IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CIVIL APPEAL No. 4 OF 2021

(C/f Resident Magistrates Court of Moshi at Moshi Civil Case No.17 of 2019)

JUSTICE NTIBANDETSE.....APPELLANT

VERSUS

CRDB BANK PLC.....RESPONDENT

27th July & 25th August 2021

JUDGMENT

MKAPA, J,

The appellant Justice Ntibandetse, aggrieved by the decision of the Resident Magistrates' Court of Moshi at Moshi (the trial court) in **Civil Case No. 17/2019**, has filed this appeal against the judgment and decree thereof.

In order to place the matter in its correct perspective it would be necessary to briefly summarize the facts leading to the present appeal. In 2015 the plaintiff (appellant herein) entered into a loan agreement with the Respondent in which the respondent advanced the appellant a loan amounting shillings one hundred million (Tshs. 100,000,000/=) being working capital for appellant's barley production. He defaulted repayment and the sum of shillings Eighty

Three Million (Tshs. 83,000,000/=) remained unpaid. In 2016, the appellant applied for an additional loan facility amounting fifty million shillings (Tshs. 50,000,000/=). The loan facilities were secured by a matrimonial house situated at Arusha, L.O. 171946 Plot No. 298/Block Njiro. It was alleged that, The Private Agricultural Sector Support Trust (PASS) agreed orally guarantee the appellant in the event of the appellant's failure to repay the loan.

A dispute arose after the appellant failed to repay the loan. Following the default the respondent herein advertised for sale the mortgaged house. Trial ensued and at the conclusion of the trial the trial court decided in favour of the respondent herein hence the instant appeal in which the appellant has raised four grounds of appeal that;

1. The trial magistrate erred in law and fact in holding that despite the agreement between the appellant and PASS in which PASS had already settled the debt, the respondent had to proceed with the loan recovery measures.

2. The learned trial magistrate erred in law and fact in failing to comprehend the fact that the appellant was misdirected in the whole process that in case of any loss PASS would cover the loss.

3. The learned trial magistrate erred in law and fact in failing to consider the evidence adduced by the appellant regarding the reasons for non- repayment of the loan.
4. The trial magistrate erred in law and fact in concluding that there existed a contract of guarantee between PASS and respondent while it was a contract of indemnity.

At the hearing of the appeal parties consented and the Court ordered the same to proceed by way of filing written submission. The appellant appeared in person and fended himself while Mr. Francis Pius, learned advocate appeared for and represented the respondent.

Submitting in support of the first ground the appellant submitted that a person who is a party to a contract is said to be privy to the contract. That, there was privity of contract between himself and other contracting party. He submitted further that, the legal position is to the effect fact that, only a person who is a party to a contract can derive benefits from it but a stranger cannot, even the obligations therefrom cannot be imposed on him. It was the appellant's view that in the present appeal, the appellant as a principal debtor was not a party to the agreement between the respondent and PASS, (the guarantor), as stated in **Exhibit D5**.

He further argued that, since he was not a party to the said agreement no obligation should be imposed on him by the said agreement (Exhibit D5). He added, since exhibit D5 is an agreement between the respondent and PASS, the law under section 92 of the Law of Contract Act, Cap 345 R.E 2019 provides that;

"Where a guaranteed debt has become due or default of the principal debtor to performance a guaranteed duty as taken place the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor."

He went on arguing that, the gist of section 92 above is that after a guarantor has paid the debt or discharge the obligation of the principal debtor, he is vested with all rights which the creditor (respondent herein) had against the principal debtor including suing the principal debtor. The appellant also cited section 97 of the Law of Contract Act and argued that the respondent cannot sue the principal debtor nor claim monies from him after the guarantor had settled the loan. That, it was wrong for the trial court to hold that the respondent should continue claiming repayment of the loan from the principal debtor after the same had been settled by the guarantor (PASS).

On the second ground the appellant submitted by referring the court to the case of **Tito Daniel Ng'akala and 10 Others V CRDB Bank Plc and Property Masters Limited, Land Case No. 29/2016** and argued that in the cited case, facing with similar situation the High Court Judge accepted the idea of his fellow barley farmers who were guaranteed by PASS for PASS to cover the loss.

As regards the third ground, the appellant contended that, he did explain to the respondent (exhibit P1) the reasons for failure to repay the loan due to unfavourable weather conditions. That, the said exhibit was admitted into evidence.

Lastly, the appellant submitted that, there existed an internal arrangement (agreement) between the respondent and the guarantor which was confidential. However, the trial court observed that;

"since the only evidence we have is an agreement between PASS and the Bank, which in fact do not have any term excluding the plaintiff from repaying the loan after being cleared by the guarantor, I have no other option than siding with the defendant that the plaintiff is still obliged to repay the loan."

Appellant argued that he secured his matrimonial home as a security for the loan in the event his guarantor failed to repay the

loan then the respondent could realize the said security for purpose of recovering the loan. It was the appellant's view that instant matter is different as the guarantor had already paid back the loan on his behalf. He prayed for this court to allow the appeal as the respondent had no right to sell the mortgaged matrimonial home. In reply to the above submission made by the appellant, Mr. Pius submitted in respect of the first ground that at the trial respondent's witness DW2 testified vide Exhibit D5 that the parties to the said PASS guarantee are the respondent and PASS. That, PASS guaranteed the respondent to offer loans to creditworthiness customers like the appellant but whose security or collateral were inadequate to secure the loans to be granted by respondent. He referred the Court to page 9 of Exhibit D5 on operational guidelines which stated;

> *"These guidelines aims at providing working modalities between CRDB Bank and the Private Agricultural Sector Support Trust (PASS) in administering PASS's credit Guarantee programme. The guidelines shall be construed as an integral part of credit guarantee agreement between CRDB bank and PASS in governing credit guarantee programme."*

The learned counsel argued further that, on the face of the Credit Guarantee Agreement, (**Exhibit D**), it is undisputed that the said guarantee was a separate arrangement between the respondent and PASS for the respondent to provide loans to customers and in the event of a default by customers PASS would pay percentage level as stipulated under clause 2.4 at page 11 of annex 1 of exhibit D5. However, that arrangement would not exonerate the respondent from recovery measures against the benefiting borrowers, as the case with the appellant since the respondent and PASS were bound by the terms and conditions of the said agreement.

In support of his argument he placed reliance on the case of **Philipo Joseph Lukonde V Faraji Ally Saidi, Civil Appeal No. 74 0f 2019**, where the Court held;

"Where parties have freely entered into binding agreements, neither court nor parties to the agreement, should not interpolate anything or interfere with terms and conditions therein, even where binding agreements made by lay people."

Furthering his argument he argued that at the trial neither the appellant nor his witnesses adduced any evidence to the effect that PASS did guarantee the appellant or exempted the appellant from repaying the loan after the same was settled by PASS. He referred the Court to section 110 of the Evidence Act Cap 6 [R.E 2019] in support of his contention the fact that he who alleges the existence of the facts must prove that those facts exists.

Regarding the second ground, the learned counsel submitted that at the trial no evidence was adduced to the effect that, the appellant was misdirected by PASS rather were appellant's mere words. He further submitted that the claim by the appellant that he was misdirected by PASS ought to have being pursued by the appellant by instituting a suit so as to enable PASS to defend her case.

Arguing on the third ground the learned counsel submitted that the terms and conditions guiding the appellant's loan repayment are stipulated in exhibit D1, D2, D3 and D4. That, the appellant did execute the said loan agreement without a provision on waiver on repayment of loan in the event of an unfavourable weather conditions. It was Mr Pius's view that in the event of non-repayment of the loan the respondent was to execute recovery measures and not otherwise. Lastly, Mr. Pius submitted that as the

appellant admitted not to be a party to the credit guarantee agreement the appellant should be stopped from claiming rights from a contract which he is not a party. He finally prayed for the Court to dismiss the appeal with costs.

In his brief rejoinder submission the appellant reiterated his earlier submission in chief and maintained that the respondent's outstanding debt had already been settled by PASS.

Having heard parties' submission and carefully perused court record the question to be asked is whether the appeal is maintainable?

It is sufficiently established that the appellant did acquire a loan facility from the respondent as a working capital for the barley production. The evidence adduced at the trial court through Exhibits D1-D4 had revealed that the appellant and the respondent did enter into a loan agreement in the total amount of one hundred and fifty shillings million shillings. The same was secured by a matrimonial house and the appellant had an obligation to pay the loan. That, the appellant defaulted in the repayment of the loan. These facts were not disputed by respondent at the trial. The relevant excerpt of the trial court's typed proceeding at page 12 is reproduced hereunder;

I was given two loans by CRDB. The 1st one was the loan of Tshs 100 million and the second loan was 50 million. I signed the loan agreement to that effect. On the said contract ***I do not know if PASS is obliged to repay my loan. (Emphasize added)***

The crux of the dispute lies on the issue as to whether the loan amount advanced by the respondent to the appellant was guaranteed by PASS hence the provisions of the Credit Guarantee Agreement between CRDB Bank Plc and the Private Agricultural Sector Support Trust (PASS) dated June 2014 were applicable to the Loan facility advanced by the respondent to the appellant.

The appellant acknowledged to have defaulted repayment of the loan. However, he alleged the fact that the loan had been guaranteed by PASS and PASS as guarantor had since settled the outstanding debt hence he was no longer indebted to the respondent.

My thorough perusal of the trial proceedings (pages 12 and 13) of the trial court's typed proceeding has revealed the appellant in his own words conceded not to have been a party to the credit guarantee agreement between the respondent and PASS when he testified the following;

"***I know nothing concerning the contract between PASS and the Bank*** *because I was not involved. If I could have been*

involved in such contract, I could have known that if the loan was already cleared by the guarantor, the court can also claim the said amount from me"

It is on record that the terms and conditions of the loan agreement between the Respondent and the Appellant are contained in exhibit D1- the Loan Facility Letter dated 5th March, 2015, Exhibit D2-Loan Facility Letter (Variation) dated 31st December, 2015, Exhibit D3-Loan Facility Letter (Variation) dated 3rd March, 2016 and Exhibit D4-Mortgage of Right of Occupancy dated 5th March, 2015.Exhibits D1, D2, D3, and D4. It is clear from a reading of the exhibits the fact that the agreement is silent on PASS being guarantor to the loan acquired by the appellant. That the appellant is not exempted from repayment of the loan and further that in the event of non-repayment of the loan the respondent was to execute recovery measures and not otherwise.

It is a cardinal principle of the law that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove those facts exists as provided for under sections 110, 111, 112, 114 of the Evidence Act Cap 6 [R.E 2019]. As the appellant at the trial proceeding did not adduce any evidence nor summoned any witness to testify on the fact that the loan was settled by PASS and that the respondent

was barred from executing recovery measures, I am of the considered view that the appellant did accept the terms and obligations stipulated in the agreement including repayment of the loan. Hence, I found the first ground of appeal baseless and I dismiss it.

As to the issue of PASS being a guarantor to the appellant on the acquired loan facility, it is on record the fact that a Credit Guarantee Agreement was entered on June 2014 between CRDB Bank Plc and The private Agricultural Sector Trust (PASS) a financial services facility (Exhibit D5) in which the respondent and PASS agreed to collaborate in a Credit Guarantee Programme in providing financial services to PASS/CRDB clients who met the criteria set forth in the said agreement and its annexure.

Now, this brings me to the Common law doctrine of privity to a contract which dictates that only persons who are parties to a contract are entitled to take action to enforce.

It is a common law principle which implies that only parties to a contract are allowed to sue each other to enforce their rights and liabilities and no stranger is allowed to confer obligations upon any person who is not a party to a contract even though the contract has been entered for his benefit. This fact is acknowledged in the appellant's submission as I mentioned earlier on.

At this juncture, it is worth noting one of the essentials of the aforesaid doctrine of privity to contract that, only parties to contract are entitled to sue against each other for non-performance of contract.

In the landmark English case of **Tweddle V. Alkinson (1861) 1 B & S 393** it was held that the plaintiff cannot sue as he was both a stranger to the contract as well as to consideration.

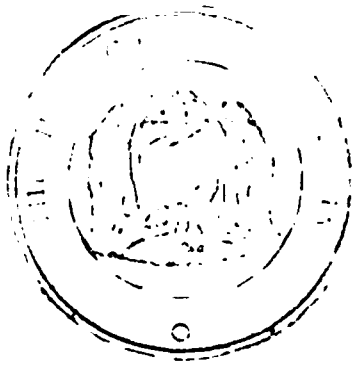
This concept of privity to contract was again analysed in the case of **Dunlop Pheumatic Tyre Co. Ltd V. Selfridge & Co. Ltd (1915) UK HL 1 (26 April 1915) [1915] AC 847** in which this concept of beneficiary under a contract has been highlightened, the rationale behind being only contracting parties have accepted the terms and responsibilities stipulated in the agreement.

Guided by the above legal authorities there can be no doubt that the appellant is a stranger to the aforementioned Guarantee Agreement between the respondent and PASS. Thus the issue as to whether PASS did guarantee the loan acquired by the appellant from the respondent need not detain me much as the same dispose of the 2nd, 3rd and 4th grounds of appeal for lacking merit.

In the event, the appeal is hereby dismissed with costs and the trial court's decision is upheld.

It is so ordered.

Dated and Delivered at Moshi this 25th day of August, 2021.



S.B. MKAPA

JUDGE

25/08/2020