

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 119 OF 2018.

THOMAS ANTHONY MBEGA..... 1ST PLAINTIFF

THOMAS ANTHONY MBEGA (Administrator

Of estate of the late LILIAN

THOMAS MBEGA (deceased) 2ND PLAINTIFF

VERSUS

MICHAEL HERMAN MREMA.....1ST DEFENDANT

LIPINA MICHAEL MREMA

T/A BASIC STOP SHOP2ND DEFENDANT

FIRST NATIONAL BANK.....3RD DEFENDANT

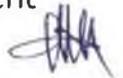
Date of Last order: 02/11/2021

Date of Judgement: 26/11/2021

JUDGEMENT

MAGOIGA, J.

The plaintiffs, **MICHAEL ANTHONY MBEGA and MICHAEL ANTHONY MBEGA (Administrator of estate of late LILIAN THOMAS MBEGA)** by way of amended plaint instituted the instant suit against the above-named defendants jointly and severally praying for judgement and decree in the following orders: -



1. The 1st and 2nd defendant

- i. Be ordered to pay the sum of Three Hundred and Fifteen Million Shillings (TZS.315,000,000/=) being sum of money secured as loan and guaranteed by the plaintiffs under loan guarantee agreement between the plaintiffs and 3rd defendant.
- ii. Interest on the item above at rate of 22% from the date money paid by plaintiffs until the date the plaintiffs will be indemnified.
- iii. That TZS.19,400,000/=being the amount of money paid by the plaintiffs to service the loan which was given to the 1st and 2nd defendant by the 3rd defendant be paid to the plaintiffs.
- iv. Interest on the item above at the commercial rate of 7% from the date money paid by the plaintiffs until of judgement the date the plaintiffs will be indemnified.
- v. Twenty Million Shillings (20,000,000/=) being a specific damaged.

2. The 3rd defendant,

- i. A declaration that the guarantee by the plaintiffs was valid until 5th January 2017.



- ii. A declaration that the home loan agreement entered in 8th March, 2017 between the plaintiffs and the 3rd defendant is null and void.
- iii. To pay one Hundred Million Shillings (Tshs.100,000,000/=) being loss of business from the time when the title deed of the plaintiffs was illegally in possession of the 3rd defendant.
- iv. The 3rd defendant to be ordered to discharge mortgage of the plaintiffs' title deed for the plot No. 2120,Block 'E' Kunduchi area Kinondoni Municipality in Dar es Salaam and the same be substituted with the 1st and 2nd defendants' title deed of plot No. 176Block 'G' Mbezi Beach ,Kinondoni Municipality in Dar es salaam.
- v. Permanent injunction restraining the 3rd defendant, their agents or any other person acting on their authority from conducting sale or any kind of disposition or destruction of the plaintiffs' property standing on plot No.2120 Block 'E' Kunduchi area in Kinondoni Municipality, Dar es Salaam.
- vi. Costs of this suit to be paid by defendants.
- vii. Any other reliefs as this honourable court deems fit and just to grant.



Upon being served with the plaint, the 1st and 2nd defendants dully filed joint written statement of defence disputing all plaintiffs' claims by contending that, there was no any arrangement for substitution of the title deed and the amount of TZS. 315,000,000/= which was advanced to plaintiffs by 3rd defendant was separate arrangement between 3rd defendant and plaintiffs, of which the 1st and 2nd defendants were not involved and prayed that the instant suit be dismissed with costs.

Upon being served with the plaint, the 3rd defendant filed written statement of defence disputing plaintiffs' claims on the ground that, there is no illegal possession of the title deed as the plaintiff without undue influences entered into home loan agreement whereby they mortgaged their plot in dispute. On that note both defendants invited the plaintiff into strict proof of her claims thereof and eventually prayed that the suit be dismissed with costs.

The facts pertaining to this suit as gathered from the pleadings are imperative to be stated for better understanding the gist of this suit. The plaintiffs freely volunteered and created third party legal mortgage on their landed property located at plot No. 2120 Block 'E' Kunduchi area, Kinondoni Municipality with CT No. 123613 in the names of Thomas Antony Mbega and Lilian Anthony Mbega, in favour of the 3rd defendant



for the 1st and 2nd defendants to secure loan to the tune of TZS.315,000,000/= in July 2015.

