

**IN THE COURT OF APPEAL OF TANZANIA**

**AT DODOMA**

**(CORAM: NDIKA, J.A., MWANDAMBO, J.A., And, KAIRO, J.A.)**

**CIVIL APPEAL NO. 421 OF 2020**

**RASHIDI ABIKI NGUWA ..... APPELLANT**

**VERSUS**

**RAMADHAN HASSAN KUTEYA .....1<sup>ST</sup> RESPONDENT**

**NATIONAL MICROFINANCE PLC .....2<sup>ND</sup> RESPONDENT**

**(Appeal from the Judgment and Decree of the High Court of Tanzania  
at Dodoma)**

**(Mlacha, J.)**

**dated the 11<sup>th</sup> day of December, 2019**

**in**

**Land Case No. 2 of 2017**

.....

**JUDGMENT OF THE COURT**

29<sup>th</sup> October & 5<sup>th</sup> November, 2021

**KAIRO, J.A.:**

This is a first appeal whereby the appellant impugns the decision of the High Court of Tanzania (Land Division) sitting at Dodoma which dismissed with costs his suit in Land Case No. 2 of 2017.

Briefly, the factual background to this appeal is that the appellant and the 1<sup>st</sup> respondent were business partners. They jointly bought an oil refinery mill situated at Plot No. 44 Block AA Kindai within Singida Municipality in Singida Region. That sometime in February, 2016, the 1<sup>st</sup>

respondent borrowed a term loan of TZS. 150,000,000.00. He also obtained an overdraft facility of TZS. 150,000,000.00 from the 2<sup>nd</sup> respondent. The proceeds of the loan were routed to his account named as Ramadhan Hassan Kuteya t/a Singida Karibu Oil Mills. The appellant and the 1<sup>st</sup> respondent executed a mortgage deed and charged their joint property to secure the loan extended but the appellant claimed that he signed as a guarantor. The borrower defaulted to pay back the said facilities as agreed which led the 2<sup>nd</sup> respondent to issue a notice of its intention to auction the mortgaged property to recover the outstanding loan. The move did not amuse the appellant who decided to institute Land Case No. 2 of 2017 before the High Court, Dodoma Registry against the 1<sup>st</sup> and 2<sup>nd</sup> respondents in a bid to rescue the property from the intended sale.

The appellant's major complaints as per his plaint were; **first**, he was not the one who took the loan, but it was extended to Ramadhan Hassan Kuteya t/a Singida Karibu Oil Mills; **second**, he executed the mortgage to secure the loan as a guarantor; **third**, he was not given documents concerning the loan signed between the 1<sup>st</sup> and 2<sup>nd</sup> respondents being a guarantor; and **fourth**, the whole loan transaction between the 1<sup>st</sup> and 2<sup>nd</sup> respondents upon which he executed the mortgage as security was tainted by fraud.

The appellant prayed the trial court to order; **one**, the 1<sup>st</sup> respondent pay the outstanding amount of the term loan and overdraft facility as per the agreement entered between the 1<sup>st</sup> and 2<sup>nd</sup> respondents; **two**, the 2<sup>nd</sup> respondent to give the appellant copies of the banking offer letter dated 26<sup>th</sup> February, 2016 and the facility agreement executed between the respondents; **three**, the 2<sup>nd</sup> respondent be ordered to desist from selling the mortgaged property; **four**, an order against the 2<sup>nd</sup> respondent to reveal to the appellant the exact amount which was advanced to the 1<sup>st</sup> respondent; and finally, he prayed for costs of the suit.

Both respondents disputed the appellant's claims through their separate written statements of defence. The 1<sup>st</sup> respondent contended that he agreed with the appellant that the loan be advanced to Ramadhan Hassan Kuteya t/a Singida Karibu Oil Mills, which is the name they used in their joint business after purchasing the Oil Mill due to its good credit track record. The 1<sup>st</sup> respondent also stated that they signed the mortgage deed as joint mortgagors, as such the appellant has never been a guarantor of the 1<sup>st</sup> respondent. He further claimed that the appellant was supervising all of the undertaking of the joint business and knew the amount advanced to their business.

The 2<sup>nd</sup> respondent refuted the appellant's claim that he was a guarantor, but a co-borrower of the loan and joint mortgagor securing the loan advanced to Ramadhan Kuteya T/A Singida Karibu Oil Mills which is the name both the appellant and the 1<sup>st</sup> respondent traded in their joint business. It further averred that, the appellant was given all the relevant documents of the loan and mortgage insisting that both the appellant and the 1<sup>st</sup> respondent had a duty to repay the loan. It denied the allegation of fraud.

Eight issues were framed before the trial court but the critical ones on the basis of which the trial court's decision hinged were; **one**, whether the appellant was a co-borrower; **two**, whether there was any fraudulent transaction between the 1<sup>st</sup> and 2<sup>nd</sup> respondents; and **three**, whether the 2<sup>nd</sup> respondent was entitled to sell the mortgaged property.

In his testimony, the appellant stated that he agreed to the proposal by the 1<sup>st</sup> respondent to borrow some money from the 2<sup>nd</sup> respondent and allowed the 1<sup>st</sup> respondent to proceed processing the loan. He further testified that, the 1<sup>st</sup> respondent later informed him that the loan had already been disbursed to him. When cross-examined by Mr. Malimi Juma; the learned counsel for the 1<sup>st</sup> respondent at the trial, the appellant conceded that he agreed that the loan be advanced through the 1<sup>st</sup> respondent. Despite admitting the execution of the

mortgage on the joint property as security for the loan, he claimed to have signed the mortgage deed as a guarantor of the loan.

The trial court dismissed the suit with costs upon finding that the appellant was a co-borrower thus liable to pay the outstanding loan, and further that no fraudulent transaction between the respondents was proved, as such the 2<sup>nd</sup> respondent was entitled to sell the mortgaged property.

Being dissatisfied, the appellant lodged this appeal raising three grounds of appeal as follows:

1. ***THAT***, the trial Court erred in law in failing to order the first respondent to pay the alleged loan as he used it for his own business instead of the business jointly owned by the appellant and the first respondent.
2. ***THAT***, the trial Court erred in law in holding that the alleged loan was used in the business jointly owned by the appellant and first respondent without proof.
3. ***THAT***, the trial Court erred in law in failing to declare sale of the mortgaged property illegal as there was no proof of the alleged loan been advanced to the first respondent account and use of the same in the intended project.

When the appeal was called on for hearing, the appellant was represented by Ms. Sophia George Gabriel, learned counsel while Messrs

Malimi Juma and Simon Robert Ng'wigulu, learned advocates represented the 1<sup>st</sup> and 2<sup>nd</sup> respondents, respectively.

While determining this appeal, we are alive to the principle that, being the the first appellate Court, we are empowered to re-assess the evidence on record and draw our own inferences of facts. The principle is stipulated in Rule 36 (1) (a) of the Tanzania Court of Appeal Rules 2009 as follows:

*"36-(1) On any appeal from a decision of the High Court or Tribunal acting in the exercise of its original jurisdiction, the Court may-*

*(a) re-appraise the evidence and draw inferences of fact"*

The dictates of the said rule has been applied in many of our cases including, **Standard Chartered Bank of Tanzania Ltd vs National Oil Tanzania Ltd and Another**, Civil Appeal No. 98 of 2008 quoted in **The Registered Trustees of Joy in the Harvest vs Hamza K. Sungura**, Civil Appeal No. 149 of 2017 (both unreported) wherein we stated:

*"The law is well settled that on first appeal, the Court is entitled to subject the evidence on record to an exhaustive examination in order to determine whether the findings and conclusions*

*reached by the trial court stand (Peters v Sunday Post, 1958 EA 424; William Diamonds Limited and Another v R, 1970 EA 1; Okeno v R, 1972 EA 32)".*

We are further aware of the dictates of sections 110 and 115 of the Law of Evidence Act [Cap. 6 R.E. 2019] (the Evidence Act) enacting that the burden of proof lies on the person who alleges. In that regard the Court will sustain such evidence which is more credible than the other on a particular fact to be proved. See **Agatha Mshote vs Edson Emmanuel and 10 Others**, Civil Appeal No. 121 of 2019 (unreported) and **Stanslaus Rugaba Kasusura and Another vs Phares Kabuye** [1982] T.L.R. 338.

Equally important is the cherished principle of law that parties are bound by their pleadings discussed in various cases. See for instance: **The Registered Trustee of Islamic Propagation Centre (IPC) vs The Registered Trustees of Thaaqib Islamic Centre (TIC)**, Civil Appeal No. 2 of 2020 (unreported), **James Funke Gwagilo vs Attorney General** [2004] T.L.R 161 and **Lawrence Surumbu Tara vs The Hon. Attorney General and 2 Others**, Civil Appeal No. 56 of 2012 (unreported).

Guided by the above principles, we now turn to determine the grounds of appeal whereby the 1<sup>st</sup> and 2<sup>nd</sup> grounds will be determined jointly as are inter-related.

In the first ground, the appellant faults the trial court for failing to order the 1<sup>st</sup> respondent to pay the alleged loan which he used for his own business instead of the business they jointly owned. Ms. Gabriel contended that the appellant consented to borrowing from the 2<sup>nd</sup> respondent so as to support and expand their joint business but the said loan was extended only to the 1<sup>st</sup> Respondent who used it for his own business. She contended that the letter of offer (exhibit D1) for the term loan and the overdraft facilities in paragraphs 3.3.1 and 3.3.2. indicates that the loan was to be utilised for the intended purpose and that all payments in relation to the loan were to be made directly to the supplier by the 2<sup>nd</sup> respondent upon submission of an invoice by the borrower. She argued that as the said conditions were not fulfilled, the trial Court ought to have ordered the 1<sup>st</sup> respondent to pay the alleged loan.

In the 2<sup>nd</sup> ground the appellant faults trial Court for holding that the loan was used in the business jointly owned by the appellant and the 1<sup>st</sup> respondent without proof. In amplifying it, Ms. Gabriel relied on the appellant's testimony at page 151 of the record of appeal where the



appellant claimed that he never utilized the borrowed money and instead, it was used by the 1<sup>st</sup> respondent for his own benefit.

In rebuttal, Mr. Juma submitted that, though it is true that the loan was extended through the 1<sup>st</sup> respondent, the arrangement was agreed by the appellant because the duo had no joint business account with the 2<sup>nd</sup> respondent. He further argued that, the appellant signed the mortgage deed which put him in equal footing with the 1<sup>st</sup> respondent in loan repayment. He backed up his argument with "part C" of the mortgage deed (exhibit D2) which states that by executing a mortgage, the mortgagor created a charge over his interest contained in the mortgaged property and secure payment to the mortgagee on demand of such sum of money which is due and owing by the borrower. He thus concluded that the grounds have no merit.

In his reply, Mr. Ng'wigulu submitted that the bank's duty before dishing out the loan is to ensure that the project, subject of the loan is viable which he contended to have been done in the loan at issue. Elaborating, he argued that, it was the duty of the mortgagor to ensure that the loan was being utilised as intended. He thus dismissed the argument by Ms. Gabriel that the 2<sup>nd</sup> respondent was supposed to make follow-up on the loan and invited the Court to find the two grounds meritless.

The issue for our determination in the 1<sup>st</sup> and 2<sup>nd</sup> grounds is whether the 1<sup>st</sup> respondent used the money for his own business instead of the business of the entity. In her elaboration, Ms. Gabriel, seems to fault the 2<sup>nd</sup> respondent for failing to ensure that the borrowed money was utilised for the intended purpose.

It is on record that the appellant was actively involved in the processing of the loan to the utilisation of it. He consented to the proceeds of the loan being channelled through the 1<sup>st</sup> respondent's account. When cross-examined by Mr. Juma at page 151 of the record, the appellant conceded to have agreed to the loan being advanced to the 1<sup>st</sup> defendant. Besides, he was informed as well by the 1<sup>st</sup> respondent when the loan was disbursed as he stated "*the 1<sup>st</sup> defendant informed me that the loan had been given to him*". We note that what the appellant pleaded in his plaint is at variance with his evidence before the trial court. Based on what we said in **Registered Trustees of Thaaqib Islamic Centre (TIC)**, (supra), we think the appellant failed to prove his case, on the contrary, his evidence supported the 1<sup>st</sup> and 2<sup>nd</sup> respondents at the trial.

Further to that, the 1<sup>st</sup> respondent testified that he used to give the appellant the borrowed money and sometimes they went together to the bank to withdraw it. In his further testimony, (at page 170-171 of the

record) he stated that all the money was utilised in their co-business. It is pertinent to note that the 1<sup>st</sup> respondent's evidence was not controverted by the appellant. Therefore, his denial was an afterthought which could not be accorded any value by the trial court.

That apart, there is no dispute that the appellant executed the mortgage to secure the loan extended. We note in para 2 titled "covenant to pay" of the mortgage deed that by executing it, the appellant pledged to effect payment of the secured loan under the mortgage. We shall let the said paragraph speak for itself:

*"The Mortgagor covenants with the mortgagee that as and when the secured sums or any part of them are due for payment the mortgagor shall pay to the mortgagee the secured sum or as the case may be the part of them due to be paid."*

Based on the foregoing, there is no way in our view, in which the appellant can distance himself from the payment of the loan on the pretext that the 1<sup>st</sup> respondent used the borrowed money for his own benefit. In the same vein, we find Ms. Gabriel's argument that the 2<sup>nd</sup> respondent had a duty to ensure that the money borrowed was used for intended purpose unwarranted. This is because the appellant being the mortgagor, was squarely responsible to make close follow-up on the

utilisation of the borrowed money so as to safeguard his interest in the mortgage. His lack of diligence cannot be a shield to exonerate him from paying the loan he secured by mortgaging his property.

On the appellant's contention that the trial judge erred to hold that the loan was used in the business jointly owned by the 1<sup>st</sup> respondent and the appellant, suffice to state that, nowhere in the judgment did the trial judge so find. To that extent the complaint is, but a misconception. We, therefore, find the 1<sup>st</sup> and 2<sup>nd</sup> grounds of appeal without merit and we dismiss them.

Turning to the 3<sup>rd</sup> ground of appeal, the appellant contends that the trial court erred in law for failing to declare the sale of the mortgaged property illegal for the reason that there was no proof of the alleged loan being advanced to the first respondent and use of the same in the intended project. In elaboration, Ms. Gabriel reiterated what she submitted on the 1<sup>st</sup> ground that, paragraph 3.3.1 of exhibit D2 required the 2<sup>nd</sup> respondent to ensure that the loan was used for the intended purpose.

In reply, Mr. Juma argued that the trial court could not declare the sale of the mortgaged property illegal as the sale was yet to be conducted. With regard to absence of proof that the loan was extended

to the 1<sup>st</sup> respondent, the learned counsel contended that the proof was abundant. He pin-pointed the evidence to include; the fact that the appellant agreed to have been informed by the 1<sup>st</sup> respondent that the loan had been given to him and the execution the of offer letter by the 1<sup>st</sup> respondent as well as the customer statement which were collectively admitted as exhibit D3. In his reply, Mr. Ng'wigulu subscribed to the submission by Mr. Juma.

We entirely agree with the arguments advanced by Messrs. Juma and Ng'wigulu that the evidence to prove that the proceeds of the loan were channelled through the 1<sup>st</sup> respondent's account is overwhelming as we demonstrated earlier in our analysis and we need not repeat.

On the complaint that the trial court erred for failing to declare the sale of the mortgage illegal, we agree with Mr. Juma that since there was no sale, such an order would have been premature. Nevertheless, even if the sale would have been conducted, we think in the circumstances, no evidence was adduced to render the mortgage and the intended sale illegal because the appellant conceded to have executed the mortgage to secure the loan which remained unpaid.

The appellant's argument that the whole transaction with regard to the mortgage creation was tainted with fraud was not substantiated and we reject it. In the circumstances, we also find the 3<sup>rd</sup> ground baseless.

In the upshot, we find all grounds of appeal unmerited. We therefore, dismiss the appeal with costs.

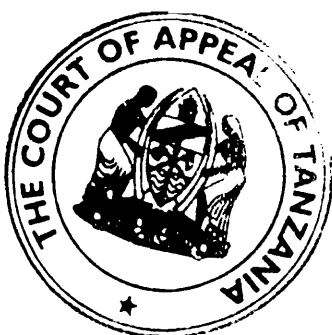
**DATED** at **DODOMA** this 5<sup>th</sup> day of November, 2021.

G. A. M. NDIKA  
**JUSTICE OF APPEAL**

L. J. S. MWANDAMBO  
**JUSTICE OF APPEAL**

L. G. KAIRO  
**JUSTICE OF APPEAL**

The Judgment delivered this 5<sup>th</sup> day of November, 2021 in the presence of Ms. Sophia George Gabriel, learned counsel for the Appellant and Mr. Francis Steven holding brief of Mr. Malimi Juma, learned counsel for the 1<sup>st</sup> Respondent and Mr. Robert Owino holding brief of Mr. Simon Robert Ng'wigulu, learned counsel for the 2<sup>nd</sup> Respondent, is hereby certified as true copy of the original.



  
B. A. MPEPO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**