

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM**

COMMERCIAL CASE NO.147 OF 2018.

BURAGANE MICROCREDIT COMPANY LTD 1ST PLAINTIFF.

GUNDELINDA RAPHAEL LUTAFIYE 2ND PLAINTIFF.

VERSUS

MYM AFRICA LIMITED 1ST DEFENDANT.

KHURRAM IQBAL MAQBOOL DEFENDANT.

ZAINAB JUMA KASWAKA 3RD DEFENDANT.

Date of last order: 18/03/2020

Date of Judgment :17/04/2020

JUDGMENT:

MAGOIGA, J.

The Plaintiffs, **BURAGANE MICROCREDIT CO. LTD AND GUNDELINA**

RAPHAEL LUTAFYE by a plaint instituted the instant suit against the

above named defendants jointly and severally praying for judgment and

decree in the following orders:-

a. The defendants jointly and severally pay the Plaintiff the sum of Tshs

100,000,000/=

- b. Payment of interest on the principal amount at the agreed rate of 25% per months from 14th July, 2107 to the date of judgment
- c. Payment of interest on the decretal sum at the court rate of 12% from the date of judgment to the date of payment
- d. Declaration that the land on Plot No. 605 Block C Madale area be sold to recover the debt
- e. Declaration the land comprised in certificate of title No. 186070/132 Bunju area also be sold to recover the debt
- f. Costs of this suit.
- g. Any other and further orders as this Honourable Court deems just and equitable to grant.

Upon being served with the plaint, the 1st and 2nd defendants filed a joint written statement of defence generally disputing everything except paragraph 15 of the plaint. The 3rd defendant despite being served by way of publication opted not to enter appearance and the suit was ordered to proceed ex-parte against herself.

The facts pertaining to this suit as gathered from the pleadings are not complicated. On 14th day of July, 2017 1st Plaintiff and 1st defendant

entered into a loan agreement of Tshs. One Hundred Million (Tshs.100,000,000/=) to be paid within fifteen working days (15 days) from the date of disbursement of the said sum of money.

The facts go further that the loan was secured by two mortgages of land; **first**, Plot No. 605 Block C, Madale area, measuring 1106 Square Meters with Certificate Title 153159 in the name of the 3rd defendant; **second**, the mortgage was in respect of certificate title No. 186070/132 Bunju "A" Kinondoni Municipality. It was further agreed that on 7th day of August, 2017 the borrower shall pay Tanzania shillings One Hundred Twenty Five Million, (Tsh 125,000,000/=) which is the sum of money borrowed plus interest. It was the parties' agreement that the said sum of money was to be transferred by one Bundelinda Raphael Lutafiye's (2nd plaintiff) account No.21808000599 to borrower's Account No. 23910000053 in the name of MYM African Limited.

Under that arrangement, the 2nd Plaintiff transferred the said money in the account of the 1st defendants. It was, among others, agreed that in case of failure to pay the agreed money on the agreed date the lender will have the right to sell the securities mentioned in clause 2.4 of the loan agreement. Consequently, the 1st defendant failed to repay the loan on the

agreed date. On 15th day of June 2018 the defendant issued NMB cheque No 00010 worth Tanzania shilling 225,000,000/= drawn in favour of the 2nd the plaintiff. However, it is alleged that upon presentation to the bank for payment the 1st defendant account had no funds.

Plaintiffs went on to allege that despite several reminders to the defendants to honour terms of the loan agreement they refused to repay the loan and consequently leading the institution of this suit, hence this judgement.

When this suit was called for hearing Plaintiffs were enjoying the legal service of Messrs. Jamhuri Johnson and Ezekiel Joel leaned advocates. On the other hand, the defendants were enjoying the legal services of Mr. Gwamaka Mwaikugile, learned advocate.

Before hearing started, the following issues were framed and agreed by the parties and recorded for the determination of this suit, namely:-

1. Whether the 1st Defendant borrowed the sum of Tshs 100,000,000/= Million from the 1st Plaintiff
2. If issue number 1, is answered in the affirmative, whether the said loan was secured accordingly by the mortgage of the landed

Property Plot NO. 605 Bloc "C" Madale area with Certificate of title NO 153159 in the name of the 3rd defendants

3. What amounts the 1st Plaintiff claims against the 1st defendants
4. Whether there was dishonoured cheque worth Tshs. 225,000,000/= issued in favour of the 2nd plaintiff to secure the loan
5. To what reliefs parties are entitled

The plaintiff through Mr. Jamhuri Johnson learned Advocate made a short opening statement on the gist of the suit and in proof of his clients' case called three witnesses.

The first witness for plaintiffs' was **GUNDELINDA RAPHAEL LUTAFIYE** – christened as PW1 for the purpose of this proceeding. Led by Mr. Johnson, learned advocate for plaintiffs, PW1 under oath prayed her witness statement be adopted as her testimony in chief. The said witness statement was adopted without any objection. PW1 introduced herself as a teacher and entrepreneur, based in Kilosa-Morogoro. Through the witness statement, PW1 testified that sometimes in 2017 she was requested by the 1st plaintiff to provide them loan of Tanzania Shillings 100,000,000/= as at

that material time the 1st plaintiff had no financial ability to meet her client's demand.

PW1 went on to tell the court that under that arrangement by the 1st plaintiff and 1st defendant, the 2nd plaintiff on 14th July, 2017 managed to transfer the said amount of money directly to the account of the 1st defendant. PW1 tendered in evidence fund transfer request dated 14th July 2017 which was admitted without any objection and marked as exhibit P1. PW1 continued to tell the court that on 14th day of July 2017, the 1st plaintiff executed loan agreement with the 1st defendant, where it was agreed that the loan was to be repaid on 7th August 2017 together with agreed interest of 25%. Hence at the end of contract the amount to be repaid was Tanzania Shilling, One Hundred Twenty Five Millions (Tsh 125,000.000/=).

PW1 went on to tell the court that upon expiry of the loan period, the 1st defendant failed to repay the loan, and on 16th June, 2018 issued NMB cheque No 000010 worth Tanzania Shillings 225,000,000/= drawn in favour of PW1 which was dishonoured. Further, PW1 tendered a cheque dated 15th June 2018 in evidence and was admitted without any objection, and marked as exhibit P 2.

Under cross-examination, by Mr. Mwaikugile learned Advocate for defendant, PW1 told the court she was not party to contract. PW1 said that the contract was signed between 1st plaintiff and 1st defendants. According to PW1, the request to deposit the money into the account of the 1st defendant was made from 1st plaintiff on behalf of 1st defendant who was the client of the 1st plaintiff. PW1 went on to tell the court that she claims from the 1st defendant because her money was deposited into the account of 1st defendant. PW1 insisted that the act of 1st defendant writing a cheque of Tshs.225,000,000/= signify the defendant acknowledgement that the money belong to her.

Under re-examination, PW1 told the court that the amount shown herein was deposited into the 1st defendant accounts and exhibit P2 is a cheque written by the director of the 1st defendant in her favour.

The next witness of the plaintiff was **JOSEPH RICHARD RUSISYE**-name PW2 for the purpose of this proceeding. PW2 told the court that he is a managing director of the 1st plaintiff and therefore conversant with the facts of the case. PW2 went on to tell the court that, sometimes in July 2017 he met with the 2nd defendant who is the director of the 1st plaintiff who wanted to borrow the money from 1st plaintiff's company. PW2

communicated with other directors on the said arrangement and they agreed that the 1st defendant be granted the loan.

PW2 continued to tell the court that at that time they had insufficient money so they decided to ask the money from the 2nd plaintiff in which it was agreed that the said money should be transferred to 1st defendant directly. It was further testimony of the PW2 that on 14th day of July 2017 the 1st plaintiff executed loan agreement with the 1st defendant in which 1st defendant borrowed a total of Tanzania Shilling One Hundred Million (Tsh 100,000,000/=) from the 1st plaintiff, which money was paid by second plaintiff. Further, PW2 tendered loan agreement in evidence which was marked as exhibit P3. It was further testimony of PW2 that the loan was to be repaid back on 7th August 2017 together with an agreed interest of 25%, hence at the end of contract the amount to be paid was Tanzania Shillings One Hundred Twenty Five Millions (Tshs. 125,000,000/=).

Further the testimony of PW2 was that the said loan was secured by two mortgages of land, the 1st one being plot No 605 Block 'C' situate in Madale area with certificate of title 153159 and the second mortgage is in respect of certificate No 186070/132 Bunju A both in Kinondoni District in Dar-es-salaam.

Furthermore, PW2 tendered title deed of plot No 605 Block C situate in Madale area in the name of Zainabu Kaswaka in evidence which was admitted and marked as exhibit P4. It was further the testimony of PW2 that the interest of 25% was to be charged for one month that is July to August 2017. PW2 told the court that the rest of months the interest was to be charged at the tune of 12.5% due to increasing interest. PW2 continued to tell the court that upon expiry of the loan period, the 1st defendant failed to repay the loan, and instead issued NMB cheque No 000010 worth Tanzania Shillings 225,000,000/= drawn in favour of PW1. The said cheque was presented to NMB Bank for payment but the 1st defendant's account had no funds. In the circumstances, the cheque was not honoured and consequently was returned to 2nd plaintiff.

Under cross examination by Mr. Mwaikugile learned advocate for defendant, PW2 admitted that the said contract was between 1st plaintiff and 1st defendant as per exhibit P3. PW2 said he is a Managing Director of the 1st plaintiff company and has no evidence of license to do business of borrowing with interest in court. Further PW2 admitted that Zainabu did not sign the loan agreement and the certificate title was not registered.

When asked to clarify to court on the licence, PW2 said that they are licenced microfinance and they were secured by the power of attorney.

The next witness of the plaintiffs was **TELESPHORY RAPHAEL RUFATIYE** -name PW3 for the purpose of this proceeding. PW3 told the court that he is a director of the 1st plaintiff. And remembers that on 14th day of July 2017 the 1st plaintiff executed loan agreement with the 1st defendant in which 1st defendant borrowed a total of Tanzania Shilling One Hundred Million (Tshs. 100,000,000/=) from the 1st plaintiff .PW3 went on to tell the court that it was agreed that the loan was to be repaid on 7th August 2017 together with an agreed interest of 25%. But at the end of contract the amount to be paid was Tanzania Shilling One Hundred Twenty Five Millions (Tshs. 125,000.000/=).

Further testimony of PW2 was that the said loan was secured by two mortgages of land ,the 1st one being plot No 605 Block 'C' situate in Madale area with certificate of title 153159 and the second mortgage is in respect of certificate of title No 186070/132, Bunju" A" both in Kinondoni District in Dar-es-salaam. PW3 continued to tell the court that upon expiry of the loan period, the 1st defendant failed to repay the loan, and instead issued NMB cheque No. 000010 worth Tanzania Shillings 225,000,000/=drawn in

favour of PW1. The said cheque was presented to NMB Bank for payment, but the 1st defendant's account had no fund and the same was not honored.

Under cross examination, by Mr. Mwaikugile learned Advocate for defendant, PW3 told the court that he was not present when the contract was signed. PW3 said the contract was between the 1st plaintiff and the 1st defendant. As to when payment was made, PW3 admitted that he was not present when the money was paid, but insisted that there is evidence which indicate that transfer was done. The certificates of title were not registered and PW3 has never met Zainabu Kaswaka.

This marked the end of plaintiffs' case.

On the other hand, the defendants called one witness in defence to this suit. This is other than one, Mr. **KHURRAM IQBAL MAQBOOL CHAUDHARY**, referred as DW1 for the purpose of this proceeding. DW1 under affirmation and through his witness statement told the court that he is the director of the 1st defendant and 2nd defendant in the present proceedings. DW1 to the court that the 1st defendant, is a legal entity incorporated under the laws of Tanzania. DW1 went on to tell the court that he is making this statement as the director and principal officer of the

1st defendant organization and 2nd defendant. DW1 further testified that sometimes in 14th July, 2017, the 1st defendant entered into a loan agreement with the 1st plaintiff; whereas the 1st defendant borrowed one hundred million only (Tshs. 100,000,000.00). The said amount of money was given to the 1st defendant and secured according to the arrangements described in the loan agreement between the 1st plaintiff and 1st defendant only.

It was the testimony of DW1 that the 2nd plaintiff, 2nd defendant and 3rd defendant were never the parties of the loan agreement between the 1st plaintiff and 1st defendant made on 14 July, 2017. DW1 further said it was agreed by the parties that the rights and obligations under the contract shall not be assigned or transferred to any third party. DW1 referred to and relied on clause 6.0 of the loan agreement. Moreover, DW1 went on to tell the court that the neither the mortgage securities nor special power of attorneys were registered according to the laws of the United Republic of Tanzania and therefore in this circumstance, the said securities were invalid *ab initio*.

It was the testimony of DW1 that the 1st plaintiff directors and 2nd plaintiff with malice and ill-motive reported 2nd defendant to the police on

allegations that he obtained money by false pretence and spent two weeks at central police until released by the court after filing application for habeas corpus under Misc. Criminal Application No. 202 of 2018 before Hon Magoiga J. DW1 went on to tell the court that, 1st defendant issued a cheque to the 2nd plaintiff. It was the evidence of DW1 the cheque issued was not for payment but security to 2nd Plaintiff and it was not dishonored by Bank.

DW1 further stated that 1st plaintiff is not entitled to the amount claimed in the Plaint, because as per the Laws of Tanzania, the agreement is void ab initio. DW1 prayed for dismissal of the suit with cost.

This marked the end of defence case.

The learned counsel for parties prayed to file final closing submissions under Rule 66(1) of this court's Rules. I granted the prayer and directed the same be filed within seven days. I must at the outset commend the learned counsel for plaintiff for their thoughtful input on this matter. The learned counsel for defendants for reason best known to himself did not file final closing submissions.

The task of this court now is to determine the merits or otherwise of the suit. However from the parties' pleadings, witness statement filed and exhibits tendered there are some of the facts not in dispute in this suit. These are; **one**, there is no dispute that 1st plaintiff entered into loan agreement with the 1st defendant in 14th day of July 2017, whereby the 1st defendant through the 2nd plaintiff advanced Tshs.100,000,000.00 to the 1st defendant. **Two**, there is no dispute that the 1st defendant secured the loan with two mortgages of land one, plot No 605 Block C situate in Madale area with certificate of title 153159 and the second mortgage is of certificate No 186070/132 Bunju A both in Kinondoni District in Dar-es-salaam properties of the 3rd defendant. **Three**, there is no dispute that the defendant has not repaid the loan. The above undisputed facts alongside with issues framed will assist the court in determination of this suit.

In the written statement of defence and the evidence tendered by defendants always maintained that the 2nd plaintiff, 2nd defendant and 3rd defendant were never parties to contract. Also, that the 1st plaintiff is not entitled to claim anything under the contract for want of lending licence.

I find it imperative to determine the relationship between 1st plaintiff and 2nd plaintiff taking in mind that I am aware of the general rule that only

parties' to contract can discharge or fill obligation and enforce the rights created under it. In the instant suit, the principle of privity of contract is not applicable here. I am saying so, because the wording of clause 2.5 of exhibit P3 in which parties agreed freely that the 2nd plaintiff to transfer Tanzania Shillings 100,000,000/=million directly to the 1st defendant account clearly and loudly shows the 2nd plaintiff was just performing certain functions in fulfillment of the contract on instruction of a party to contract, who is the 1st plaintiff. Therefore the 2nd plaintiff was acting on request of the 1st plaintiff and indeed she transferred the money from her own account to the account of the 1st defendant. It is not in dispute that the 1st defendant received the said money and he did not bother to ask why received that money from the 2nd plaintiff who is not a party to contract. For that reason the 1st defendant is stopped from denying the fact that the amount received was in the performance of contract between 1st plaintiff and 1st defendant and not otherwise. Also, the allegations that 3rd defendant was not a party to contract is misplaced in this situation because the 3rd defendant was join in this suit as a guarantor and guarantor need not be a party to the contract.

Furthermore, the allegation that the 2nd defendant was not a party to contract it's not true because under Companies Act is very loud that outsiders are presumed to know the memorandum and articles of association of a company but not what may or may not have taken place within the doors that are closed to them. Also, the company performs its duties through the minds and acts of its officials, these states of minds of those managers and directors are the state of mind of the company and it is treated as asuch. This instance was taken in the case of **Tanganyika Land Agency and others Vs Monohar Lal Aggrawal Civil Appeal No 26/2003** that a company may in many ways be likened to human body if that is the case then I can safely conclude that 2nd defendant cannot be exonerated from the company liability in the name of privity of contract as by the virtue of being a director 1st plaintiff was properly joined as the 2nd defendant, nothing wrong done.

Now having resolved the above defence, I now turn into the merits of this suit which I will address seriatim starting with the 1st issue:

The first issued was couched that **whether the 1stdefendant borrowed the sum of Tshs 100,000,000/= million from the 1st Plaintiff.** I have dispassionately listened and considered the rival testimony of both

parties and I am inclined to find that the 1st defendant do not seriously deny that he borrowed Tshs. One Hundred Million shillings (Tshs. 100,000,000.00) ,but the fact that the 1st defendant through his counsel framed this as an issue to be determined by this court for resolving the matter between them, it shows that the 1st defendant is not certain as to who is the real lender of the said money.

However, this issue will not detain this court much. I have said earlier that the contract was between the 1st plaintiff and 1st defendant and that the 2nd plaintiff was just assignee to transfer the money only and it was so agreed in writing. The 1st defendant accepted the money from 2nd plaintiff in his name as provided under clause 2.5 in which parties agreed to sign is the direct proof that the 1st Defendant borrowed the money from the 1st plaintiff. On the foregoing it is the considered opinion of this court that the first issue has to be answered in the affirmative, that 1st defendant borrowed the money from the 1st plaintiff, which money was paid by the 2nd plaintiff.

This takes me to second issue which was couched that if issue number 1 is answered in the affirmative whether the said loan was secured accordingly by the mortgage of the landed Property Plot NO. 605 Bloc "C" Madale area with CT NO 153159 named by the 3rd defendant. The plaintiff in proof of

this issue tendered loan agreement and certificate Title No 153159 of landed properties in the name of the 3rd defendant which were admitted in evidence without any objection as exhibits P3 and P4. I have carefully considered this line of argument alongside with the spirit of Section 112 (6)(a) and (b) of the Land Act [CAP 113 R:E 2002]. The said section provides as follows:-

Section 112 -That nothing in this section shall operate to prevent a borrower from offering and the lender from accepting;-

(a) a written and witnessed undertaking ,the clear of which is to charge the borrower land with the repayment of money worth obtained from the lender or

(b) a deposit of any of the following (i) Certificate of a granted right of occupancy(ii) Certificate of a customary right of occupancy (iii) document of lease(iv) any other document which may be agreed upon evidencing a right to interest in land.

Based on the above provision, failure to produce and tender in court the written consent of the Zainabu Kaswaka (third defendant) water down the case of plaintiffs' in this suit. The plaintiffs' failure to bring written evidence

that the 3rd defendant signed the documents of guarantoship renders this issue unproved and same has to fail. The issue of registration could make sense where there is a written consent of the guarantor.

The third issue is what amounts the 1st Plaintiff claims against the 1st defendants. This issue will not detain me much. Much as there is no dispute that the 1st plaintiff extended to the 1st defendant Tanzania shillings 100,000,000/= which was to be repaid to the 2nd plaintiff and had not been repaid to date. That is to say the 1st and 2nd defendant are in breach of the contract. Failure to pay back the whole amount as agreed in the contract plus agreed interest. Since it is not the duty of this court to change the terms dully and freely agreed by parties, this court is of opinion that the rate of interest stipulated in the said contract was lawful and the defendants shall jointly and severally pay plaintiffs the money borrowed plus interest as agreed in the contract

The next issue is whether there was dishonored cheques worth 225,000,000/= issued in favour of the 2nd plaintiff to secure the loan. This issue also will not detain me much. From the pleadings and DW1 testimony do not dispute that upon expiry of the loan period, the 2nd defendant who is the director of the 1st defendant issued NMB cheque No 000010 worth

Tanzania Shillings 225,000,000/= drawn in favour of PW1 which was tendered and admitted in evidence as exhibit P2 without any objection. The 2nd defendant testified that the cheque was not for payment but it was act as security of the debt and therefore it was an additional security. After a careful review and assessment of the evidence adduced in court, I wish to make the following observations. That it is not true that the cheque was dishonoured as there is no evidence from the bank or an endorsement such that **'refers to draw.'** More so, no explanation was either given to explain how the amount of Tshs.125,000,000.00 changed to Tshs.255,000,000.00 within a year from when this suit was instituted. In the absence of all these, the plaintiffs are to be considered to have failed to substantiate this issue, hence same is hereby answered in the negative.

The last issue in this suit is what reliefs parties are entitled to. The 1st defendant prayed that the instant suit be dismissed with costs. Based on what this court has decided above, this suit cannot be dismissed. This suit is equally, therefore, allowed to the extent I have explained above. That said and done, I hereby enter judgment for the plaintiffs as follows:

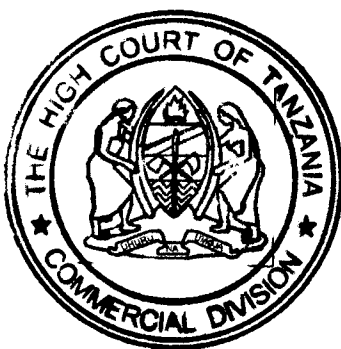
- i. The defendants shall jointly and severally pay the plaintiffs the sums of Tshs 100,000,000/= being the principal amount as prayed and


readily admitted by DW1 under affirmation to be deposited directly to the account of the 2nd plaintiff.

- ii. The 1st and 2nd defendant shall jointly and severally pay plaintiff interest on the principal amount at the agreed rate of 25% from the date of judgment to be deposited in the account of the 2nd defendant.
- iii. The 1st and 2nd defendant shall equally pay interest on decretal sum at the courts rate of 12% from the date of judgment to the date of payment till payment in full to be shared between plaintiffs.
- iv. Prayers (iv) and (v) in the plaint are not granted for want of evidence.
- v. That 1st and 2nd defendants shall jointly and severally pay the plaintiff the costs of this suit.
- vi. The suit against 3rd defendant is dismissed.

It is so ordered.

Dated at Dar es Salaam this 17th day of April, 2020.




S.M. MAGOIGA
JUDGE
17/04/2020