Further facts were that, parties agreed that as soon as the 1st and 2nd defendants were issued with certificate of title of their plot No.176, Block 'G' Mbezi Beach ,Kinondoni Municipality, the mortgaged property of the plaintiffs be discharged and the 1st and 2nd defendants title deed be substituted for created mortgage instead. Facts went on that in January 2017 the 1st and 2nd defendants were issued of their title deed in respect of their plot No.176 Block 'G' Mbezi beach, Kinondoni Municipality in Dar es Salaam and the plaintiffs took it to the 3rd defendant for substitution but the 3rd defendant after staying with it for one year refused to substitute it as earlier agreed.

Further facts were that, the 1st and 2nd defendants defaulted to pay the loan taken and the 3rd defendant initiated process to realise the money and in the course misrepresented and under duress wanting to sale the house of the plaintiffs, forced the plaintiffs to be principal debtors by creating home loan agreement of the same amount. The plaintiffs in fears to lose their house, signed the home loan agreement and managed to pay only TZS.19,000,000/= and the 1st and 2nd defendant paid only TZS. 6,000,000/=.



It was further stated that the whole arrangement was meant to defraud the plaintiffs by making them principal debtors and realising the 1st and 2nd defendants from the payment of the money taken, hence, this suit claiming the reliefs as contained in the plaint.

The plaintiff at all material has been enjoying the legal services of Ms. Stella Manongi and Ms. Aisha Bade, learned advocates. On the other hand, the 1st and 2nd defendants were jointly enjoying the legal services of Mr. Benson Kuboja, learned advocate; And the 3rd defendant equally was enjoying the legal service of Mr. Innocent Mushi, learned advocate.

In view of the contentions reflected in the pleadings, before hearing started, the following issues were framed, agreed between parties and recorded for determination of this suit, namely; -

1. Whether there was legal contract between the plaintiffs and the 3rd defendant with regard to home loan arrangement?.
2. Whether or not, there was agreement between the plaintiffs and the 1st and 2nd defendants with regards to substitution of the title deed of the 1st and 2nd defendants and whether such agreement was guaranteed by the 3rd defendant?.



3. Whether there was an agreement between the plaintiffs and the 1st and 2nd defendants to pay for home loan agreement which the plaintiffs entered into with the 3rd defendant
4. Whether there was a breach 1st, 2nd, and 3rd issues above.
5. To what reliefs parties are entitled.

At the outset and before going into testimonies of the parties, I would like to point out that on 4th June, 2012 when the suit was called on for final pre-trial conference the learned advocate for plaintiff informed the court that the 2nd plaintiff is no more and that he has the death certificate and letter of administration of the estate of the 2nd plaintiff, (one Lilian Anthony Mbega) and prayed the name of administrator Thomas Mbega be substituted for the name of deceased. The prayer was granted and the personal representative was made a party and the suit proceeded under Order XXII Rule 3 of the Civil procedure Code [Cap 33 R.E. 2019].

The plaintiff in proof of her case, called two witnesses, the first witness to testify was one, **THOMAS ANTONY MBEGA** (to be referred in these proceedings as "**PW1**"). PW1 under oath and through his witness statement adopted in these proceedings as his testimony in chief told the court that, he is the plaintiff, hence, conversant with the fact of this

case. PW1 went on to testify that, sometimes in July, 2015, the 1st and 2nd defendants requested for plaintiffs' title deed to use it as security in order to obtain TZS 315,000,000/= from the 3rd defendant. PW1 went on to testify that, it was an agreement between plaintiffs and the 1st and 2nd defendant. Among others, it was agreed that, as soon as the 1st and 2nd defendants receive their title deed at plot No. 176 ,Block 'G' Mbezi Beach ,Kinondoni Municipality, the plaintiffs landed property located at plot No. 2120 Block 'E' Kunduchi area, Kinondoni Municipality with CT No 123613, was to be discharged and the 1st and 2nd defendants title deed be substituted for the created legal mortgage. It was further testimony of PW1 that, despite the fact that the 3rd defendant guaranteed that arrangement, but when plaintiffs delivered the said title deed to 3rd defendant on 5th January, 2017 for creation of the mortgage and release the plaintiffs' title deed, the 3rd defendant did not heed the agreement as agreed. PW1 went on to tell the court that, the 1st and 2nd defendant failed to repay the loan as agreed. In the circumstance, on 17th February 2017 the 3rd defendant sought to auction the plaintiffs' property in order to recover the said loan. Following that notice, the 3rd defendant when approached by the plaintiffs induced the plaintiffs by misrepresentation to sign and accept new arrangement called home loan agreement to rescue plaintiffs' property. PW1 further told the court that,



it was agreed that, the 1st and 2nd defendants to repay whole amount taken by the plaintiff through monthly instalment of TZS 6,000,000/=per each month of the calendar. However, PW1 told the court that the 1st and 2nd defendants managed to repay only one instalment of TZS.6,000,000/= and refused to pay the rest of outstanding amount as agreed. PW1 went on to testify that, after the refusal by the defendants to repay the rest of outstanding amount, the plaintiffs through his capital from other sources decided to pay TZS.19,000,000/ on the said loan. However, the 3rd defendant auctioned his property and it was at this time realised that it has induced to enter into agreement by misrepresentation on the part of the 3rd defendant, According to PW1, the home loan agreement was never intended to rescue plaintiffs' property from being sold but rather was ill trick to make the plaintiff as principal debtor.On the basis of the above testimony, PW1 prayed that this court be pleased to enter judgement and decree against all defendants as prayed in the amended plaint.

In proof of the case the plaintiff tendered in evidence the following exhibits, namely:-

- (a) Mortgage right of occupancy with CT No 123618 on plot No. 2120 Block 'F' as **exhibit P1**

- (b) Loss report and Hati ya makabidhiano dated 6/12/2016 as **exhibit Pa-b**
- (c) Facility letter dated 27th June,2014 as **exhibit P2**
- (d) Loss report and handing over as exhibit **P3 a-b**
- (e) The first Deed of variation of mortgage dated 20th March,2017 as **exhibit P4**
- (f) Agreement between Michael Mrema, Lipina Mrema and Thomas Mbega, Lilian Mbega as **exhibit P5.**
- (g) Home loan agreement dated 20/3/2021 as **exhibit P6**
- (h) Bank statement of Thomas Mbega as **exhibit P7**
- (i) Payments slips collectively admitted as **exhibit P8a-d**
- (j) Document for sale of house of plaintiff as **exhibit P9**

Under cross examination by Mr. Kuboja, PW1 admitted to have guaranteed the loan agreement between the 3rd defendant and 1st and 2nd defendants as exhibited by exhibit P1. PW1 went on to tell the court that, the amount taken was 1,300,000,000/= and different securities were used to cover the whole amount, including Lipina's properties. PW1 when shown exhibit P2 admitted to have given the Certificate of Title to 1st and 2nd defendant with a condition that it will be returned within 2 months. PW1 when asked about the meeting told the court that



the meeting was held at the 3rd defendant office and that it is the officer of the bank who allowed substitution of the title deed.

When pressed with question concerning the home loan agreement, PW1 told the court that, PW1 admitted to have signed the home loan agreement, but was quick to tell the court that, he signed the agreement after being convinced by the officer of the bank to sign it. PW1 shown exhibit P4 admitted on the contents of the agreement and that parties were Thomas Mbega, Lilian Mbega and the First National Bank. However, PW1 added that Lipina promised to pay the home loan agreement.

PW1 when shown exhibit P3 a-b told the court that, he wrote the letter to the Chief Executive Officer of the bank but the letter was replied after the lapse one year.

Under cross examination by Mushi, PW1 when shown exhibit P6 told the court that, the purpose of the loan was home equity release and amount which were advanced were similar to the value of the house which was Tshs.315,000,000/=. PW1 when asked to read exhibit P6 he admitted that ,there is no any provision for the exchange of title deed, but told the court and they are seeking remedy for their property which 3rd defendant wanted to sale it instead of the house of the 1st defendant.



PW1 when questioned on relationships with the 1st and 2nd defendant, he replied that Lipina is her sister in law as he is married one house with Michael Mrema. PW1 when pressed with question in regard to exhibit P2, he replied that, the heading shows that 1st and 2nd defendants surrendered their C.T so that it can become a new security. PW1 when pressed with more questions, PW1 told the court that, most of the agreements were being made orally but the handing over of the CT was witnessed by Renah Henry Vegula. PW1 further told the court that, he is aware that the guarantor has responsibility to pay the loan in case of default by the principal debtor. When questioned on securities, he replied that other securities have not been realized but his property was subject to sale.

Under re- examination by Ms. Manongi PW1 told the court that, the reference was done after the title deed was out and that he knew the numbers of the Certificate of Title. PW1 when asked to read exhibit P3 told the court that, the bank did not reply the letter, until after one year. PW1 when questioned on the amount disbursed he replied that TZS. 315,000,000/= was credited in plaintiffs' account on the same date and the money was debited in 1st and 2nd defendant account. PW1 told the court that on 29th April, 2017, 1st and 2nd defendant paid only TZS.



6,000,000/= out of 315,000,000/=and making unpaid balance TZS.
454,400,000/=

When asked question for clarification to court PW1 told the court that, after the 1st and 2nd defendant surrendered the CT to the Bank, the 3rd defendant returned it after a year.

The next witness was one, **RENAH HENRY VEGULA**, (to be referred in these proceedings as "**PW2**"). PW2 under oath and through her witness statement adopted in these proceedings as his testimony in chief told the court that, she is businesswoman doing business in Morogoro, Dar es salaam and Mtwara. PW2 told the court that sometimes in 2016 while in Dar es Salaam she was called by the plaintiffs to witness the handing over of the CT on landed property located at plot No 176, Block 'G' Mbezi Beach, Kinondoni Municipality. PW2 went on to tell the court that, on 6th December, 2016 the 1st and 2nd defendants availed plaintiffs the said CT in her presence. It was the testimony of PW2, that sometimes on March, 2017 she was called again to witness the agreement between plaintiffs and 1st& 2nd defendants on the payment of home loan agreement.



The rest of the testimony of PW2 was more of PW1 on what happened after the plaintiff guaranteed the previous loan extended to 1st and 2nd defendant.

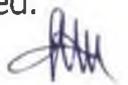
PW2 when shown exhibits P2 and P5 told the court that they are handing over of the certificates of titles between Mbega family and Mrema family of which she personally witnessed.

Under cross- examination by Mr. Kuboja, PW2 when shown exhibit P1 told the court that, the parties in exhibit P1 were Mbega & Lilian and FNB bank. According to that exhibit, PW2 admitted that she was not party to agreement. PW2 insisted that she just witnessed the exchange of the CTs as security. When questioned on the relationship with the parties she replied that, she is the elder sister to Lilian and Lipina that's why she was involved in the handing over of the title deeds.

Mr. Mushi had nothing to cross examined PW2.

Re- examination by Ms. Manongi, PW2 when shown exhibit P1 and P6 she told the court that she was not involve in those exhibits but she was present in several meetings and that the meetings for exchange of CTs are the one she was referring.

This marked end of plaintiff case and the same was dully marked closed.

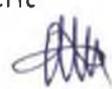


In defence, the defendants were defended by Mr. MICHAEL HELMAN MREMA (to be referred in these proceedings as '**DW1**'). DW1 under oath and through his witness statement adopted in the proceedings as his testimony in chief told the court that, he is retired officer of Tanzania Breweries Limited and denied to have entered into an agreement of substitution of his title deed. DW1 went on to tell the court that, he has no knowledge of any arrangement made between the plaintiffs and the 3rd defendant with regard to home loan agreement and as such denied to have committed himself to pay for home loan of the plaintiffs.

Under cross examination by Ms Manongi, DW1 recognised his written statement of defence and the witness statement but denied to have pleaded the home loan agreement and therefore, he has never entered in any arrangement nor guaranteed anyone using his property. When pressed with more questions DW1 refused to have taken any loan or signed any document.

Under -cross examination by Mr. Mushi, DW1 admitted to have taken a previous loan

Under re-examination by Mr. Kuboja DW1 told the court he was not present when the transaction took place neither was he not present



when the documents were taken to be used in the home loan agreement.

DW1 when asked questions by the court for clarification DW1 told the court that he has never complained anywhere that the signature in document are not the same with his signature. DW1 asked more clarification on the relationship with Mbega, DW1 told the court that DW1 and Mbega are family members because the wife of DW1 and the wife of Mbega are blood sisters.

The next witness of the defendant was **MS. LIPINA MICHAEL MREMA** (to be referred in these proceedings as '**DW2**'). DW2 under oath and through her two witness statements adopted in the proceedings as his testimony in chief told the court that, way back 2010 she had a very strong relationship with her sister, one, Lilian Antony Mbega. It was the testimony of DW2 that, sometimes in 2015 she wanted to borrow money from the 3rd defendant but she had few collaterals which did not meet the requirement of the Bank to cover 1,000,000,000/= she intended to borrow. In the circumstances, DW2 approached her sister one Lilian Mbega who was ready to support by giving DW2 her title deed with the condition that DW2 to repay the loan



to the Bank and there was no condition for substitution of the title deed because it is not the policy of the bank.

DW2 testified that just after she was granted the loan in terms of Bank guarantee to enable Tanzania Breweries Limited to offer more beers, the administration of Tanzania Breweries Limited changed and new management come up with different policies that was her downfall of her business. The bank started to put pressure to her sister on the landed property mortgaged and following that pressure from the bank, one day her sister Lilian visited DW2s' office and took the title deed with the aim of making 1st and 2nd defendants to repay the outstanding balance to the bank.

Testifying further DW2 told the court that, she was informed by her sister that the title she undertook is nowhere to be seen but later on she was informed by Lilian that they have entered into home loan agreement with the 3rd defendant so as to rescue their property. DW2 insisted that she have never entered into agreement for repayments of home loan neither an agreement for substitution of the title deed.

In proof of what has been testified above, DW2 tendered in evidence the following exhibits, namely; -

1. Mortgage Right of occupancy as **exhibit D1**.



Under cross examination by Ms. Manongi DW2 admitted to have taken the loan in 2015 and plaintiffs guaranteed the amount of TZS. 300,000,000/=. DW2 when pressed with the questions on exhibit P2a she told the court that she has no evidence to disapprove that the signature in exhibit P2a does not belong to her. When further pressed with question she told the court that, it is the normal practice of the bank does not to allow substitution of the title deed. DW1 when questioned about the loan of TZS 1,300,000,000/= told the court that, she failed to repay the whole loan because his business went wrong. Under further cross-examination told the court that she has never signed any agreement to pay home loan agreement neither deposited any amount in plaintiff account.

Mr. Mushi had nothing to cross examination DW2.

Under re- examination by Kuboja DW2 told the court that, her business went into loss to the extent that she failed to pay loan. DW2 when shown exhibit P5 told the court that, she has never signed it and it is for the first time she saw it before the court. DW2 when questioned further, told the court that, she have never paid any amount concerning home loan agreement.



This marked the end of hearing 1st and 2nd defendant and the same was dully marked closed.

The last witness in defence was FRANCIS EMANUEL MANGULA, (to be referred in these proceedings as '**DW3**'). DW3 under oath and through his witness statement adopted in the proceedings as his testimony in chief told the court that, he is Recovery Manager of the 3rd defendant and hence conversant with the case .DW3 went on to tell the court that, plaintiffs previously mortgaged their landed property over the certificate title No 123613 in the name of Thomas Antony Mbega and Lilian Antony Mbega as third party mortgage to secure the loan taken by the 1st and 2nd defendants. DW3 went further to tell the court that Michael Herman Mrema and Lipina Michael Mrema defaulted in loan payment and the bank-initiated recovery process including auctioning plaintiffs' house.

It was the testimony of the DW3 that before the auction took place plaintiffs approached the bank and requested to take over part of the loan so that she could rescue their house. It was a further testimony of DW1 that, as means of securing the house, plaintiffs entered into home loan agreement with the 3rd defendant and the amount of TZS 315,000,000/= was extended to plaintiff as principal borrower.



As a security for the loan a landed property located at plot No 2120 Block 'E' Kunduchi area, Kinondoni Municipality with CT No 123613 in the name of Thomas Antony Mbega and Lilian Anthony Mbega through the deed of variation dated 20 March,2017 was created .DW3 went on to testify that, there was no any agreement between the bank and plaintiffs or the 1st and 2nd defendant regarding substitution of the title deeds.

Further testimony of DW3 was that, the loan was taken with the purpose of clearing 1st and 2nd defendant and to rescuer the house from being sold. More testimony of DW3 was that, plaintiffs repaid only 19,000,000/= leaving the whole amount plus interest unpaid.

DW2 prayed that **exhibits P4 and P6** already admitted in evidence to form part of defence case on their party, which prayer was not objected.

Under cross- examination by Ms. Manongi, DW3 admitted to have stated in written statement of defence that, no letter for substitution was brought to the bank, however, when shown exhibit P3a admitted that the letter was received by the bank. DW3 when pressed with questions regarding other securities, he replied that previously loan had other securities because the house did not have the value of one billion. DW3 when pressed with more questions he admitted to have stated under

paragraph 4 of the written statement of defence that Mbega was a borrower who wanted to pay the buyer of the property that was part of security. DW3 further told the court that he is aware of the procedure to be followed before the loan is granted and the relationship between guarantor and borrower in case of default. DW3 when asked on valuation report of the security he replied have none in court.

DW3 under further cross-examination told the court that, the transaction between plaintiffs and the 3rd defendant after default by 1st and 2nd defendant was different from the previously arrangement between 1st & 2nd defendants and 3rd defendant, even guarantee changed in a new arrangement. According to DW3, the 3rd defendant was claiming the outstanding balance of TZS.504 Million as principal amount plus interest. The plaintiffs only paid 19,000,000/= which is inclusive of TZS 6,000,000/=and after the death of one Lilian Mbega Insurance paid 309,000,000/=. DW3 when asked further question on the outstanding balance he replied that, even after the death of one Lilian Mbega the 3rd defendant continued to charge interest on unpaid amount.

Under cross -examination by Aisha Beda DW3 told the court that, there was no application letter but plaintiffs approached the bank to take over the loan and the loan was granted after the assessment of the flow of

business. DW3 under further questioning, told the court that, there are two types of auctions, public and private auction, although this type of auction were not explained in written statement of defence or in witness statement.

Under cross -examination by Kuboja DW3 told the court that, plaintiffs were guarantor when guaranteed the loan of Basic Stop shop but later on when 1st and 2nd defendants defaulted to pay the loan, 3rd defendant wanted to sale the house put as the security plaintiffs approached the bank to buy part of the loan and during this arrangement 1st and 2nd defendants were not involved. DW3 when questioned further told the court that under the bank practice there is no policy of substitution of title deed and admitted to have received the proposal for substitution but 3rd defendant did not agree to the proposal. DW3 when shown exhibits P7 and P8 replied that those exhibits does not show if Lipina paid TZS.6,000,000/= and that there is no provision for substitution of the of title deed.

DW3 shown exhibit P7, replied that plaintiff was granted TZS. 315,000,000/= but later on was credited to 1st and 2nd defendants account to clear part of the loan. DW3 insisted that after the death of



Lilian, the insurance paid TZS 309,000,000/= leaving the outstanding balance was TZS, 246,000,000/=.

This marked the end of hearing of this hotly contested suit inter parties. The learned advocates for parties prayed for leave to file final closing submissions beyond the statutory time allowed by Rules and given the nature of the suit, I allowed them to file the same not later than 2nd November, 2021. I have had time to go through the rivaling submissions, and I truly commend them for their immense research and contribution which has enlightened this court much on this kind of dispute in issue. However, to avoid this judgement to be long, I will not repeat each and every thing argued but here and there will refer them. And where I will not, it suffices to say all have been taken and considered on board.

However, based on the pleadings, evidence and exhibits tendered, I noted some facts are not disputed between parties. These are; **One**, it is not disputed by the parties herein that the 1st and 2nd defendants entered into loan agreement with 3rd defendant and 1st and 2nd defendants defaulted in repayment of the loan advance to them.

Two, it is not disputed that the said loan was guaranteed by plaintiffs landed property No, at plot No 2120 Block 'E' Kunduchi area, Kinondoni



Municipality with CT No 123613 in the name of Thomas Antony Mbega and Lilian Anthony Mbega. **Three**, it is not disputed that 3rd defendant granted the loan of TZS 315,000,000/=to plaintiffs so as to rescue the house which was previously used as security and the whole amount was credited to the account of the 1st and 2nd defendant to clear part of the loan guaranteed by plaintiff but remained unpaid. **Four** it is also not disputed that, plaintiffs and the 3rd defendant signed a deed of variation dated 27th March, 2017.

On that note, the noble task of this court now is to determine the merits or otherwise of this suit by answering each issue as agreed and recorded in the light of evidence on records. I find imperative to point out that, in this suit plaintiffs are claiming, among others, for payment of TZS. 315,000,00/ being money paid by plaintiff for servicing the loan guaranteed to 1st and 2nd defendants and the validity of home loan agreement entered between plaintiffs and 3rd defendant.

With the above contention, therefore, the 1st issue to determine was thus coached that, **whether there was legal contract between plaintiff and the 3rd defendant with regard to home loan agreement.** Plaintiffs pleaded and testified that they were induced to enter into home loan agreement by misrepresentation by 3rd defendant



that home loan will give the 2nd defendant more time to pay the loan and their house will be secured from being sold, the statements which were untrue. In rebuttal the 3rd defendant denied to have committed misrepresentation to the 1st and 2nd plaintiffs and testified that there was a legal contract because plaintiffs were the one who approached the 3rd defendant and willingly signed exhibit P6 and exhibit P4.

In order to answer this issue justly, I find apposite to understand what is misrepresentation in law and what the plaintiffs who raised it are required of to prove. According to **Black's Law Dictionary, Ninth Edition** by **Pryan Garner**, the word "**Misrepresentation**" is defined to mean the act of making a false or misleading assertion about something, usually with the intent to deceive.

The English writers **Laurence Koffman and Elizabeth Macdonald** in their book '**The Law of Contract**' **fourth Edition** defined misrepresentation as false statement of existing or past fact made by one party to the contract to the other, before or at the time of contracting, on which the other party relied in contracting. According to the learned authors, while acknowledged that misrepresentation is thin complex remedy but observed that in order the alleged untrue or statement or conduct to be operative must be a term in the contact or

collateral contract for action on misrepresentation to stand and where it is not an action for misrepresentation will not stand. The learned authors went further to observe that statement of intention, opinion and law will not stand.

