IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(IRINGA DISTRICT REGISTRY)

AT IRINGA

CIVIL APPEAL NO. 08 OF 2021

[Originating from the Judgement and Orders of the District Court of Mufindi at Mafinga before Hon. A. Ringo, Resident Magistrate in Civil Case No. 27 of 2018]

MUSA MAKWETA MUSA.....APPELLANT

VERSUS

FARAJA CREDIT FINANCE.....RESPONDENT

JUDGEMENT

Date of last order: *24/08/2021*
Date of Judgement: *28/10/2021*

MLYAMBINA, J.

In a nutshell, the Court in this appeal will restate the principle to be applied in determining jurisdiction of the Court in matters involving both normal contract of a civil in nature and mortgage contract relating to landed property. The Judgement will proceed to cast light to the negative and positive impact of the enforceability of the *Written Laws (Miscellaneous Amendment) (No. 3) Act No. 5 of 2021 that amended the Land Disputes Courts Act, Cap 216.* In so doing, the Court will have to answer three issues surrounding this appeal. *One*, whether the District Court of Mufindi at Mafinga in *Civil Case No. 27 of 2018* had jurisdiction to entertain the matter at hand. *Two*, whether there was valid contract between the parties. *Three*, whether the herein Respondent (Plaintiff) proved their case on the required standards during trial. The view point thereof is to answer the following Appellant's six ground of appeal:

One, the Trial Court erred in both law and fact by entertaining a case for which it had no jurisdiction as the matter involved loaned agreement secured by mortgage which was supposed to be entertained by Court of competent jurisdiction to deal with land disputes.

Two, the Trial Court erred in law and fact by making a finding that there was a valid contract between the Appellant and the Respondent basing on mere statement by the Respondent that the Appellant had started to pay part of the purported loan without proof of the same.

Three, the Trial Court erred in law and fact in finding that the Respondent issued and the Appellant received an amount of TZs 5,000,000/= as a loan without considering that the Respondent failed to prove how the said money were issued to and received by the Appellant.

Four, the Trial Court erred both in law and fact as it interfered the freedom of parties to contract in that; according to loan agreement, parties agreed that; in case the borrower defaults the lender will resort to seize and sell the collateral without seeking assistance of the Court, the remedy which the Respondent never pursued.

Five, the Trial Court erred in law and fact when it made finding that there was valid loan agreement basing on weak evidence of the Respondent and ignoring strong evidence of the Appellant.

Six, the Trial Court erred both in law and fact in delivering Judgement in the Respondent's favour as prayed in the Plaint without taking into consideration that the Respondent never pursued remedy stipulated and agreed in the loan agreement to wit seizing and selling the collateral before instituting the suit in a Court of law.

During the hearing, both parties were represented vide the legal services of Mr. Gaspar Kalinga and Mr. Abraham Rupia learned Counsel respectively.

The appeal was canvassed by the way of written submission. According to the schedule, the Appellant was to file his submission in chief the latest on 7th September, 2021, the Respondent was to file reply submission by 21st September, 2021 and rejoinder (if any) was to be filed by 28th September, 2021. It is noteworthy that the Respondent never filed her reply submissions. This reminds me of the old adage; *vigilantibus non dormientibus jura subveniunt* which roughly means, the law helps the vigilant but not the sluggard. There was no explanation as to why the Respondent never complied with the Court order.

The non- compliance of the Respondent to the Court order of filing the written submission in reply is as good as non-appearance when the matter was fixed for hearing by the Court. It was the wisdom of the Court of Appeal of Tanzania in the case of **Godfrey Kimbe v. Peter Ngonyani**, Civil Appeal No. 41 of 2014 at page 3 that:

> *We are taking this course because failure to lodge written submission after being so ordered by the Court, is tantamount to failure to prosecute or defend one's case.*

The same position was underscored in the case of **Abisai Damson Kidumba v. Anna N. Chamungu and 3 Others,** Miscellaneous Land

Application No. 43 of 2020 District Registry of Mbeya at Mbeya (unreported), in which the Court observed:

> *...The law is settled to the effect that a case shall face dismissal for want of prosecution if a party fails to file his written submission on the date fixed by the Court... Consequently, under the circumstances, I dismiss the applicant's application with costs for want of prosecution.*

The effect of noncomplying with the Court's order of filling written submissions was earlier on stated in the case **of NIC of Tanzania and Consolidated Holding Corporation v. Shengana Ltd,** Civil Application No. 20 of 2007 (unreported), the Court of Appeal of Tanzania at Dar es Salaam, whereby it was held:

> *The 1st applicant did not file submissions on due date as ordered. Naturally the Court could not be made important by a party's inaction. It had to act and it is trite law that failure to file submissions is tantamount to failure to prosecute one's case. In this case the supporting submission was not in place, the Court.*

The above being the case, failure of the Respondent to file her reply submissions amount to her failure to defend her case without the notice on the day fixed for hearing. The same position was stated in the case of **Patson Matonya v. The Registrar Industrial Court of Tanzania & Another**, Civil Application No. 90 of 2011 (unreported).

Reverting to the matter under consideration, the Appellant argued the 2nd, 3rd and 5th grounds of appeal jointly; the 4th and 6th grounds of appeal jointly and the 1st ground in its isolation.

With regards to the first ground of appeal, the Appellant argued that; it is trite position of law that *Magistrate's Court established by the Magistrates Court Act, 1984* are barred from entertaining matters which are governed by Land Act, 1999 [R. E. 2019] and Village Land Act, 1999 [R. E. 2019] as expressly provided so under *Section 4 (1) the Land Disputes Court Act Cap 216 [R.E. 2019]. Section 4 (1) (supra) provides* as follows:

> *Unless otherwise provided by the Land Act, 1999, no Magistrate's Court established by the Magistrates Courts Act, 1984 shall have Civil jurisdiction in any matter under the Land Act,1999 and the Village Land Act, 1999.*

Further, the Appellant submitted that; the subject matter to this appeal was originally entertained by Mufindi District Court established under *Magistrate's Courts Act, 1984*. Thus, according to what was averred in the Plaint and on the face of terms of the loan agreement which is Annexture FCF1 to the Plaint and the same was admitted as exhibit PI. In view of the Appellant, it is apparent that the subject matter of the suit is a matter falling under *the Land Act, Cap 113 [R.E. 2019].*

Moreover, the Appellant argued that; under para 6 of the said Plaint, it is alleged that; in order to secure the loan from the Defendant, the Appellant pledged a Matrimonial House located at Plot No. 528 Block "M" Ihongole

within Mafinga Township, with Certificate of Right of Occupancy bearing Title Number 25672, which was attached to the Plaint as annexture FCF2, and was admitted as exhibit P2. In view of the Appellant, pursuant to the loan agreement and a Title Deed deposited by the Appellant with the Respondent, it is clear that; parties created both an informal mortgage and lien by deposit of documents governed under the Land Act. The Appellant cited *Section 113 (5) (a) & (b) and (6) of the Land Act Cap 113 [R.E. 2019]* which provides that:

> *(5) Nothing in this section shall operate to prevent a borrower from offering and a lender from accepting-*
> *(a) a written and witnessed undertaking, the clear intention of which is to charge the borrower's land with the repayment of money or money's worth obtained from the lender; or*
> *(b) a deposit of any of the following-*
> *(i) a certificate of a granted right of occupancy;*
> *(i) N/A*
> *(Hı) N/A*
> *(iy) N/A*
> *fv) N/A*
> *(6) The arrangement specified in paragraph (a) of subsection (5) may be referred as an*
> *"Informal mortgage" and a deposit of documents specified paragraph (b) of subsection (5) shall be*

known and referred to as a "lien by deposit of documents.

Furthermore, the Appellant argued that; specifically under clause 5, 6, 7, 10, 11 and 12 of the loan agreement, parties had clearly expressed their intention to charge the Appellant's land with the repayment of money lent by the Respondent. Again, Clause 8 of the loan agreement indicates that the Respondent had kept with him original document of the secured property. Therefore, the Appellant was of firm stand that; where subject matter of a suit is a matter falling under *the Land Act,* District Courts are precluded from entertaining such matter. To back up the position, the Appellant cited the case of **Abdul Rahim Shadhili as guardian of Miss Fatuma A. R. Shadhili v. Mandhar Govind Raykar,** Civil Appeal No 296 of 2004, (unreported) at page 17.

From the above Appellant's submission on the issue of jurisdiction, it must be noted that, this being a first Appellate Court, the duty of this Court as prescribed by *Section 76 (2) of the Civil Procedure Code, Cap 33 [R.E. 2019]* is to reconsider and re-evaluate the evidence in record and draw its own conclusions taking into account and giving due allowance to the fact that the trial Court had the advantage of seeing and hearing the witnesses who testified before it. The dictate of *Section 76 (2) (supra)* is as follows:

Subject to any conditions and limitations prescribed under subsection (1), the High Court shall have the same powers and shall perform, as nearly as may be, the same duties as are conferred and imposed by this

Code on Courts of original jurisdiction in respect of suits instituted therein.

With the afore guidelines in mind, and having considered the impugned records and the Appellant's written submissions in chief, I find there is no doubt that, the District Court had jurisdiction to entertain *Civil Case No 27 of 2018*. The Respondent properly invited the trial Court to determine on the matter of contract and not on the ownership or matter related to the land as the Appellant claimed. From the Plaint, it is evident that the Plaintiff prayed for the following relief (s):

(i) An order for the payment of Tanzanian Shillings Seventy Four Million One Hundred and Fifteen Thousand (TZs 74, 115, 000/=) only as per paragraph 3 above.

(ii) Payment of Tanzanian Shillings Fifty Million (TZs 50,000,000/=) only as general damages.

(iii) Interest on special claim above at the rate of 25 per annum from filling date to the date of Judgement.

(iv) Interest on decretal sum at the Court's rate from the date of Judgement to the days of fully satisfaction.

(v) Costs of the suit.

(vi) Any other relief (s) that the Court may deem just and equitable to grant.

It follows, therefore, that there is nowhere the Plaintiff had a prayer of auctioning the mortgaged landed property. The suit was purely based on a commercial transaction involving the loan contract.

Another point to note is that; the suit was named as civil case which implies the Respondent herein (Plaintiff) intended it to be in normal civil nature. It was not registered as a Land Case. This being the case, the value claimed by the Respondent during the trial was within the jurisdiction of the District Court as it is provided under *Section 40 (2) of the Magistrates Court Act, Cap 11 [R.E. 2019] which* states that:

> *(2) A District Court when held by a civil Magistrate shall, in addition to the jurisdiction set out in subsection (1), have and exercise original jurisdiction in proceedings of a civil nature, other than any such proceedings in respect of which jurisdiction is conferred by written law exclusively on some other Court or Courts, but (subject to any express exception in any other law) such jurisdiction shall be limited-*
>
> *(a) in proceedings for the recovery of possession of immovable property, to proceedings in which the value of the property does not exceed three hundred million shillings; and*
>
> *(b) in other proceedings where the subject matter is capable of being estimated at a money value, to*

proceedings in which the value of the subject matter does not exceed two hundred million shillings.

Following the above letter of the law, the Court is of settled mind that the District Court of Mufindi sitting at Mafinga had jurisdiction while entertaining *Civil Case No 27 of 2018.* The cited case of **Abdul Rahim Shadhili as guardian of Miss Fatuma A. R. Shadhili v. Mandhar Govind Raykar** (*supra*) is distinguishable to the case at hand because the latter was talking about sell of landed property. It was not on enforcing normal civil rights remedies. I will further elucidate this point. *First*, *Section 167 of the Land Act of 1999 [R. E. 2019]* vests with exclusive jurisdiction to the herein below Courts, to hear and determine all manner of disputes, actions and proceedings concerning land. A dispute involving mortgage transaction is one of such manner.

(a) The Court of Appeal of Tanzania.
(b) The High Court of Tanzania
(c) The District Land and Housing Tribunals
(d) Ward Tribunals
(e) Village Land Councils.

The Court is also of the findings that; interpretations of *Section 167 (1) of the Land Act, No. 4 of 1999 [R.E 2019] and Section 33 (1) of the Land Disputes Courts Act No. 2 of 2002 [R.E. 2019] will give the meaning of a land case to cover but not limited to:*

(i) Dispute over ownership of land in its strict sense as defined in

Section 2 of the Land Act, No. 4 of 1999 [R.E. 2019].

(ii) Leases as covered under Part IX of the Land Act, No. 4 of 1999 [R.E. 2019].

(iii) Mortgages and Security as Covered under Part X of the Land Act, No. 4 of 1999 [R.E. 2019] and been amended from time to time.

(iv) Easements and analogous rights as covered under Part XI of the Land Act, No. 4 of 1999 [R.E. 2019].

In any event, mortgage matters can attract either commercial litigation based on the contract itself or land litigation based on disposal of the mortgaged landed property. The Court in that circumstances has to apply **the decisive controlling rule** in assessing whether it has jurisdictional powers to entertain such matter.

I may expand further, when the Court is faced with an issue; *whether the sale of the mortgaged land in issue is/was proper in recovery of the loan, then the Court must get satisfied on the decisive controlling factor in that dispute.* If the Plaintiff/ Applicant wants to enforce mortgage rights, then the Land Courts as established under *Section 167 (i) of the Land Act No. 4 of 1999 (R.E. 2019)* would be the proper Court to determine the dispute. In that respect **the decisive controlling aspect is a landed matter**. The herein below are my nine reasons to expound such position:

One, Section 4 (1) the Land Disputes Court Act Cap 216 [R. E. 2019] expressly prohibits *Magistrate's Court established by the Magistrates Court Act, 1984* from entertaining matters which are governed by *Land Act, 1999 and Village Land Act, 1999.*

Two, the Court is of views that; while determining jurisdictional point of which Court is competent to adjudicate matters arising out of mortgage, one must go back to the land policy tenets. The 1997 second version of the National Land Policy re-emphasized that:

> *There is a need to have well established land disputes settlement machinery. Therefore, existing quasi-judicial bodies should be strengthened to deal with such disputes. Such bodies shall start from Mabaraza ya wazee ya ardhi to quasi-judicial bodies at the district, regional and national level with appeal to High Court on point of law (See page 20 of the revised policy).*

Mortgage has never ceased to be a land matter capable of being dealt with by land Courts as anticipated by the National Land Policy.

Three, with an exception of the Village Councils as per *Section 7 (c) of the Land Disputes Courts Act, Cap 216 [R.E. 2019]* and Ward Tribunals as per *Section 45 (4) read together with Section 46 of the Written Laws (Miscellaneous Amendment Act (No. 3) Act No. 5 of 2021* that amended *Section 13 and repealed Section 15 and 16 respectively of the Land Disputes Courts Act, the District Land and Housing Tribunal* have jurisdiction to determine land disputes arising out of mortgage contracts.

The current *Section 13 of the Land Disputes Courts Act (supra)* provides:

> Notwithstanding subsection (1), *the District Land and Housing Tribunal shall not hear* ***any proceedings*** affecting the title to or any interest in land unless the Ward Tribunal has certified that it has failed to settle the matter amicably;
>
> *Provided that, where the Ward Tribunal fails to settle a land dispute within thirty days from the date the matter was instituted, the aggrieved party may proceed to institute the land dispute without the certificate from the Ward Tribunal.*
>
> [Emphasis added].

A reading of the above *Section 13 of the Land Disputes Courts Act as amended in 2021,* will give a meaning that every dispute affecting title or any interest thereon including mortgage cases must be referred to the Ward Tribunal for amicable settlement.

It is the humble view of this Court that the word **"any proceedings"** under *Section 13 of the Land Disputes Courts Act as amended in 2021* should be qualified or be given exceptions especially on *inter alia* registered formal mortgages. In alternative, there are should be a specialized mechanism of reconciliation on matters involving mortgages. I have seven reasons:

(i) The Ward Tribunal System is not stable due to its set up. The Members who forms composition are lay persons, mostly not

trained in mortgage matters which are technical.

(ii) The intention of the legislature of reconciling parties to any proceedings that affects title of lands and interests thereon will not be achieved due to likelihood of flooding Ward Tribunals with mushroom of cases. Indeed, if not closely supervised, there are possibilities of reconciliation certificates to be issued on unknown procedures as it sometimes happens in marriage reconciliation bodies.

(iii) The tenure of Ward Tribunal members is periodic. Sometimes their renewal takes time. If *Section 13 (supra*) is retained at a mandatory tune that "any proceedings involving title or rights on land must be initiated at Ward Tribunal for reconciliation", the economy of the Country especially on registered formal mortgaged properties is likely to be paralysed. There will be no trial of mortgaged land disputes to the competent Land Courts due to non-securing of reconciliation certificates occasioned by lack of quorum.

(iv) The Land Disputes Courts amendment of 2021 does not tell on whether land matters whose original jurisdiction lies to the High Court should secure reconciliation certificates from the Ward Tribunal or not. The law has assumed all land matters originates from District Land and Housing Tribunals.

(v) *Section 54 (4) of the Written Laws (Miscellaneous Amendments) (No. 3) Act No. 5 of 2021 amended Section 33 of the Magistrates Courts Act, Cap 11* by adding immediately

after subsection (3), the following:

> (4) Notwithstanding the provisions of this section, an advocate may appear or act for any party in a primary Court presided over by a Resident Magistrate.

However, appearance of Advocates before the Ward Tribunal is still prohibited. The retained *Section 18 (1) of the Land Disputes Courts Act, Cap 216 (R.E. 2019)* read:

> *No advocate as such may appear and act for any party before the Ward Tribunal.*

Even if the new law would be amended by repealing *Section 18 (1) (supra)* and allow appearance of Advocates before the Ward Tribunals, unlike the Primary Courts which are manned by Resident Magistrates, the Ward Tribunals are not composed of lawyers. As such, reconciliation on matters represented by lawyers is likely to be mostly complicated, which may lead to its failure and wastage of time.

(vi) The Ward Tribunals have no infrastructure. They are mostly accommodated in Ward Executives buildings which are relatively small. Subjecting all manner of land disputes to the Ward Tribunals for settlement is likely to cause havoc especially in Cities, Municipalities and Township.

(vii) Worse indeed, the mortgagee or any person who have an interest in the mortgaged land will not be timely entitled to

challenge auction of the landed property by the Lender till he/she secures reconciliation certificate from the Ward Tribunal. If the lender exercises her rights mal-scrupulously, most of borrowers will be rendered homeless.

Needless, the afore negative repercussion, there are other positive repercussion on the part of the Banks which includes ability of Banks to recover their loans through auction without facing obstruction from mushroom of interim injunctions issued by District Land and Housing Tribunals. However, in return, Land Courts will be flooded with cases aimed to restrain transfer of titles to the purchasers of mortgaged land.

Four, Part X of the Land Act No.4 of 1999 [R. E. 2019] covers Mortgage and Security. The apparent stated scope and purpose of the *Land Act No.4 of 1999 [R. E. 2019],* in particular in its Part X which covers Mortgage and Security, was to make the dispute involving sale of a mortgaged land to be the land issue. As such, the decisive controlling factor is a land and not the commercial aspect. It is a position here that, neither land nor advancement of a loan in that aspect.

Five, Section 33-(1) of the Land Disputes Courts Act No.2 of 2002 (R. E. 2019) empowers District Land and Housing Tribunals to deal with all matters arising out of the *Land Act No.4 of 1999 [R. E. 2019]* including matters arising out of mortgage transaction.

Sixth, the Land Act No. 4 of 1999 [R. E. 2019] does not only cover formal mortgages. It also covers informal mortgage under *Section 113 (2) of the Land Act [R. E. 2019]. Section 117 (2) of the Land Act* (*supra*) goes further

to rank informal mortgage according to their date of creation. It provides:

> *Informal mortgages shall rank according to their order in which they are made provided that where an informal mortgage is registered under section 11 of the Registration of Documents Act, it shall take priority over the unregistered informal mortgage.*

Seven, Land is the source of Commerce and not to the contrary. Principles of Commerce has never laid down that Commerce is the source of land. Indeed, land is deemed to be one of the four pillars of Tanzanian development philosophy. The other three being; people, good policies and good leadership. (*See National Land Policy of Tanzania, 1995*). If Land is the source of commerce as per the commercial principles and philosophy and is the one pillar of our national development, then, any dispute involving sale or trespass or any interference of a mortgaged landed property shall be dissolved by the specialized Land and Housing Tribunals and other Courts as established under *Section 167 (1) of the Land Act. No.4 of 1999 as amended.*

If the decisive controlling factor in a loan disputes involving mortgaging of a land shall be the loan itself, I'm compelled with my mind to observe that, it will be overturning the basic Commercial principle and philosophy that Land is the source of Commerce. The new Commercial principle and philosophy will be Commerce is the source of Land. I understand that there is no permanent position in this World, however, such overturn of Commercial principle and philosophy will work at the peril of our people.

Eight, there has never been any amendment to *Section 33-(1) of the Act No.2 [R.E. 2019]* which disentitles the District Land and Housing Tribunal with exclusive jurisdiction in all proceedings under *the Land Act, 1999* and in all such other proceedings relating to land under any written law.

Nine, the question whether Land Tribunals have jurisdiction to adjudicate dispute over matters arising out of a loan facility involving mortgage of a landed property has been settled by the Court of Appeal of Tanzania. In the case of **Olam Tanzania Limited, Property International, National Housing Corporation and Faraji Rukwanja v. Selemani, Baraka Nkondola, Chihako M. Saidi, Joseph Mpanda and T.E.D Lindi Town Council**, Consolidated Civil Revisions No.2, 3, 4, 5, and 6 of 2010, Court of Appeal of Tanzania full bench (Mbarouk J.A, Bwana J.A and Massati J.A, as they then were) at Mtwara (un-reported) the Court made a settled position in its ruling dated 6th and 12th October, 2010 at page 15-18. At page 16 the Court held:

> So with respect, if by "registered land" the learned judge was referring to the mortgaged land, *the District Land and Housing Tribunal has jurisdiction to handle mortgage (subject to its pecuniary limits) and that is the kind of dispute that falls squarely within section 33 (1) (a) of the Land Disputes Courts Act, because it is a dispute under the Land Act.* And since we do not see how else the learned judge brought up the application of *the Land Registration Act (Cap 334- R.E.2002)* in the scene and

since none of the provisions of the statutes she cited specifically bars District Land and Housing Tribunals from taking cognizance of disputes over registered land, and since the subject matter in the present application are disputes under the Land Act, we think the learned judge misapplied those provisions and came to the wrong conclusions... [Emphasis added].

The afore said, I will proceed to determine the 1st, 3rd and 5th grounds of appeal. The Appellant generally faults the trial Court for reaching its decision in favour of the Respondent despite the fact that the Respondent failed to prove his case at the required standard. He informed this Court that; the trial Court was in default when it observed that there was a valid contract between the parties by relying on the mere statement of the Respondent that the Appellant had already started to perform the contract by paying TZs 635,000/= the facts which were not proved by any document to evidence receipt of the said amount. Thus, the trial Magistrate shifted the burden to the Appellant when she said at page 5 of the Judgement *"the Appellant did not dispute this piece of evidence during Plaintiffs' case"* as he failed to cross examine for the same.

The Appellant insisted that; it is a trite position of law, if the Plaintiff fails to prove his case to the required standard, the said case automatically will fail without a need to call the Defendant to defend it. The Appellant cited the case of **The Registered Trustees of joy in The Harvest v. Hamza K. Sungura,** Civil Appeal No 149 of 2017, (unreported) at page 18.

Also, the Appellant faulted the trial Court when it observed and concluded that; the Respondent issued and the Appellant received the loan money amounting to TZs. 65,000,000/= without prove on the modus how the said money was given to the Appellant. It was the Appellant's considered view that; in the trial Court, the Respondent failed to prove the case at the required standard of proof in civil litigations, as it is obvious that the burden of proof lies on a person who positively asserts existence of certain facts.

On the issue of standard of proof, all lawyers know that the standard of proving civil case is on the balance of probability or on balance of preponderance. However, that standard does not waive the duty of the one who alleges to prove as per *Section 110 (1) of the Evidence Act (supra)* which states that:

> *Whoever desires any Court to give Judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

The afore stated implies that even in civil cases someone should not rely on the weakness of other for him to secure verdict in his or her favour. However, in the case before the Court, even if the evidence of the Appellant was weak, the evidence of the Respondent was untrustworthy to the extent of not been depended upon as it was said in the case of **Browne v. Dunn** (1893) 6 R. 67 HL in which it was held that:

> a decision of not to close examine at all or a particular point is tantamount to an acceptance of the unchallenged evidence as accurate *unless the testimony of the witness is incredible or there has been a clear prior notice of the intention to impeach the relevant testimony.* [Emphasis added]

The afore being the case, I agree with the Appellant that the Respondent did not prove his case to the required standard so as to secure victory at the trial. The victory achieved was questionable in the eyes of law and evidences. It was a spurious evidence legally incapable of proving the claims on balance of preponderance.

