

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

LAND CASE NO. 05 OF 2019

NICHODERMS BETHELEHEM MWADUMA.....PLAINTIFF

VERSUS

**KCB BANK TANZANIA LIMITED.....1ST DEFENDANT
MAIMUNA MPANDA.....2ND DEFENDANT
PETER ANDREW ATHUMANI.....3RD DEFENDANT
NSOMBO & COMPANY LIMITED.....4TH DEFENDANT
(The Original Action)**

KCB BANK TANZANIA LIMITED.....PLAINTIFF

VERSUS

**MAIMUNA MPANDA.....1ST DEFENDANT
NICHODERMS BETHELEHEM MWADUMA.....2ND DEFENDANT
ROSE WILBERT KOMBA.....3RD DEFENDANT
(By Way of Counterclaim)**

Date of Last Submissions: 15.12.2021
Date of Judgment: 28.02.2022

JUDGMENT

V.L. MAKANI, J

The plaintiff in this case is praying for judgment and decree against the defendants as follows:

- 1. A declaration that Plot No. 38 Block B Low Density Kibaha Urban Area belongs to the plaintiff.*

2. *The mortgage of the suit premises to the 1st defendant under 3^d Party mortgage created by Peter Athumani to secure the 2nd defendant was fraudulently procured.*
3. *The 1st defendant to return the Certificate of Right of Occupancy CT No. 37292 over the said Plot No. 38 Block "B" Low Density Kibaha Township to the 2nd on account of fraud afore pleaded*
4. *An order restraining the 1st defendant and the 4th defendant from auctioning and or evicting the plaintiff from the suit property.*
5. *General damages and costs.*

The 1st defendant KCB Bank (the **Bank**), and the 4th defendant, filed a joint Written Statement of Defence and counterclaim. In the counterclaim they prayed for orders against the plaintiff, 2nd defendant and one Rose Wilbard Kombe, who were the 1st, 2nd and the 3rd defendants respectively in the counterclaim. The orders prayed in the counterclaim were as follows:

- (a) *That the plaintiff and 2nd defendant are breach of the banking facility letter and the mortgage deed for their failure to repay the loan as covenanted.*
- (b) *That the plaintiff and the 2nd defendant be ordered to repay the debt due in the sum of TZS 164,786,500.97 as ta 30th May 2014.*
- (c) *That the plaintiff and the 2nd defendant be ordered to pay interest at the rate of 23% and a penalty of 3% to be charged to the principal sum hereof counting from the date of filing the counterclaim until the entire debt is paid in full.*

- (d) *That the plaintiff and the 2nd defendant be ordered to pay interests at the courts rate of 7% from the date of filing of the suit until the date the debt is liquidated in full.*
- (e) *That in the event the plaintiff and the 2nd defendant fail to repay the claimed principal sum and interests hereof, the Bank be allowed to sell the mortgaged property as covenanted; and the proceeds realized thereat be used to liquidate the debt due together with all interest accrued.*
- (f) *The plaintiff and the 2nd defendant be ordered to pay costs incurred by the Bank in filing and prosecuting the counterclaim.*
- (g) *Any other reliefs of the honourable court shall deem just and fit to grant.*

The issues framed for determination of the suit and counterclaim were as follows:

- 1. Whether the mortgage deed between the 1st and the 2nd defendants is legally valid; and whether there was any breach of the Facility Letter by the said defendants.*
- 2. Who is the lawful owner of the suit premises namely Plot No. 38, Block B, Low Density Kibaha Township under Certificate of Title No. 37292 (the **suit property**).*

The 3rd defendant Peter Andrew Athumani did not file his defence or enter appearance so the matter proceeded in his absence.

The plaintiff (**PW1**) was the first witness. He said he applied for the allocation of a plot from Kibaha District Council vide a letter (**Exhibit**

P1) and he adhered to the conditions of payment and was given a Letter of Acceptance and thereafter a Certificate of Title No. 37292 (**Exhibit P2**). He said he started living in the suit property in 1992 and he built a residential house and two other houses. The plaintiff said the dispute started when Nsombo Court Brokers (the 4th defendant) came to the house with a copy of a notice letter demanding that there was default of payment of a loan of TZS 150,000,000/= by the 2nd defendant and the suit property was the security to the said loan. The letter of instruction from the Bank to the 4th defendant was tendered as **Exhibit P3** and the notice from the 4th defendant to the 2nd defendant was tendered as **Exhibit P4**. He said he went to the 4th defendant and the Bank for clarification, and he was told that the borrower was the 2nd defendant, and the alleged guarantor of the loan was himself. He said the bankers told him that the person who came to the bank was elderly and he used his name and after investigation they came to know that that person who impersonated him was Peter Andrew Athumani (the 3rd defendant).

The plaintiff further said the Bank confirmed that the 2nd defendant took a loan, and he was purported to have guaranteed the said loan.

He said he went to Kibaha Police and reported the loss of his Certificate of Title. There was a charge laid against the 2nd and 3rd defendants in Criminal Case No. 25/2019 (**Exhibit P5**). On cross-examination he said the criminal case was still pending awaiting some documents from the Bank.

He said there was another Land Case purportedly by him against the Bank and the 2nd defendant (Land Case No. 151 of 2014 (**Exhibit P6**)). He said he was not party to the case as the Nichodermus B. Mwaduma was a fake one and he never entered appearance. So, he decided to enter appearance as an Interested Party. The said case was struck out. The plaintiff prayed for the court to order the Bank to return the Certificate of Title to him as he is not the guarantor to the loan taken by the 2nd plaintiff and begged the court to decide in his favour.

In cross-examination the plaintiff said he came to know that the Certificate of Title was with the Bank in 2015 and he said he did not know how it reached the Bank. He said his wife Rose Wilbard Kombe is not a party to the original suit but in the counterclaim. He said the real fraudster is the 3rd defendant who decided not to enter

appearance in court. He denied being a guarantor to the loan and so he was not subject to the loan taken by the 2nd defendant.

PW2 was Adamson Daniel Mwandalima. He is Mtaa (Street) Executive Officer of Mkoani A Tumbi ward in Kibaha District. He has known in the said location since 2017 and he knows the plaintiff as one of the residents in his Mtaa. He said he knows the suit land as the plaintiff is registered for payment of Property Tax. He said the plaintiff's house is on Plot 138, House No. 298/1/2/3 and they are three houses on the said plot. PW2 also informed the court that he knows the plaintiff's wife and his sons. He said he has never seen any history of the loan in respect of the property.

PW3 was Wambura Francis Gati. He said he has known the plaintiff since 2011 as his neighbour. He confirmed that in the suit property there are three houses, and the plaintiff lives in one of the houses. He said the other houses have tenants. On cross-examination he admitted not to have seen the Certificate of Title or Letter of Offer of the suit property. He said the plaintiff told him of the loss of the Certificate of Title when he wanted him to testify in court.

Hamim Kibwana Gamba was the first defence witness (**DW1**). He said he was Recovery Manager of the Bank. He said the plaintiff and the 2nd defendant applied to the Bank for a loan as Maimuna Business Shop according to the Banking Facility Letter dated 30/01/2013 (**Exhibit D1**). He said the loan was for TZS 150,000,000/= and the reason for the loan was to increase working capital of the business. He said the loan was supposed to be payable within 24 months at monthly payments of TZS 7,855,955.90 and interest at 23% per annum. He said the security offered was a Legal Mortgage (**Exhibit D2**) over the suit property. He said there was acceptance signed by both the plaintiff and the 2nd defendant. There was a spousal consent (**Exhibit D3**) by the wife of the plaintiff Rose Wilbard Kombe and Notification of Disposition (**Exhibit D4**) and Land Form No. 40 signed by the plaintiff and his wife (**Exhibit D5**). He said these documents show that the mortgage was duly registered at the Lands Registry. The witness identified the Certificate of Title (**Exhibit P2**) and said it was brought by the plaintiff and 2nd defendant and the signature of the plaintiff appearing therein is the same as the signature in all the documents (**Exhibits D1 to D5**). He said the signature in **Exhibit P2** and that on the plaint **are not** similar. **DW1** said he has no information that the plaintiff had gone to the police for loss of his

Certificate of Title. He said the claims against the Bank are not true because the plaintiff in collaboration with the 2nd defendant took a loan from the Bank. In cross examination **DW1** confirmed that the loan was taken by the plaintiff and the 2nd defendant trading under the name of Maimuna Business Shop and the loan amount went to the account of the 2nd defendant.

DW2 was the 2nd defendant Maimuna Abdallah Mpanda. She said she has business in Kariakoo and in 2012 she wanted a loan so she used a Broker by the name of Kisoka who brought her a Certificate of Title. She said the broker told her that Pamela Nicodemus Mwaduma and Steven Walimboto were the ones who gave him the Certificate of Title and they said they were sent by their father to give out the Certificate of Title so that when the loan is granted, he gets something. She said they went to *Serikali ya Mitaa Kimara B* so that they would hand over the Certificate of Title and there was an Agreement as to the handover (**Exhibit D6**). She said on 27/06/2012 Pamela Mwaduma and Steven Elimboto told her that their father was in Muhimbili hospital and they wanted TZS 1,000,000/= which would be deducted when the loan was granted. But she gave them TZS 800,000/= only and the money was handed over to them on

27/02/2012 at the office of Serikali ya Mitaa and there was a written understanding, "*Makubaliano ya Kukopeshana Pesa*" (**Exhibit D7**). She said before she took a loan from the Bank of TZS 150,000,000/= and before disbursement, the Bank inspected the suit property and there was consent by the plaintiff and his wife as guarantors. She said before the disbursements Steven Elimboto and Pamela Mwanduma and the plaintiff himself at different times collected money from her and by 10/01/2013 the amount taken was TZS 3,205,000/= and Pamela signed to take the money (**Exhibit D8**). She said when the loan was disbursed, she paid out TZS 50,000,000/= to them in phases. They first took 20,000,000/=: then 12,000,000/= and TZS 18,000,000/= was deposited in Pamela's account. She said they refused to sign any agreement. She said the plaintiff and his children were not ready to assist her in repayment of the loan; she managed to repay part of the loan, but later business was not good because the containers she ordered from China were confiscated. She said she tried to locate the plaintiff, Pamela and her husband Steven Elimboto but there was no cooperation. She said according to her records she managed to pay to the Bank TZS 78,000,000/=. She said when the notice was issued to them Pamela told her that the one who came to the Bank to sign the documents

was not his father but their father's friend. She said Pamela was the one who suggested that they institute a case against her, and the Bank and it was before this court and the plaintiffs in the case were the plaintiff herein, Pamela Mwanduma and Steven Elimboto against her and the Bank. She said the case was dismissed. The plaintiff then filed this case. She said the Certificate of Title was not stolen but was given out by the plaintiff himself.

On cross-examination she said the plaintiff she knows is not in the court room and the persons who gave her the Certificate of Title were also not in court. She said the Certificate of Title was received from Pamela Mwanduma and Steven Elimboto. She said she was in a Criminal Case in Kibaha and the other accused person Peter Andrew Athumani (the 3rd Defendant herein) was the Nicodemus B. Mwanduma she knew. She said the plaintiff herein is not the Nicodemus B. Mwanduma that was introduced to her as the father of Pamela Mwanduma. She said the photos of Nicodemus B. Mwanduma in the Bank documents is not of the plaintiff herein and that the two are friends as they had a car deal. She said the two were also aware of the loan. She said the Nicodemus Mwanduma of the Bank (the **fake** one), the plaintiff, Pamela Mwanduma and Steven Elimboto are family.

She said they knew what they were doing because the plaintiff has never arrested his daughter and son in law, that is, Pamela and Steven Elimboto.

The court called two witnesses Pamela Nicodemus Mwaduma and Peter Andrew Athumani. Only Pamela Nicodemus Mwaduma appeared as **CW1**. She said her husband is Steven Elimboto and he is in South Africa since 2018 and they have three children. She said she does not know Peter Andrew Athumani (the 3rd defendant). She said she heard information of the loss of his father's Certificate of Title from her younger sister who told her that their house was under threat of being sold by the Bank. She said she gave the 2nd defendant the Certificate of Title because they had a sick child at Muhimbili and TZS 800,000/= were required for treatment, so she asked for a loan from her friend, the 2nd defendant. She told the court that the 2nd defendant demanded a Certificate of Title or a Car Registration Card and since she did not have a car, she took the Certificate of Title of the suit property without the knowledge of her father because he was in Njombe. She said she gave the 2nd defendant the Certificate of Title so she could give her the TZS 800,000/= to pay the hospital bills. She said after two months she returned the TZS 800,000/= to

the 2nd defendant and she gave back the Certificate of Title and there was also a Hand Over Note (*Makabidhiano ya Kukopeshana Pesa*) (**Exhibit C2**). She said the cover of the Certificate of Title was original but the contents inside were not the same as they were copies (**Exhibit C1**). She said when she discovered this, she went back to the 2nd defendant who told her the Certificate of Title was with the Bank. She said up to now the Certificate of Title has not been returned to her.

On cross-examination she said she was not a thief, but she took her father's Certificate of Title without permission and it was because she had a sick child who was in the ICU. She said she had never taken a loan from the 2nd defendant except for the TZS 800,000/= and she has never received TZS 18,000,000/= in her account as alleged. **CW1** confirmed to the court that the difference between the original certificate and the one that has been tendered as **Exhibit C1** is that the latter is a scanned copy.

In the final submissions on behalf of the plaintiff, Mr. Machibya after summarising the facts of the case submitted on the first issue whether there was a breach of the facility. He said there was a breach

because according to **Exhibit D1** the Banking Facility Letter paragraph 11.1.7 payment is supposed to be direct to the suppliers as per the invoices submitted. But he said the Bank deposited the loan amount of TZS 150,000,000/= in the 2nd defendant's account instead of the partnership account. He said, in the testimony, the 2nd defendant denied that the 3rd defendant was his partner in business but considered him as a guarantor. He said there are contradictions as regards the evidence of the 2nd defendant and **DW1**. While the 2nd defendant declares that the 3rd defendant was a guarantor **DW1** states that they were in partnership business. He cited section 64 of Law of Contract Act CAP 345 RE 2019 which provides for rescission of a voidable contract. He said the banking facility was voidable due to non-existence of partnership between the 2nd and 3rd defendants. Mr. Machibya said that the defendants do not dispute that the plaintiff is the lawful owner of the suit property as was said by the 2nd defendant and **CW1** as the Certificate of Title in question was stolen by **CW1** and it reached the 2nd plaintiff, who used the 3rd defendant to forge the signatures of the plaintiff and obtain the loan. He said these actions amount to a criminal conspiracy, forgery and theft and this could not have been possible if the Bank Officers had conducted a due diligence before the grant of the loan. He said that the

counterclaim ought to be dismissed with costs as the 2nd and 3rd defendants were responsible to defraud the Bank.

As to the second issue who is lawful owner of the suit property, Mr Machibya said according to sections 110 and 115 of the Evidence Act CAP 6 RE 2019, the plaintiff has proved the case to the standard required by the law. He said the plaintiff testified how he obtained the Certificate of Title and he was supported by **PW2** and **PW3**. He said **CW1** testified to have stolen the Certificate of Title therefore the plaintiff was not part of the theft but was done by **CW1**. Mr. Machibya concluded by praying to the court to issue an order against the 1st defendant to return the original Certificate of Title to the plaintiff as he is owner of the suit property. And since the Third Party mortgage by the 3rd defendant for the 2nd defendant was fraudulently obtained they be ordered to repay the loan. He further prayed for the other reliefs in the plaint to be granted.

Mr. Msuya filed final submissions on behalf of the Bank. He said that the plaintiff is the architect in the borrowing processes and had aided the 2nd and 3rd defendants to procure the loan from the Bank. He said according to the 2nd defendant and **CW1** it is the plaintiff who freely

offered the Certificate of Title to be pledged as security and he was aware of the mortgaging processes. And according to the 2nd defendant they have failed to repay the said loan. He went on saying that there is also evidence that the plaintiff did not take any action against her daughter **CW1** even after discovering that she took the Certificate of Title. There are no criminal charges filed against her and this, according to Mr. Msuya, demonstrates acquiesce on the part of the plaintiff. He said even the criminal case against the 2nd defendant and the 3rd defendant was terminated for lack of evidence because the plaintiff was uncooperative with the police to enable them to prosecute the case. He said according to the 2nd defendant, the plaintiff knew the criminal case would expose him as part of the scam. He further said the demeanour of the plaintiff also showed that he knew what was going on. He said the plaintiff lied to court that he knew the whereabouts of **CW1**, the 3rd defendant and his wife Rose and further that **CW1** was abroad and so service could not be effected. However, **CW1** came to testify that she is residing in Dodoma unlike what the plaintiff said that she was in Uganda. Mr. Msuya said the 2nd defendant affirmed/acquiescence the contracts, that is, **Exhibit P1** and **D2** and these cannot be cancelled. He said since the plaintiff's involvement in the mortgage process is vividly

clear he cannot come out now to claim their cancellation. He cited the case of **Othman Kawila Matata vs. Grace Titus Matata [1981] TLR 23** where it was stated that a contract founded on fraud will not be cancelled if there is affirmation or acquiescence. He said the evidence of the plaintiff, **PW2** and **PW3** did not establish involvement of any Bank official in the signing of **D1, D2, D3, D4** and **D5**. He said the exhibits reveal that they were signed by the 2nd and 3rd defendants. He said the evidence of **DW1** stand uncontroverted because all the procedures to advance the loan facility to the borrower were followed before the mortgage deed was created. He said the position of the Bank is that of a bonafide purchaser for value without any encumbrance and who suffered loss by disbursing a substantial amount of money to the borrower. He relied on the case of **Godebertha Rukanga vs. CRDB Bank Limited & 3 Others, Civil Appeal No. 25/17 of 2017 (CAT-DSM)** (unreported) where it was stated that being a bonafide purchaser for value, and because there is no evidence of fraud or misrepresentation by the mortgagee, the suit property is legally protected. He also cited the case of **Peter Adam Mboweto vs. Abdallh Kulala & Mohamed Mweke [1981] TLR 169**. Mr. Msuya emphasized that the Court of Appeal and this court were discussing

remedies available to the bonafide purchaser. He said that in the present case the Bank departed with money bonafide believing that the Certificate of Title belonged to the plaintiff, but he said the position in the instant case is worse because the plaintiff participated to defraud the Bank and he cannot seek the reliefs to annul the mortgage which he himself forged. He said the plaintiff has himself to blame. He prayed that the court be pleased to hold that the plaintiff defrauded the Bank to obtain banking facility and in so doing he involved the 2nd and 3rd defendants who are equally liable. He said it is also his prayer that since there is no dispute that the loan facility is still outstanding to the extent of TZS 164,786,500.97 as at 30/05/2014 the three, that is, the plaintiff, the 2nd and 3rd defendants should be held liable to pay and failure of which the suit property should be auctioned and the proceeds realized be used to liquidate the outstanding debt, interest and costs of the case.

Having narrated the evidence by the parties herein, and having gone through the final submissions by Counsel, I will now endeavour to consider the issues agreed upon and in so doing I will be guided by the principle that whoever desires a court to give judgment in his/her favour, has to prove that those facts exist. This is under the sections

110 (1) (2) and 112 of the Law of Evidence Act CAP 6 2019. In the case of **Abdul Karim Haji vs. Raymond Nchimbi Alois & Another, Civil Appeal No. 99 of 2004** (unreported) the Court of Appeal held that:

".....it is an elementary principle that he who alleges is the one responsible to prove his allegations."

Also, in the case of **Anthony M. Masanga vs. Penina (Mama Mgesi) & Lucia (Mama Anna), Civil Appeal No. 118 of 2014 (CAT)** (unreported) where it was further held that the party with legal burden also bears the evidential burden on the balance of probabilities.

In the present case therefore, the burden of proof at the required standard of balance of probabilities is left to the plaintiff and the Bank in the counterclaim; the plaintiff must prove that he is the owner of the suit property and he did not offer the suit property as a guarantee to the said loan. On the other hand, the Bank and the 4th defendant have to prove that the plaintiff and the 2nd defendant took a loan and there is a breach of the banking facility; and further that the loan amount has not been paid to date. What this court is to decide upon is whether the burden of proof has been sufficiently discharged.

The first issue for consideration is whether the mortgage deed between the 1st and the 2nd defendants is legally valid; and whether there was any breach of the Facility Letter by the said defendants.

For a loan to be granted there are documents to be duly filled and signed by the borrower, guarantor, and the bank. And the most important thing is that the bank has the duty to ensure the validity of the security offered to cover the loan, and also conduct a due diligence on the property to establish the ownership, its physical existence consent of the guarantor (if any) and his status thereof. On the face of the documents, everything appears to be fine, that is there is a Facility Letter (**Exhibit D1**), Mortgage Deed (**Exhibit D2**), Spousal Consent (**Exhibit D3**), Notification of Disposition (**Exhibit D4**) and Land Form No. 40 (**Exhibit D5**). But in actual sense these documents were not signed by the plaintiff. Though **DW1** asserted in his testimony that the signatures appearing on the security documents (**Exhibits D1, to D5**), and the signature in Certificate of Title (**Exhibit P2**) were similar, but the evidence of the 2nd defendant was that the person who signed the security documents purporting to be the plaintiff is not the plaintiff who appeared in court but the

3rd defendant who masqueraded himself as the plaintiff. It should be noted that the 2nd defendant was with the 3rd defendant and this also confirms the plaintiff's assertion that he never took a loan from the Bank and he was never at the Bank to sign any papers. As said hereinabove, the duty of the bank after receiving an application for a loan was to ensure the status of the borrower and the guarantor (if any). It was the duty of the Bank to conduct a due diligence to satisfy itself that the borrower has capacity, capital, character and collateral to secure the loan.

In the present case, I may say with certainty, that the Bank was negligent in the whole process of grant of the loan to the 2nd defendant. I say so because according to **DW1** the Bank only conducted a search at the Registry of Lands to establish ownership of the suit property but did not check the credentials of the owner of the suit property who is the guarantor to satisfy themselves that indeed the guarantor apart from being the owner of the suit property, he was also the one who signed the security documents at the Bank. Regrettably, the Bank has failed to establish that the plaintiff was the same person who signed the security documents, and they did not make any effort to find and/or call the 3rd defendant who is alleged

to have signed the documents purporting to be the plaintiff. The Bank did not even find it necessary to call the alleged wife of the plaintiff who gave a spousal consent. Further, it is also surprising why the Bank did not tender the original Certificate of Title while the 2nd defendant said she deposited it with the Bank, and assertion which was also confirmed by **DW1**. In the absence of the original Certificate of Title the court cannot state with conviction that the mortgage was duly registered as alleged by the Bank. Certainly, the annexure (**Annexure TMA-4**) to the WSD showed that the mortgage was registered, but failure by the Bank to tender the original Certificate of Title and not stating its whereabouts while all along parties assert and know that it was deposited with the Bank, raises a lot of doubts as to the creation of the mortgage and its registration thereof.

The Bank through **DW1** compared the signature of the plaintiff vide **Exhibit P2** and **Exhibits D1** to **D5**. In their submissions the Bank pointed out that the security documentation was proper and the said documents were signed by the 2nd and 3rd defendants (page 7 of the submissions). This assertion is a further proof that the plaintiff was not part of the transaction. And the Bank's claim that the the signing of the security documents by the 3rd defendant was proper without

him being the owner of the suit property offered as security increases a lot of questions as to the efficient performance and integrity of the Bank. With the doubts which are evident, the plaintiff cannot be said to have signed the documents at the Bank.

As aforesaid, the Bank cannot escape responsibility as the extent of negligence is so evident by failure to conduct proper due diligence which is a very essential requirement for grant of a loan. Further, the lack of interest on the part of the Bank raises a presumption that the transaction was a designed game known to the parties and the bank officials with the intention to defraud the Bank. Considering that the Bank is a reliable institution it was supposed to practise a high level of competence and integrity in the grant of the loan. Clearly, the Bank's omission to conduct a proper due diligence resulted to impersonation of the plaintiff as the guarantor. In that regard, it cannot be presumed, without proper evidence, that the plaintiff signed the security documents. In that regard, having established that the Mortgage Deed and the Facility Letter and all accompanying documents were not signed by the plaintiff, I am satisfied that the whole loan transaction was not lawful and therefore null and void.

4. The 1st defendant and the 4th defendant are restrained from auctioning and or evicting the plaintiff from the suit property.
5. The counterclaim is dismissed, and
6. The defendants are condemned to costs of this suit.

It is so ordered.


V.L. MAKANI
JUDGE
28/02/2022