Our Law of Contract [Cap 345 R.E.2019] defined misrepresentation to mean:-

- (a) The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believed it to be true;
- (b) Any breach of duty which, without intent to deceive, gains an advantage to the person committing it, or anyone claiming under him , by misleading another to his prejudice, or to the prejudice of anyone claiming under him;
- (c) Causing however innocently, a party to an agreement to make mistakes as to the substance of the thing which is the subject of the agreement.

From the foregoing, I carefully revisit and considered the pleadings, the testimonies together with contents exhibit P6 and exhibit P4 of which the born contention in this issue is the validity of the home loan agreement and the guarantee created thereon. But with due respect to



the plaintiffs I failed to grasp the untrue statement by the 3rd defendant which was part of the exhibits P4 and P6 to substantiate the version of misrepresentation. The plaintiffs were given 180 months (which is 15 years) within which was to repay the loan in dispute. Not only that but the purpose of the loan was home equity release which is aimed at saving someone house form auctioning.

It is on the totality of the above findings, I increasingly answer issue number on in the negative for following reasons. **One**, there was no reliance by the plaintiffs on allege misrepresentation because the home loan agreement was made against the sale of plaintiff's house, therefore, plaintiffs cannot be heard complaining that they were induced to enter into contract for reasons of misrepresentation because they are the one who approached the 3rd defendant so as to secure their property which was underway to be sold. **Two**, plaintiffs had the means of discovering the truth with ordinary diligence before signing the home loan agreement, at a time of entering into the contract plaintiffs were well aware that 1st and 2nd defendant had defaulted to pay the outstanding balance and the remedy available to the bank was to exercise recovery process by sale of securities and no extension of the time for payment without an agreement to that effect. **Thee**, plaintiff



totally failed to prove the alleged misrepresentation as to the terms of the agreement. No evidence was led to the fact that he has been negatively influenced by any of the representations of the 3rd defendant in exhibit P6. It should be noted that, the onus of proof of misrepresentation lies to the plaintiffs in circumstance of this case. Guided by the provision of section 110 of the evidence Act [Cap 6 R; E 2019] which provides that:-

Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of a fact which he asserts must prove that those facts exist.

The same position was stated by the court of appeal of Tanzania in the case of **Antony M. Masanga v. Penina (mama mgesi) Civil Appeal No 118 of 2014**, that the burden of proof lays on the part who alleges anything to be decided in his favour. It is common knowledge that in civil proceedings the party with burdens also bears the evidential burden and the standard in each case is on balance of probabilities.

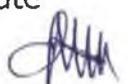
On the above reasons, therefore, I do not agree with the plaintiffs and his counsel that there was no legal contract as plaintiffs failed to prove the element of misrepresentation under section 18 of the law of contract to the required standard.



This takes me to the second issue which was couched that, **whether or not there was agreement between the plaintiffs and the 1st and 2nd defendants with regards to substitution of the title deed of the 1st and 2nd defendant and whether such agreement was guaranteed by the 3rd defendant.** To answer this issue in the positive on the part of the plaintiffs, the learned counsel for plaintiffs relied heavily on exhibits P2b, P3b, P5 and the testimony of PW2 and concluded that there this arrangement and the 3rd defendant was involved.

In rebuttal the learned counsel for 1st and 2nd and 3rd defendants argued that there was no such agreement and the 3rd defendant did not guarantee the agreement.

Without much ado, having considered the pleadings, the testimonies of both witnesses and exhibits tendered, this issue has to be answered in the positive. The reasons I am taking this stance are abound. One, the plaintiffs alleged that the arrangement was there and it was sanctioned by the bank official and upon going exhibit P2b one of the witnesses was Ibrahim Lisso, but looking at written statement of defence, the 3rd defendant did specifically denied that Ibrahim Lisso who was loan officer was involved. This is a clear admission as it not enough to say I dispute



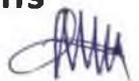
the contents. Two, both the 1st and 2nd defendants utterly failed negate the facts that their signatures appearing in exhibits are not theirs. The denial were just empty denial and I noted their conduct was an empty and not worthy to be believed.

Three, the argument that bank has no such policy was raised out of context because no such policy was brought to court to justify such a claims by the defendants witnesses.

Therefore, from the available evidence including exhibit P2b there was agreement between the plaintiffs and the 1st and 2nd defendants which was blessed by Ibrahim Lisso the employee of the bank. The plaintiff in this case has discharged the burden required in civil cases to prove that arrangement was there and the 3rd defendant's loan officer Ibrahim Lisso was witness to such arrangement.

Therefore the second issue is to be answered in the positive that there was agreement between the plaintiffs and the 1st and 2nd defendant with regards to substitution of the title deeds and same was guarantee by 3rd defendant on such arrangement.

The next issue was couched thus that, **whether there was an agreement between the plaintiffs and the 1st and 2nd defendants to pay for home loan agreement which plaintiffs**



entered into with the 3rd defendant. This issue will not detain me much as it is evidently from the party's testimonies as well as plaintiff evidence that there was agreement for payment of TZS 315,000,000/= by instalment. This piece of evidence is supported by exhibit P5 which is an agreement for payment of home loan agreement between the plaintiffs and 1st and 2nd defendants. More so I have considered exhibit P7 bank statement on 29th April, 2017 the basic stop shop deposited the amount of TZS 6,000,000/= which is similar to amount agreed to be deposited. From this piece of evidence this court is thus fully satisfied that there was existence an agreement for payment of the contract entered between plaintiffs and 1st and 2nd defendants. The denials by the 1st and 2nd defendants were empty denials not supported by evidence on record. Therefore this issue is answered in affirmative.

This takes me to next issue which was couched ' **whether there was a breach of the contract on the above 1st, 2nd and 3rd issue above**'. On the first issue, plaintiffs have strongly submitted that the 3rd defendant breached duty of care for failure to act reasonable. In rebuttal learned counsel for defendants alleged that there was no agreement for substitution. I have already held in relation to the 1st



issue that there was a contract between plaintiffs and 3rd defendant and therefore did not breach any term of the contract.

On the second issue, the learned counsel for plaintiff has submitted that there was agreement for substitution of the title deed and the 3rd defendant guaranteed, while the defendants have denied the existence of an agreement, already held in relation to the first issue that there was agreement for substitution of title deed. Therefore this issue is answered in positive that there was contract between the plaintiffs and 1st& 2nd defendants of substitution. Therefore, there was breach of contract.

On the 3rd issue as I have already held in relation to the 3rd issue that exhibits P5 and P7 that there was an agreement for payment, and since the 1st and 2nd defendants did not perform their obligation of repaying the loan by instalment then there was breach of the contract.

The last issue is to **“what reliefs parties are entitled to?”** The defendants claimed that the instant suit be dismissed with costs. On the other hand, the plaintiffs claimed several reliefs and based on my findings in the issues above, I am inclined to allow this suit on the following reliefs, namely:-



(1) For 1st and 2nd defendants

- a. To pay the sum of Three Hundred and Fifteen Million Shillings (TZS.315,000,000/=) being sum of money secured as loan and guaranteed by the plaintiffs under loan guarantee agreement between the plaintiff and 3rd defendant.
- b. Interest on the item above at rate of 22% from the date money paid by plaintiffs until the date the plaintiff will be indemnified.
- c. Payment of TZS.19,400,000/=being the amount of money paid by the plaintiffs to service the loan which was given to the 1st and 2nd defendant by the 3rd defendant.
- d. Interest on the item above at the commercial rate of 7% from the date money paid by the plaintiffs until of judgement the date the plaintiffs will be indemnified.

2. The 3rd defendant:-

- e. The 3rd defendant to be ordered to discharge mortgage of the plaintiffs' title deed for the plot No. 2120,Block 'E' Kunduchi area Kinondoni Municipality in Dar es Salaam and the same be substituted with the 1st and 2nd



defendants' title deed of plot No. 176 Block 'G' Mbezi Beach, Kinondoni Municipality in Dar es Salaam.

- f. Permanent injunction restraining the 3rd defendant, their agents or any other person acting on their authority from conducting sale or any kind of disposition or destruction of the plaintiffs' property standing on plot No. 2120 Block 'E' Kunduchi area in Kinondoni Municipality, Dar es Salaam.
- g. Costs of this suit to be paid by defendants.
- h. In the totality other reliefs as claimed in the plaint are not granted for want of evidence because most of them being specific claims were not strictly proved and hence denied. Other equally declaratory orders against the 3rd defendant were not proved given the court's findings in issue number 1 above.

It is so ordered.

Dated at Dar es Salaam this 26th day of November, 2021.



A handwritten signature in blue ink, appearing to read 'S. M. Magoiga', written over a horizontal line.

S. M. MAGOIGA

JUDGE

26/11/2021