As regards the 4th and 6th grounds of appeal, the Appellant faults the trial Court for interfering the freedom of parties to contract. It is common knowledge that parties to the contract are bound by the terms of their contract. The Appellant cited the case of **Unilever Tanzania Ltd v. Benedict Mkasa trading as BEMA Enterprises**, Civil Appeal No 41 of 2009 (unreported) **Philipo Joseph Lukonde v. Faraji Ally Said,** Civil Appeal No 74 of 2019 (unreported), **Simon Kichele Chaha v. Aveline M. Kilawe,** Civil Appeal No 160 of 2018 (unreported) and **Lulu Victor Kayombo v. Oceanic Bay Limited and Mchinga Bay Limited,** Consolidated Civil Appeal No 22 and 155 of 2020 (unreported).

The Appellant insisted that; pursuant to the terms of clause 6 of loan agreement it is apparent that in securing the loan the Appellant mortgaged matrimonial house. According to terms of clause 7 and 11 of the loan

agreement parties had agreed that in case the Appellant defaults to repay the debt, the Respondent shall have right to sale the mortgaged property. As such, upon failure by the Appellant to repay the loan, the Respondent was entitled to enforce parties' agreement in particular selling of the mortgaged house.

Moreover, it was the Appellant's considered view the trial Court ought to have enforced what the parties' agreed by ordering them to stick to what they had freely agreed, particularly the order that the Respondent had to recover her money by selling the mortgaged property upon failure by the Appellant to repay the loaned money agreed in the loan agreement. To bolster up the argument, the Appellant cited the case of **Lulu Victor Kayombo v. Oceanic Bay Limited and Mchinga Bay Limited,** (*supra*) at pages 11-12.

The Appellant, therefore, prayed for this appeal be allowed with cost, the decision, Judgement and all consequent orders of the trial Court be reversed.

At this juncture, I find the root of the case is; *whether there was a loan contract between the parties.* It was the verdict of the trial Magistrate that; there was valid contract between the parties as per *Section 10 of the Law of Contract Act, Cap 345 [R.E. 2019]*. With due respect, there is a big doubt if real there was a valid contract between the parties in relation to TZs 65,000,000/=. This is due to the following reasons:

First, the contract which was submitted and admitted in the trial Court was neither original nor certified to be the true copy of the original, thus its authenticity is questionable. Even the signature and thumb print of the spouse of the Appellant are not original as the trial Magistrate claimed at page 5 of her Judgement. This was contrary to the provisions of *Section 65 of the Evidence Act, Cap 6 [R. E. 2019].*

Second, there is no any evidence which show that the Appellant signified his acceptance by starting to pay the purported loan of TZs 65,000,000/=. This is due to the fact that; the trial Magistrate insisted the same by mere words without backup of any piece of evidence which state that at certain date the Appellant paid TZs 635,000/= as part of his purported loan. In real sense, this Court is not made aware as to why it was observed so by the trial Magistrate. Even there is no any evidence to prove that the Respondent deposited TZs; 65,000,000/= to the account of the Appellant at certain time.

The Court is of observation that; since the Appellant was the normal client of the Respondent, the latter took advantage of the enough information she had relating to the Appellant's former loans transactions. There is no good reason to tell as to why all documents tendered before the Court were not original but uncertified copies. There is no good tell as to why the crisis started when the Appellant demanded his Certificate of Title which was deposited as security to his certain loan.

Therefore, it is the observation of this Court that, there is no trite evidence to prove that the Appellant and the Respondent had a valid loan

agreement of TZs 65,000,000/= as purported by the Respondent. Hence, the whole case before the trial Court was devoid of merits as against the Appellant herein.

In view of the above findings, the Court do hereby allow the appeal in its entirety with costs as prayed.

Y.J. MLYAMBINA

JUDGE

28/10/2021

COURT

Judgement pronounced and dated 28th October, 2021 before Counsel Gaspar Kalinga and Miniva Nyakunga for the Appellant and in the absence of the Respondent.

Y.J. MLYAMBINA

JUDGE

28/10/2021