

COMMERCIAL LITIGATION



RECENT COURT DECISIONS ON BANKING LAW -OBLIGATIONS TO REPAY THE LOAN

A. Introduction

The High Court and Court of Appeal of Tanzania have recently made decisions on Bank rights to recover the repayment from the Customers and Guarantors. The recent Court decisions that are central to this digest entails the Decision of the High Court Commercial Division in *Bank of Africa Tanzania Limited V. Rose Miyago Assea, Commercial Court No 138 of 2017(Unreported)*, Mruma, J. and *Bank of Africa Tanzania Limited V. Nai Salum Balhabou and 2 Others, Commercial Case No 140 of 2017 (unreported)*, Mwandambo, J. (as he then was) also, this digest shall discuss the decision and principles laid down in the Court of Appeal case between *CRDB Bank Limited V. Issack B. Mwamasika And 2 Others, Civil Appeal of Tanzania No. 139 of 2017 (Unreported)*.

B. Banks to Recover the Loan from only the Properties pledged by the Customer

In the High Court Commercial Case No 138 of 2017 between *Bank of Africa Tanzania Limited V. Rose Miyago Assea, Commercial Court (Unreported)*, Mruma, J., the High Court was of the settled view that Banks cannot recover unrealized amount of Loan from other sources/properties of the Borrower.

In this case, the Borrower (Rose Miyago Assea) defaulted the loan repayment that was granted to her by the Bank of Africa Tanzania Limited. Consequently, the Bank appointed the auctioneer to dispose of the mortgaged property. The property was disposed of in a public auction and it fetched only TZS 100,000,000/= but the outstanding loan remained at TZS 71,856,044.55/= which has continued to accrue interest and together with other charges to the tune of TZS 101,651,444.55. The Bank made necessary efforts including filing this case so as to recover the loan including selling of the Borrower other properties that were not mortgaged.



KEY ISSUES:

There are two views from the High Court Decisions:-

- On one hand, Banks should only recover from the properties pledged by the Borrower (Rose Migeyo Case)
- On the other hand, Banks can pursue the Borrower for unpaid balance upon insufficient realization (recovery of the Loan) from the pledged security (Nai Salum Balhabou case).
- In Relation to Loan Guarantors, the Court of Appeal has clearly defined the role of Loan Guarantors and warned that, Loan Guarantors put themselves in a risk to repay the loan if the principal debtor defaults.

In its decision, Mruma, J. was of the view that, *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.* The Court reasoned that, *If consequently it is found that the value of the security does not cover or it fall 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 other means other than the security it accepted.*

The Court cautioned Banks and thus finally ruled that, *It is high time now for the banks to be aware that once they 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 the view of having recovered the unrealized amount by attaching and auctioning other properties of the Mortgagor.*

From this decision, the High Court made it clear that, *Banks cannot enforce their recovery measures to other properties other than what has expressly been agreed upon between the Borrower and the Bank.*

C. Banks to Recover the Loan from Additional (other) properties of the Borrower

In a different and interesting decision of the same High Court Commercial Division involving the same *Bank of Africa Tanzania Limited against Naif Salum Balhabou and 2 Others, Commercial Case No 140 of 2017, Mwandambo, J. (as he then was)*, the Court was of the firm view that, there must be evidence of negligence or breach of duty in conducting sale resulting into obtaining a price lower than the market value which will preclude the lender from pursuing the borrower for the balance.

The facts of this case involved the loan recovery amounting to TZS 314,290,629 by Bank of Africa Tanzania Limited from the defendant *Naif Salum Balhabou and 2 Others*. The loan was granted in form of overdraft facility for 12 months, but the defendant defaulted the repayment of the loan and interest accrued. Among others, the issue that was framed for determination of the court was whether the plaintiff breached the duty of selling the mortgaged property below the forced market value.



In deciding the matter, Mwandambo, J (*as he then was*). followed the argument that, *a price obtained at public auction is taken to be the best price in the absence of any foul play.* Hence it was the court view that *there must be evidence of negligence or breach of duty in conducting sale resulting into obtaining a price lower than the market value which will preclude the Lender from pursuing the Borrower for the Balance.* It is clear that, in this case the court was very settled and focused in deciding that, the Borrower is duty bound contractually for the amount borrowed. Hence the bank is entitled to recover appropriately. In holding this position, the court held that, *the defendant has not proved any breach of duty in the sale of mortgaged property by the plaintiff*

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and even if there was such proof, it could not have absolved the defendant from his loan contractual obligations.

D. The Role and obligations of Guarantor to repay the Loan

The Court of Appeal of Tanzania has on its recent decision dated 07th August, 2018 exhaustively deliberated and decided on the role of Guarantors offering themselves to guarantee the loan repayment in banks.

In celebrated case between CRDB Bank Limited against Issack B. Mwamasika and 2 Others, Civil Appeal of Tanzania No. 139 Of 2017 (Unreported), the court of Appeal decided that, guarantors can not escape the legal consequences waiting loan guarantors incase their principal debtors fails to pay their loans or default their repayment schedules.

The background of this case emanated from the refusal of CRDB Bank Limited ("the Bank") to release Title documents of the First Respondent (Mr. Mwamasika) that were used as security for the Loan to the second Respondent (Registered Trustees of Dar es Salaam International School). The second Respondent having repaid the loan back to the Bank, prompted Mr. Mwamasika to request back the return of his title documents from the Bank. The Bank refused to return the document, reasoning that, since Mr. Mwamasika was one of the personal guarantors in another existing non performing loan facility at the Bank, the Bank would go after his personal assets as a guarantor should a principal borrower continue to default.

In reasoning to its decision, the Court of appeal observed that, *we have no doubt that, as long as Mr. Mwamasika is one of the guarantors of a non performing loan advanced, the Bank retains the justification in the form of lien priority over his assets still in bank's custody.* To this effect, the court pointed out that, *if a person executed a personal guarantee to support the principal debtor's application for loan, the guarantor concerned puts all his property at risk if the principal debtor defaults. This means, the three Guarantors of this loan will retain their burden as guarantors, untill the Borrower clears its debt to the Bank.*

E. Conclusion

The three court decisions puts the clarity on the legal perspective on the court stance against defaulting Borrowing customers and their counterpart guarantors. Indeed, despite the seemingly conservative view taken by Mruma, J. in *Bank of Africa Tanzania Limited V. