IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWANDAMBO, J.A., MAIGE, J.A. And KHAMIS, J.A.)

CIVIL APPEAL NO. 362 OF 2021

CHIYANGA ENTERPRISES (T) LTD .....APPELLANT

VERSUS

EXIM BANK (TANZANIA) LIMITED (as the Successor of THE FIRST NATIONAL BANK TANZANIA LTD) ..... 1ST RESPONDENT

TRANQUIL BUREAU LIMITED BANK TANZANIA LTD .....2ND RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania Land Division at Dar es Salaam)

(Luvanda, J.)

dated 25th day of February, 2021

in

Land Case No. 46 of 2016

.....

RULING OF THE COURT

5th & 13th August, 2024

MAIGE, J.A.:

On 12th September, 2014, the appellant procured an overdraft facility of TZS 290, 000,000.00 from the first respondent (exhibit P1) for a term of 12 months from 12th September, 2014 and which was payable in equal monthly installments of TZS 9,000,000.00. It was to be secured, by among others, a residential property at Plot No. 10 Block A, Kigogo

area within the District of Kinondoni in the region of Dares Salaam which is in the name of Francis George Manyama ("the first security") and Commercial Property on plot No. KND/KGG/KAT4/96 Kigogo area within Kinondoni District in Dares Salaam Region which is in the name of George Manyama Mangaru,("the second security").

On 11th June, 2016, the appellant requested for a reschedule of the loan repayments from TZS 9,000,000.00 to TZS 5,000,000.00 per month. Subsequently, the second respondent, at the instance of the first respondent, issued a 14 days - notice of sale of the two securities in realization of the outstanding loan arising from the overdraft in question (exhibit P3, collectively). Being aggrieved, the appellant commenced a suit at the High Court of Tanzania, Land Division ("the trial court") for the following reliefs: **One**, declaration that the first appellant was in breach of the overdraft agreement; **Two**, a mandatory injunction compelling the first respondent to adhere to the terms and conditions of the overdraft agreement; **Three**, declaration that the notices issued by the second respondent to the appellant under the mandate of the first respondent are premature and therefore illegal; **Four**, a mandatory injunction compelling the first respondent to reschedule the overdraft facility and allow the appellant to remit to the first respondent the sum of TZS 5,000,000.00 per month; **Five**, an order suspending interest on principal

sum from the date of institution of the suit to the date of judgment. The factual allegations constituting the appellant's cause of action were pleaded at paragraphs 9, 10,11 and 12 of the plaint as follows:

> *"9. That instead of receiving positive answer from the 1st Defendant as per clause 7 of the overdraft facility agreement the Plaintiff was served with 14 days' notice from 2nd Defendant to sell the Plaintiff's suit properties on 11th June 2016. The said notice was not preceded over by the notice of default from the 1st Defendant and thus the 2nd Defendant's notice is therefore illegal. Furthermore the said notice does not specify the amount which is due under which the Plaintiff's properties should be sold.*
>
> *Attached herewith and marked as JLC-3 is a copy of the said notice leave of which is craved to form part of this Plaint*
>
> *10. That apart from change of circumstances as explained above, the Plaintiff has, since the grant of the overdraft facility, been repaying the overdraft money in accordance with the terms and manner as agreed without failure.*
>
> *11. That the Plaintiff states further that the 1st Defendant's demand under the mandate from the 1st Defendant of selling the Plaintiff's properties before the expiry of contractual term is breach of overdraft*

Agreement and a total disregard of the Plaintiff's change of circumstances which has not been the Plaintiff's fault but rather occasioned of its main contractor.

12. That the Plaintiff states that the said notices are unlawful, illegal and therefore inoperative."

In its judgment, the trial court found that, the appellant did not adduce sufficient evidence to establish that the first respondent was in breach of the overdraft facility or that, the notices of default were issued against the law. It, therefore, dismissed the suit with costs.

Aggrieved, the appellant has instituted this appeal criticizing the judgment of the trial court on the following grounds:

1. *The Trial Court erred in law and fact by failure to take into consideration that without change of mode of payment from that of an overdraft facility to that of term loan facility, the Appellant could not be in a position to discharge its liability freely as suggested by the Trial Court.*
2. *The Trial Court erred in law and fact by failure to take into account that the Appellant did not fail to discharge the overdraft agreement rather it was the 1st Respondent who had failed to create conducive environment to the Appellant with a view of enabling it to discharge its liability.*
3. *The Trial Court erred in law and fact by holding that the allegation of default notice was an afterthought while it was*

not as it had featured in the appellant's and respondent's pleadings and evidence.

4. *The Trial Court erred in law and fact by condemning the appellant for failure to pay the overdraft facility for the period of six years without taking into account the 1st Respondent's failure to change the modality of payment.*
5. *The trial Judge erred in law and fact by failure to take into account the appellant's evidence which was stronger compared with the 1st respondent's evidence on failure to pay the overdraft money.*

At the hearing, Mr. Philemon Mutakyamirwa, learned advocate appeared for the appellant while Mr. Innocent Felix Mushi, also learned advocate, appeared for the respondents. Right from the outset, Mr. Mushi informed the Court that, the first respondent phased out of existence in July 2022 and its assets and liabilities acquired by Exim Bank Tanzania Limited (herein referred to as "the successor in title"). He prayed, which was not objected by Mr. Mutakyamirwa, for leave so that the appeal proceeds against the first respondent's successor in title. Pursuant to rule 4(2) (a) and (b) of the Tanzania Court of Appeal Rules, 2009, we granted the prayer as reflected herein above.

As we were preparing ourselves for the hearing, we entertained doubt, in the first place, whether, to the extent that it sought to challenge the first respondent's realization of the two securities, the suit would stand

without the mortgagors being joined. In the second place, we entertained doubt that, to the extent that it sought to enforce an overdraft facility, the suit in question was a land dispute which, in the absence of the claim to challenge the enforcement of the securities, it would fall within the jurisdiction of the trial court.

We, therefore, invited the learned advocates to address us on the issue. Mr. Mutakyamirwa conceded that, it was wrong to proceed with a suit on mortgage without the mortgagors being joined and, therefore, the judgment and the whole proceedings of the trial court were a nullity for non-joinder of the necessary parties. Conversely, while conceding that a mortgagor is a necessary party in a suit founded on mortgage, Mr. Mushi was of the contention that, the omission in the instant matter was not fatal, as the mortgagor in the second security was a director of the appellant and testified as PW1. On that basis, he urged us to proceed determining the merit of the appeal. When asked on whether the mortgagor in the second security was involved, he admitted that he was not.

This issue cannot consume much of our time. As we demonstrated herein above, the appellant's claims at the trial court was, among others, a declaration that the notices of default in respect of the two securities

were illegal. In accordance with the overdraft facility and the notices of sale pleaded in the plaint, it is apparent that, while the first security belongs to Francis George Manyama, the second security belongs to George Manyama Mangaru. It is an elementary position of law and the parties are not in dispute that, in a suit on mortgage, the mortgagor is a necessary party. [See for instance, Order XXXII of the Civil Procedure Code]. In here, the suit was commenced by the appellant as the borrower without joining any of the mortgagors. Mr. Mushi contends that, the omission was not fatal as one of the mortgagors testified. With respect, we cannot agree with him because, as we understand the law, a person does not become a party to the proceedings just because he appeared as a witness. Assuming that was the law, the suit would remain incompetent as the mortgagor in the second security was not involved howsoever in the proceedings.

Determination of a suit without joining a necessary party is a fatal irregularity which renders the decision and proceedings thereof a nullity. See for instance, **Abdulatif Mohamed Hamis v. Mehboob Yusuf Othman & Another** (Civil Revision No. 6 of 2017) [2018] TZCA 25 (1 August 2018; TANZLII) and **Gapco Tanzania Limited & Another v. Ramzan D. Walji Company Ltd** (Civil Appeal No. 381 of 2020) [2024] TZCA 558 (15 July 2024; TANZLII). Indeed, where, like here, the

enforcement of the mortgage is challenged, the proper plaintiff should be the mortgagor.

In view of the foregoing, we invoke our revisional powers under section 4(2) of the Appellate Jurisdiction Act, Cap. 141 R.E.2019 and set aside the judgment and decree of the trial court and nullify the proceedings thereof. We further strike out the suit for being incompetent. Since the issue was raised by the Court on its own motion and, considering Mr. Mutakyamirwa's stance, we make no order as to costs.

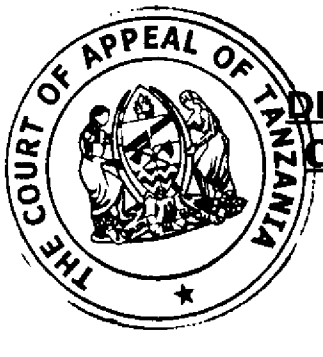
DATED at **DAR ES SALAAM** this 9th day of August, 2024.

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

A. S. KHAMIS
JUSTICE OF APPEAL

The Ruling delivered this 13th day of August, 2024 in the presence of Mr. Philemon Mutakyamirwa, learned counsel for the Appellant and Mr. Godfrey Ngassa, learned counsel for the Respondents, is hereby certified as a true copy of the original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL