**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: MWARIJA, J.A., SEHEL, J.A. And MASHAKA, J.A.)**

**CIVIL APPEAL NO. 214 OF 2019**

**BANK OF AFRICA (TANZANIA) LIMITED ..... APPELLANT**

**VERSUS**

**ROSE MIAGO ASEA ..... RESPONDENT**

**(Appeal from the ex-parte Judgment and Decree of the High Court of Tanzania, Commercial Division at Dar es Salaam)**

**(Mruma, J.)**

**dated the 31st day of July, 2018**
**in**
**Commercial Case No. 138 of 2017**
**.....**

# JUDGMENT OF THE COURT

*26th September, 2022 & 12th April, 2023*

## MWARIJA, J.A.:

This appeal is against the decision of the High Court of Tanzania, Commercial Division at Dar es Salaam in Commercial Case No. 138 of 2017. The appellant, Bank of Africa Tanzania Limited, had sued the respondent, Rose Miago Asea in that court for breach of the loan agreement in which, the latter was granted a credit facility of TZS. 100,000,000.00 on 14/11/2011, TZS. 200,000,000.00 on 23/4/2014 and another TZS. 200,000,000.00 on 31/8/2015.

As a security for the loan, a mortgage deed was executed whereby Jimmy Brown Mwalugelo mortgaged his property situated on Plots No. 660/1, 662/1, 696/1 and 698/1 Block 'C' Ukonga Sitakishari within Ilala Municipality held under Certificate of Title No. 55709, Land Office No. 191125.

According to the plaint, until the expiry of the scheduled period of repayment of the loan in April 2016, the respondent had outstanding amount of TZS. 171,856,044.55. As a result, on 4/4/2016, the appellant issued to the mortgagor a statutory notice of intention to offer for sale the mortgaged property. After expiry of the sixty days notice, the appellant appointed the auctioneer who sold the mortgaged property in a public auction. The property was bought at TZS 100,000,000.00.

Since the amount of TZS 100,000,000.00 realized from the auction did not satisfy the whole outstanding amount of the credit facility, the appellant instituted the suit claiming for the balance of TZS 71,856,044.55 plus interest and other charges arising from the respondent's default. In paragraph 11 of the plaint, the appellant stated as follows:

> *"That disposition of security above could not satisfy the entire outstanding loan. The amount of TZS 71,856,044.55 remained outstanding*

*which has continued to accrue, plus auctioneer's fee which is 15% of the purchase price above (10,000,000.00), land rent fee for the said property (1,075,400.00) making a total loan of TZS 101,651,444.55 as of 18th July, 2017. The defendant remains adamant to pay the ioan balance causing the plaintiff to suffer financially."*

From the record, the respondent could not be served with a copy of the plaint on account that, despite the Process Server's efforts to effect service both at her residence and the place believed to be where she used to conduct business, she could not be found. Since the respondent's whereabouts could not be known, the appellant applied for default judgment. However, the learned trial Judge found it apposite that the suit be proved exparte.

Having heard the evidence of two witnesses for the plaintiff; Victor Lewanga (PW1) who was at the material time the appellant bank's recovery officer and Kasanga Nicholous Kaombwe (PW2) who was the Administrative Manager, the learned trial Judge agreed that the respondent had breached the terms of the loan agreement by defaulting to repay the outstanding amount of TZS 171,856,044.55. Notwithstanding that finding, the learned trial Judge was of the view that, the appellant was not entitled to recover the balance of TZS 71,856,044.55 which remained outstanding after realization of TZS

100,000,000.00 from the sale of the mortgaged property. He stated as follows in his judgment at page 221 of the record of appeal:

> *"... the loan was secured by a mortgage over landed property owned by a third party. By signing the mortgage agreement, the plaintiff's bank had accepted that the security was sufficient to secure all or such sums that would be due and owing by the borrower to the bank. Under clause 3:0 of the Mortgage Agreement (exhibit P4) it was agreed that the security was for unspecified amount which shall not at any time exceed the amount specified in the facility letter. The assumption here is that the value of the security was sufficient to cover the amount specified in the facility letter. If consequently it is found that the value of the security does not cover or it fails short the amount specified in the facility letter or if the bank disposes the security at the price less than the specified amount, then the bank has to blame itself for undervaluing the security either before accepting or at the time of sale. It cannot come back to the court to seek to recover the loan by means other than the security it accepted."*

On the basis of that holding the learned trial Judge dismissed the suit. The decision aggrieved the appellant hence this appeal which is predicated on the following four grounds:

"1. *The learned trial Judge erred in law by holding that the bank (the appellant) cannot come back to Court to seek to recover the loan by other means other than the security it accepted if the value of the security does not cover or it falls short the amount specified in the facility letter or if the bank (the appellant) disposes the security at the price less than the specified amount.*

2. *The learned trial Judge erred in law and in fact by making wrong general assumption that in terms of the mortgage agreement the value of the security was insufficient to cover the amount specified in the facility.*

3. *The learned trial Judge erred in law and in fact by holding that once the banks decide to exercise their statutory power of sale under the mortgage agreement and the sale does not realize the amount secured, they cannot come to court with a view [to recover] the unrealized amount by attaching and auctioning other properties of the mortgager.*

4. *The learned trial Judge erred in law and in fact in holding that the appellant is not entitled to automatically recover legal charges from the borrower as contractually agreed."*

At the hearing of the appeal, the appellant was represented by Mr. Stephen Axweso, learned counsel. The respondent, who was served by

way of substituted service through publication in the Mwananchi and Daily News papers both of 22/9/2022 did not enter appearance. As a result, hearing of the appeal proceeded in her absence under Rule 112 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

After institution of the appeal, Mr. Axweso complied with Rule 106 (1) of the Rules by filing his written submission in support of the grounds of appeal. In his written submission, which he adopted at the hearing, he abandoned the 2nd and 4th grounds of appeal and thus argued the 1st and 3rd grounds only.

In his lucid submissions, Mr. Axweso argued in the 1st ground of appeal that, the learned trial Judge erred in holding that, after the sale of the mortgaged property which the appellant had accepted as a collateral for the credit facility, it cannot later claim in court, the outstanding balance if the amount realized from the sale does not satisfy the outstanding amount. It was Mr. Axweso's argument that, as a borrower, the respondent's primary obligation was to repay the loan and therefore, despite the sale of the mortgaged property, she still had the obligation of paying the outstanding balance.

On the reliance by the trial Court, on clause 3.0 of the Mortgage Agreement, the learned council submitted that, the learned trial Judge misinterpreted it and thus erred in his judgment. According to the

learned counsel that clause of the Mortgage Agreement should not have been read in isolation of the laws governing the sale of mortgaged properties, such as the Land Act, Cap. 113 of the Revised Laws. He made a reference to s.133 (2) of that Act which allows a mortgaged property to be sold not necessarily at the specified value but at any price of more than 25% of the average price at which its comparable interest in the same character and quality are being sold in the open market.

He also cited the cases of **Juma Jaffer Juma v. Manager, PBZ Ltd and Two Others**, Civil Appeal No. 7 of 2002 (unreported) and **CRDB Bank PLC v. True Colour Limited and Another**, Civil Appeal No. 29 of 2019 (unreported) in which the Court held that, in the absence of evidence that the price of a mortgaged property was realized out of a collusion or foul play in the conduct of auction, then the realized value is that of the market price.

With regard to the 3rd ground of appeal Mr. Axweso argued that, the action by the appellant before the High Court was not against the owner of the mortgaged property but the respondent who had primary duty under the loan contract, to repay the whole amount of the credit facility. He stressed that, the claim against the respondent was for payment of the remaining balance after realization of TZS 100,000,000.00 from the sale of the mortgaged property.

Having duly considered the submissions of the learned counsel for the appellant, we agree with him that the trial court erred in holding that, the appellant could not claim from the respondent, the balance of the outstanding credit facility which remained due after receipt of the amount realized from the sale of the mortgaged property. As submitted by the learned counsel, the respondent had the obligation of repaying the whole amount of the credit facility. This includes, the amount of the agreed interest and penalties in case of default of repayment according to the agreed schedule. In that regard, where the mortgaged property is auctioned and the purchase price does not satisfy the debt, in the absence of evidence of bad faith or fraud in the conduct of the auction, the lender has the right to claim for the balance of the outstanding amount from the borrower.

In the case of **CRDB Bank PLC v. True Colour Limited and Another** (supra) cited by Mr. Axweso, the Court observed *inter alia* as follows:

> *"... a mortgage is made for the purpose of securing the payment of the loan, it is not the law that; in the absence of negligence or bad faith, a mortgagee who fails to realize the full loan from the proceeds if the mortgage is barred from claiming the outstanding loan balance."*

The Court cited with approval persuasive authorities in the cases of **Cuckmere Brick Co. v. Mutual Finance** [1971] 2 All E.R. 633 and the High Court decision in the case **National Bureau De Change Ltd v. Tanzania Petroleum Products Ltd and Others** [2002] T.L.R 430. In the first case, the Court took inspiration from the following passage at page 643 of that decision:

> *"Approaching the matter first of all on principle, it is to be observed that if the sale yields a surplus over the amount owed under the mortgage, the mortgage holds this surplus in trust for the mortgager.* ***If the sale shows a deficiency, the mortgagor has to make it good out of his own pocket****."*
>
> *[Emphasis added]*

We also agree with the arguments made by the learned counsel for the appellant on the 2nd ground of appeal that the learned trial Judge misinterpreted clause 3.0 of the Mortgage Agreement. By that clause, the parties thereto agreed that:

> *"This security is for unspecified amount but the purpose hereof shall not at any one time exceed the amount specified in the facility letter in addition with the aforesaid interest and other charges thereon from the time of the mortgage debt becoming payable until the actual payment*

*of the mortgage debt or so much thereof as may from time to time to be outstanding notwithstanding any intermediate settlement of account or other matter or thing whatsoever and shall not prejudice or affect any agreement which may have been made with the bank prior to the execution hereof or any security which the bank may now or at any time hereinafter hold in respect of the mortgage debt or any part thereof"*

In this case, the mortgagor was not the beneficiary of the credit facility and thus after the sale of his property, he was discharged from the liability arising from the credit facility. As stated above, it was the respondent who had the primary obligation to fully repay the credit facility. In the circumstances, any deficiency after the mortgaged property had to be paid, has to be recovered from the respondent. The appellant was, therefore, justified to claim the balance from her.

On the basis of the reasons stated above, we are of the settled mind that this appeal has merit. We thus allow it and reverse the impugned decision of the High Court to the extent shown above. For the purpose of clarity, since the 4th ground of appeal was abandoned, and because of the finding by the trial court that the expenses which were incurred in the debt recovering process including legal fee should

not be claimed as part of the outstanding loan, we declare that the appellant is entitled to the outstanding balance of the credit facility which is TZS 71,856,044.55 plus interest at the bank rate.

Given the fact that at the trial and during the hearing of this appeal, the respondent did not appear, we make no order as to costs.

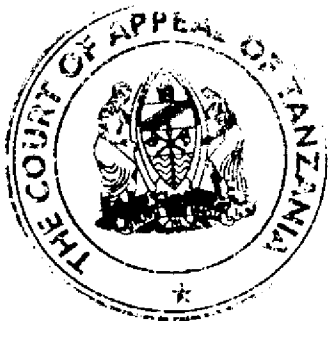
**DATED** at **DAR ES SALAAM** this 6th day of April, 2023.

A. G. MWARIJA
**JUSTICE OF APPEAL**

B. M. A. SEHEL
**JUSTICE OF APPEAL**

L. L. MASHAKA
**JUSTICE OF APPEAL**

The Judgment delivered this 12th day of April, 2023 in the presence of Mr. Stephen Axwesso, learned counsel for the appellant and in the absence of the respondent, is hereby certified as a true copy of the original.




F. A. MTARANIA
**DEPUTY REGISTRAR**
**COURT OF APPEAL**