2016 until the date of judgment;*
3. *Interest at court's rate of 7% from the date of judgment until the date of full satisfaction of the decretal amount; and*
4. *Costs of the suit.*

It is on record that on 13th December 2010 the respondent advanced to the first appellant a credit facility of USD 900,000 repayable within five years in sixty equal monthly installments. The second to fifth appellants guaranteed the loan. Apart from that, the first appellant mortgaged his four properties located on plots Nos.2,3,4 and 5 Block "A" Bukangala Area, Musoma Township with Titles No.11815, 11816,13728 and 13729. However, it turned out that the first appellant defaulted the payment of the said loan and the respondent on 4th March, 2016 issued a statutory notice of default on the first appellant in terms of section 127 of the Land Act, No.4 of 1999. Thereafter, the respondent filed a summary suit in the trial court against all the appellants. Since the appellants had no automatic right to appear and defend the summary suit, they filed an application for leave to appear and defend under

Order XXXV Rule 3(1)(b), Rule 3(2) and section 95 of the Civil Procedure Code, Cap 33 R.E. 2002 (the CPC), but the same was struck out for non-citation of proper provision of the law. As a result, the trial court proceeded to enter summary judgment against the appellants.

Aggrieved, the appellants filed Civil Appeal No. 189 of 2017 which was struck out for being time barred. Later, vide Miscellaneous Commercial Cause No. 222 of 2018, the appellants were granted leave to file their appeal out of time, hence the present appeal with the memorandum of appeal which comprises four grounds. For the reasons to come into light later, we shall not reproduce all the ground of appeal except the first ground which reads:

> *"1. That the trial Court grossly erred in law in entering summary Judgment against all the defendants while the suit involved partly mortgage and partly guarantors who were not parties to the mortgage hence, unlawfully depriving the guarantors (2nd, 3rd, 4th and 5th) defendants their fundamental right to be heard and or defend."*

At the hearing of the appeal, the appellants were represented by Mr. Ruben Robert, learned advocate while Mr. Zacharia Daudi, also learned advocate, represented the respondent.

Mr. Robert rose and informed the Court at the outset that, he had no intention to argue all the grounds of appeal except the first ground. Therefore, he urged the Court to mark grounds 2-4 of appeal abandoned. In support of the appeal, he adopted the appellants' written submissions in respect of the first ground and made a brief oral submission in respect of that ground.

It was his submission that, the gist of the first ground of appeal is that the impugned judgment was wrongly entered against the parties who were not privy to the mortgage deed. He went on to state that the only parties to the mortgage deed were the first appellant and the respondent. He referred us to pages 84-85 of the record of appeal where it is clearly shown that only the said two parties executed the mortgage deed.

In the circumstances, he argued, the summary suit was incompetent as it impleaded parties who were not privy to the mortgage deed and the summary judgment was erroneously entered against other appellants, that is, the second, third, fourth and fifth appellants. According to him, the guarantors were condemned unheard contrary to Article 13 (6) (a) of the Constitution of the United Republic of Tanzania 1977 (as amended). He supported his arguments by the decisions of the Court in **R.S.A Limited v. Haspaul Automechs Limited and**

Govinderajan Senthil Kumal, Civl Appeal No.179 of 2016; **Jomo Kenyatta Traders Limited and 5 others v. National Bank of Commerce Limited,** Civil Appeal No.48 of 2016; and, **Prosper Paul Massawe and 2 Others v. Access Bank Tanzania Limited,** Civil Appeal No.39 of 2014 (all unreported). Mr. Robert invited us to follow those decisions and allow the appeal with costs.

In reply, Mr. Daudi opposed the appeal arguing that, since a guarantee is similar to a promissory note, a summary suit can be instituted against the guarantor. He cited to us Order XXXV Rule 1 (a) and (c) of the CPC. In this regard, he was of the view that a guarantee is similar to promissory note and as such, in case of default in payment of a loan, conditions set in guarantee are also applicable in a promissory note. In the circumstances, he said, the rest of appellants were also covered under Order XXXV Rule 1(c) of the CPC and the trial court was justified to enter the summary judgment against all the appellants. He thus prayed for the appeal to be dismissed with costs.

Mr. Robert submitted in his rejoinder that, promissory notes and guarantees are different as they are governed by different laws. As such he said, while a guarantee is governed by the Law of Contract Act, Cap 345 R.E. 2019 (the LCA), the promissory note is governed by the Bills of Exchange Act, Cap 215 RE 2002(the BEA). He went on to state

that while a guarantee has conditions of default, that is not the case with a promissory note. He urged us to reject the argument by the counsel for the respondent on that aspect. According to him Order XXXV Rule 1 (a) of the CPC does not cover a guarantee and if the legislature wanted it to be so, it could have expressly said so in the statute book. Finally, he reiterated his submission in chief and urged us to allow the appeal with costs.

We have thoroughly gone through the record of appeal, the ground of appeal under consideration and the submissions by the learned counsel for the parties; the main issue for our determination is whether in the circumstances of this case, the trial court was justified to enter summary judgment against all the appellants. We think, the answer to this issue is straight forward. The record of appeal is clear and there is no dispute that the loan advanced by the respondent to the first appellant was guaranteed by the second, third, fourth and fifth appellants. It is also not in dispute that apart from that guarantee, the first appellant mortgaged his properties to secure the said loan from the respondent as well. Thus, other appellants were not privy to the said mortgage deed executed by the first appellant and the respondent. However, it is apparent on the record that the respondent impleaded all the appellants in the summary suit which she instituted in the trial court.

The question to be answered in the circumstances is, whether it was proper for the respondent to include the second, third, fourth and fifth appellants who were not parties to the mortgage deed and if the verdict of the trial court is proper.

The law on summary procedure on suits arising out of mortgages is articulated under Order XXXV Rule 1(c) (i) of the CPC which provides:

> *"1. This Order shall, where the plaintiff desires to proceed in accordance with the Order, apply to-*
>
> *(a)--------*
>
> *(b)-------*
>
> *(c) Suits arising out of mortgages, whether legal or equitable, for-*
>
> *(i) Payment of monies secured by mortgage."*

In the current matter, as intimated above, the mortgage deed was between the first appellant and the respondent. This means that, since the respondent proceeded under summary procedure to recover monies secured by mortgage, she ought not to have impleaded other appellants who were not parties to the mortgage deed in terms of Order XXV Rule 1 (c) (i) of the CPC.

We were invited by the counsel for the respondent to hold that, it was right for the respondent to implead all the appellants in the summary proceedings because the procedure apply even to the

guarantors in terms of Order XXXV Rule 1 (a) of the CPC. The said provision provides for suits upon bills of exchange (including cheques) or 'promissory notes', which according to him, are similar to mortgage deed.

It cannot be overemphasized that the "promissory notes" and *"mortgage deed"* are not one and the same thing, being guided by different laws. As correctly submitted by Mr. Robert, while promissory notes are governed by the BEA, mortgage deeds are governed by LCA. In terms of section 78 of the LCA, a contract of guarantee is defined as follows:

> *"78. 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."*

While on the other hand, promissory note is defined as follows:

> *"Promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay on demand or at a*

fixed or determinable future time, a sum certain in money, to, or to the order of a specified person or to bearer – ***ANSON'S LAW OF CONTRACT 25TH EDITION (CENTURY EDITION)*** *BY A.G. GUEST, M.A. at Page 461-462."*

In the circumstances of the cited position of the law, we decline invitation to equate a promissory note and a guarantee because that was not envisaged in the legislation and besides, the two are not similar at any stretch of imagination. On this we wish to state that, it is cardinal principle of statutory interpretation that the meaning of a statute must in the first instance, be sought in the language in which the Act is framed - see: **The Republic v. Mwesige Geofrey Tito Bushahu**, Criminal Appeal No.355 of 2014 and **Geita Gold Mining Limited v. Commissioner General Tanzania Revenue Authority**, Civil Appeal No.132 of 2017 (both unreported). In the latter case, the Court restated what it said in the former case regarding interpretation of statute as follows:

"Courts must presume that the legislature says in a statute what it means and means what it says: ***CONNECT CUT NAT'L BANK v. GERMAIN,*** *112 s.ct.1146, 1149 (1992)."*

In the present case, Order XXXV Rule 1 (a) of the CPC is very categorical that summary procedure is applicable to *"suits upon bills of exchange (including cheques) or promissory notes".* We do not find any ambiguity in this provision and thus there is no need of interpolation to assume what is not stated in the statute.

In the light of the rules of statutory interpretation, we are unable to agree with Mr. Daudi that the respondent was right to institute a summary suit under Order XXXV Rule 1 (c) (i) of the CPC against all the appellants under the circumstances of this case. We are guided by our previous decision in **Jomo Kenyatta Traders Limited and 5 others** (supra) where, when the Court was determining the issue on summary procedure, it held thus:

> *"The suit did not fall under summary procedure having regard to the pleadings and the fact that it involved parties who did not execute any mortgage. It is quite unfortunate that the appellants did not obtain leave to appear and defend. It is equally unfortunate that the learned High Court Judge believed that the suit fell under summary procedure and proceeded to enter a summary judgment upon the appellant's failure to obtain leave to appear and defend".*

Circumstances of the present case reflects exactly what had transpired in the above quoted decision in that respect, where parties who were not privy to the mortgage deed were impleaded in a summary procedure and a summary judgment entered against them. We must state that justice of this case deserves nothing but to be determined in accordance with the already established position, as we hereby hold - see also: **Prosper Paul Massawe and 2 Others** (supra)

Therefore, the appellants were denied their fundamental right to be heard in what culminated into a summary judgment against them. See: **Mbeya Rukwa Autoparts and Transport Ltd v. Jestina George Mwakyoma** [2003] T.L.R. 253; **Transport Equipment Limited v. Devramp Valambhia** [1998] T.L.R. 89 and **Abbas Sherally and Another v. Abdul Sultan Haji Mohamed Fazal Boy,** Civil Application No. 33 of 2002 (unreported). In the latter case the Court emphasized that, the right of a party to be heard before adverse decision is taken against such party is so basic that a decision arrived at in violation of it will be nullified. Thus, as the summary procedure was wrongly invoked against the second to fifth appellants who were condemned without a hearing, the summary judgment cannot be spared.

On the basis of what we have endeavored to discuss above, we find the appeal is merited. Consequently, we allow it and hereby set aside the summary judgment entered on 15th May, 2017. The High Court is directed to determine the suit as an ordinary suit according to the law. Having considered circumstances surrounding this matter, we make no order as to costs.

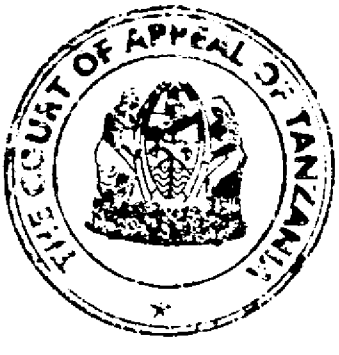
DATED at **DAR ES SALAAM** this 3rd day of October, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 4th day of October, 2022 in the presence of Mr. Ruben Robert, learned counsel for the Appellants and Mr. Harrison Lukosi hold brief of Mr. Zakaria Daudi, learned counsel for the Respondent, is hereby certified as a true copy of the original.



S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL