IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 130 OF 2013

KCB BANK TANZANIA LIMITED ..... **PLAINTIFF**

VERSUS

NASRA SAID ..... **DEFENDANT**

JUDGMENT

Date of the Last Order: 10/01/2018 *Date of the Judgment 23/01/2018*

SEHEL, J.

This is a judgment on a claim for payment of Tshs. 79,476,438.62 emanating from an overdraft and term loan facility advanced to the defendant and one Niah Ogutu t/a Nunaa Fashion and secured by a legal mortgage of the property belonging to the defendant. The Plaintiff also claims for interest at the contractual rate of 23% as from April, 2013 to the date of judgment; interest on the decretal amount

at the court's rate of 12% per annum to be charged from the date of judgment till date of full payment; for an order for sale of the property charged as security; costs of the suit; and any other relief that the court may deem fit to grant.

It is contended by the plaintiff in the plaint that on 20th September, 2011 the plaintiff extended to the defendant and one Nuru Niah Ogutu a banking facility in a form of a term loan, in the sum of Tshs. 70,000,000/=. The said banking facility was accepted by the defendant and Nuru Niah Ogutu who signed Form of Acceptance. It was alleged that the defendant agreed to liquidate the said term loan facility by making monthly instalments of Tshs. 2,709,700/= for a period of 36 months.

The pleadings further allege that the term loan facility was secured by a legal mortgage which was charged by the defendant's landed property situate at Plot No. 699, Block "F", Tegeta Area, Kinondoni Municipality, Dar es Salaam registered under Certificate of Right of Occupancy No. 105548.

The plaintiff averred that the defendant and Nuru Niah Ogutu failed to repay the term loan advanced to them despite being issued with Default Notice. Thus the Plaintiff decided to institute the present suit.

The defendant upon being served with the summary suit successfully applied for leave to appear and defend the suit. In her written statement of defence she denied to have ever taken any loan from the Plaintiff bank and denied to have traded in partnership with Nuru Niah Ogutu. She acknowledged that Nuru Niah Ogutu had account No MG 1129400007 and it was Nuru Niah Ogutu who took the loan. the defendant further averred that she never mortgaged her property rather she entrusted her Certificate of Right of Occupancy to one Anyangisye with an intention to secure a loan of Tshs. 28,000,000/= but Anyangisye misused his position and in collaboration with Nuru Niah Ogutu forged defendant's signature on all documents and used it illegally the matrimonial property to secure Tshs. 70,000,000/=. The defendant categorically disputed to be indebted to the Plaintiff and put the plaintiff to strict proof.

At the trial four issues were framed for determination by the Court thus:-

1) Whether the loan facility was advanced to the defendant and Nuru Niah Ogutu;

2) Whether the bank facility was secured by the mortgage created by the defendant;

3) Whether the defendant is indebted to the plaintiff for failure to repay the advanced facility and to what extent; and

4) To what reliefs are parties entitled.

To prove her case, the plaintiff filed one witness statement of one Masoud Manya (PW1) which was admitted by this Court on 17th October, 2017 to form part of his examination in chief. In his witness statement, PW1 stated that he is a head of recover at KCB Bank Tanzania Limited and was employed by the plaintiff sometime in December, 2013 but he has adequate knowledge regarding the

dispute at hand. He testified that sometime on 25th day of September, 2011 one Nuru Niah Ogutu accompanied by Nasra Saidi- the two trading as Nunaa Fashion approached the Bank seeking for an advance facility in the sum of Tshs. 70,000,000/=. He testified that upon reading and understanding the terms and condition of the facility the defendant extended her property to the plaintiff by placing it as a mortgage in order to secure the loaned amount. He said the said mortgage deed together with an affidavit declaring the mortgage property as hers, were made and attested before Yusta Msoka, learned advocate who declared to have personal knowledge of the defendant, the deponent. It was further testified that the defendant and the borrower failed to service the banking facility as such a notice of default dated 19th March, 2013 was served upon the defendant but despite such notice the defendant continued to default thus by 30th April, 2013 the outstanding amount was Tshs. 79,476,438.62.

PW1 tendered the following documents:

1. A copy of a letter titled "Banking Facility" dated 20th September, 2011 as Exhibit P1;

2. Mortgage Deed dated 26th September, 2011 together with Land Forms Nos. 29 and 40; and affidavit of Nasra Said to create a mortgage were collectively admitted as Exhibit P2;

3. A copy of the Certificate of Title in respect of Plot No. 699, Block F Tegeta, Kinondoni Municipality, Dar es Salaam as Exhibit P3;

4. A copy of notice of default dated 21st January, 2013 as Exhibit P4; and

5. Copy of account statement in respect of Account number MG1129400007 in the name of Nuru Niah Ogutu as Exhibit P5.

In his cross examination, PW1 acknowledged that the defendant's name does not appear in the account and that he does not know the signature of the defendant. He further told this Court that he never witnessed the defendant signing Exhibits P1 and P2 as he was employed by the Plaintiff in 2013.

The defendant on her part filed one witness statement of herself wherein she denied to have either taken a loan of Tshs. 70,000,000/= or guaranteed it. She further testified that she had neither been partner in Nunaa Fashion nor traded with Nuru Niah Ogutu. She however conceded that Account Statement dated 1st January, 2012 belongs to Nuru Niah Ogutu who is the borrower and she had a bank account with the plaintiff with account number MG1129400007. DW1 further stated that all signatures appears in the mortgage deed; Land Forms; affidavit were fabricated and forged and they were illegally used by Anyangisye and Nuru Niah Ogutu.

She tendered:

1. Letters dated 5th July, 2012 and 5th August, 2012 from KCB Bank Tanzania Limited to Nuru Niah Ogutu as Exhibit D1;

2. Four copies of paid-in slips as Exhibit D2;

3. Land Appraisal self contained Report as Exhibit D3;

4. A copy of fire policy as Exhibit D4; and

5. Two books of Savings Account at Tanzania Postal Bank together with a copy of a letter dated 25th July, 2008 collectively admitted as Exhibit D5.

In her cross examination, DW1 conceded to have known Nuru Niah Ogutu and that she did present her title in 2011 to the bank in order to secure a loan from the plaintiff and the said mortgage deed contained her photograph but she denied to have signed exhibits P1 and P2. When asked how she obtained Exhibits D1; D3; and D4 which belongs to Nuru Niah Ogutu, she responded that she received the documents from Frank, Plaintiff's officer when she was following up on her Title Deed. She further stated that upon making follow up she found out that her title deed was mortgaged to secure a loan of Tshs. 70m which she said she did not take it.

In essence these are the evidences brought before this Court for the determination of the framed issues. I will combine issue number one and two together because they are intertwined in that there is allegation that the defendant placed her signature to Exhibits P1 and P2 while the defendant denied to have done so. On these issues

Counsel for the plaintiff submitted that Exh P1 was signed by Nuru Niah Ogutu and the Defendant before Advocate Yusta Msoka and according to the **jurat of attestation**, the attesting officer indicated that he knows the Defendant and Nuru Niah Ogutu which according to the counsel for the plaintiff this is enough evidence to prove that the loan facility was advanced to the defendant and Nuru Niah Ogutu. Counsel for defendant argued that the Defendant never filled any formal loan application form rather the officers of the plaintiff together with Nuru Niah Ogutu forged the defendant's signature. He said the Defendant did, after malicious advise given by Anyangisye, submit her Certificate of Occupancy to Anyangisye by her own will but was never issued with the loan application form. The Counsel for defendant further submitted that the defendant made regular follow up but Anyengisye was telling her untrue response like her Certificate of Occupancy had been sent to head office of the Plaintiff and there are so many loan applicants therefore the Defendant should wait.

Regarding allegation of forgery committed by Mr. Anyangisye and several other officials of the Plaintiff bank in order to deceit the bank and steal money from it, Counsel for Plaintiff argued they were not proved by the defendant to the required standard of proof. To support his submission, he referred this Court to the case of **Othman Kawila Matata vs. Grace Titus Matata** [1981] LRT P.23 at p. 26/27 where the late Mr Justice Lugakingira, J, (as he then was) quoting the case of ***Batter*** [1951] P.35 at p. 37 by Lord Denning stated:-

> *"It is settled law that fraud must be strictly proved. In Batter [1951] p.35, p.37 Lord Denning said".*
>
> *"A civil court when considering a charge of fraud will naturally require a higher degree of probability than that which it would require if considering whether negligence were established"*
>
> *"And even more pertinently the Court of Appeal for East Africa said in **R.G. Patel vs. Lalji Makanyi** [11957] EA 314 at p. 316:-*
>
> *"Allegations of fraud must be strictly proved, although the standard of proof may not be as heavy as to require proof beyond reasonable doubt, something more than were*

balance of probabilities is required." It is upon that standard that the plaintiff allegations are to be considered. I will require something more than a balance of probabilities".

Quoting Section 110(1) and (2) and S.111 of the Law of Evidence Act, Cap.6 the Counsel for the Plaintiff argued the burden of proving fraud is on the defendant.

Counsel for the plaintiff invited this Court to invoke its powers conferred under Section 75 of the Evidence Act, Cap.6 by making comparison of signatures appears in Exhibits P1 & P-2 with the one appears on the pleadings and the witness statement filed in court though not tendered in evidence. It was submitted that these signatures they look alike.

Let me start with the argument on the burden of proof. I totally agree with the counsel for the plaintiff that in terms of Section 110 of the Evidence Act, Cap.6 the burden of proof of existence of any fact is placed on the person who desires the Court to give judgment based on the existence of facts which he asserts exists. It is the law that the burden of proving any fact necessary to be proved in order

to enable a person to give evidence of any other fact is on the person who wishes to give such evidence (See Section 113 of the Evidence Act, Cap.6).

It follows then that in order for the defendant to prove that the plaintiff committed forgery, the Plaintiff must prove in the first place that the defendant did sign Exhibits P1 and P2. That is the purport of Section 113 of the Evidence Act, Cap.6.

Once it is established that the said Exhibits P1 and P2 were signed by the defendant, then the burden shifts to the defendant to show that the alleged signatures was actually forged, because then that fact becomes peculiarly within the defendant's knowledge. This is the combined effect of Sections 112 and 115 of the Evidence Act which read:-

> *"112. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other person.*

115. In civil proceedings when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

Now the question that ensues is whether the Plaintiff discharged her duty. It is heavily relied by the plaintiff that the attestation given by advocate Yusta Msoka as it appears in Exhibits P1 and P2 is enough proof that the defendant did sign the said documents simply because the advocate indicated in the said Exhibits that he knows the deponent. The said advocate Yusta Msoka was not summoned before this Court to clarify as to whether the deponents who appeared before him, most specifically the defendant is the one who is before this Court. It has been the defendant's stand all the way along that she never executed any loan agreement nor signed any mortgage deed. With these outright denials it was important for the plaintiff to summon the said advocate in order to establish the truth of the allegation. It is trite law that failure by a party to call a material witness renders the Court to draw adverse inference that if at all the said material witnesses were called; they

could have tendered adverse evidence against that party. (See the case of **Hemedi Saidi Vs. Mohamedi Mbilu** [1984] TLR pg 113.)

Further under Section 69 of the Evidence Act, Cap. 6 it is provided that if a document is alleged to be signed by a person, then the signature appears in that document must be proved to be his handwriting. In order to prove the identity of the handwriting any mode prescribed under the Evidence Act, Cap.6 can be resorted to. It is pleaded by the counsel for the plaintiff that this Court should exercise its powers conferred under Section 75 of the Evidence Act, Cap. 6 by comparing and contrast the signatures appear in Exhibits P1 and P2 with that appears in the pleadings filed before this Court.

In the case of **DPP Vs Shida Manyama @ Selemani Mabuba,** Criminal Appeal No. 285 of 2002 (CA-M2) (unreported) the Court of Appeal stated as follows on the application of Section 75(1) of the Evidence Act, Cap 6:

"Generally handwriting or signature may be proved on admission by the writer or by the evidence of a witness" or witnesses in whose presence the document was written or signed. This is what

can be conveniently called direct evidence which offers the best means of proof.... More often than not; such direct evidence has not always been readily available. To fill in the lacuna/ the evidence Act provides three additional types of evidence or modes of proof. These are opinions of handwriting experts (S. 47) *and evidence of persons who are familiar with the writing of a person who is said to have written a particular writing* (S. 49). *The third mode of proof under S.75 which unfortunately; is really used these days,* ***is comparison by the court with a writing made in the presence of the court or admitted or proved to be the writing or signature of the person.*** "

It was cautioned in the case of **Bisseswar Poddar v. Nabadwip Chandra Poddar &** Anr., AIR 1961 Cal.300, 64 CWN 1067 which was cited in approval by the Court of Appeal of Tanzania in the case of **Thabitha Muhondwa Vs Mwango Ramadhani Maindo & Another**, Civil Appeal No. 28 of 2012 (Unreported) that:-

"....so long as the court bears in mind the caution that such comparison is almost always by its nature inconclusive and hazardous...."

It is deduced from the above cases that a hand writing may be proved to be the handwriting of a particular person by the evidence of persons familiar with the handwriting of that individual or by the testimony of an expert or by comparison of signatures to be made by the Court. The later method is not very safe to rely upon and to act upon it.

P. B. Mukherjee, J in **Bisseswar Poddar** (Supra) sourced from http://www.kanoon// at page 1076 explained the scope and ambit of Section 73 of the Indian Evidence Act as follows:

"My reading and interpretation of Section 73 of the Evidence Act as whole lead me to conclude that this comparison mentioned there can and is intended to be made by the Court. In fact, the words for the purpose of enabling the court to "compare" leave little room for doubt on this point. To my mind it makes no material difference in this interpretation on the ground that these words

appear in the second paragraph of Section 73 of the Evidence Act dealing with the Court's power to direct a person present in court to write for the purpose of comparison because the Court to be permitted to compare in such case and not in any other such as mentioned in the first paragraph of that section will be to make an unreasonable distinction .....

While the Statute did not make the Judge blind, some of the learned Judges have preferred to invoke self-induced blindness. The Law on this point has oscillated between, severe criticism of the handwriting experts who had been condemned as talking in terms of pseudo-science on a subject which is not science, such as, pen pressure, pen scope, pen pause, pen presentation, pen lift, hand movement, joining pivotal change, under stroke, cross bar and loops of many kinds and whom Judges have described as available on hire to speak in favour of the party who has paid as per Jessel M.R. in Abinger Ltd. v. Ashton, LR 17 Equity 373-4, and on the other the Judicial attitude that whenever there is a disputed question in respect of handwriting, it is dangerous and

unwise for the Judge to use his own eyes without the evidence of the handwriting expert.

.....I am, therefore, unable to accept the theory of Judicial blindness curable and redeemable only by the light of the handwriting expert. I do not conceive justice in that sense is blind or should be blind. Physiologically opticians tell us that everyone has a blind spot. So indeed have judges. But that need not make them any more blind than they must be by nature's ordinance. Indeed, pitifully enough justice is not always all-seeing as it should be and no one is more conscious than the judges themselves of the limitation of their vision."

As a judge, Section 75 (1) of the Evidence Act, Cap. 6 gives me power to use my bare eyes to make comparison of the disputed signatures appear in Exhibits P1 and P2 with the undisputed signatures appear in Exhibits P3 and D5. Though I cannot claim expertise but with my bare eyes I have carefully compared the admitted Exhibits P1 and P2 which have disputed signatures with Exhibits P3 and D5 which have undisputed signatures and I was able

to note considerable differences in pen pressure between the disputed and undisputed signatures. The disputed signatures have more ink pressure on the first letter than the undisputed signatures. Further letters "M" and "S" appear in Exhibits P1 and P2 have different shape with the ones appear in Exhibits P3 and D5. On the whole therefore the plaintiff has not established by cogent evidence that the defendant did sign Exhibits P1 and P2 for the defendant to be said to have been advanced with the credit facility and placed legal mortgage. In this suit, it would have been more suitable for the Plaintiff to bring either a witness in whose presence Exhibits P1 and P2 were written or signed; or a handwriting expert as envisaged under S. 47 of the Evidence Act, Cap. 6; or a person who is familiar with the writing of the defendant as envisaged under S. 49 of the Evidence Act, Cap. 6 to give evidence.

From the above, it is evident that the plaintiff failed to prove on the preponderance of probability that loan facility was advanced to the defendant and secured by the defendant's legal mortgage. Issues number one and two are therefore answered in the negative.

I now turn to the third issue that is whether the defendant is indebted to the Plaintiff for the loan advanced and to what extent. It is submitted by the counsel for the Plaintiff that the defendant is indebted as a borrower by virtue of Section 203 of the Law of Contract Act, Cap. 345 since she signed Exhibit P1 and the defendant is a mortgagor by virtue of Section 80 of the Law of Contract, Cap. 345 because she executed Exhibit P2. Counsel for the defendant insisted that the defendant was never granted the alleged loan of Tshs. 70,000,000/= and that the officers of the plaintiff took an advantage of the defendant's ignorance after being entrusted with the Certificate of Title. I have found in issues number one and two that the defendant never executed Exhibits P1 and P2. Since there is no other evidence to connect the defendant with the said loan and since the defendant never executed the legal mortgage then issue number three is also answered in the negative.

The last and the fourth issue, to what reliefs are parties entitled. It was the contention of the counsel for the plaintiff that the plaintiff is entitled to the reliefs prayed in the plaint. Since the Plaintiff failed to

prove its case against the defendant then she is not entitled to any reliefs claimed in the plaint. In totality the suit against the defendant is hereby dismissed with costs. It is so ordered.

Dated at Dar es Salaam this 23rd day of January, 2018.

B.M.A Sehel

JUDGE

23rd day of January, 2018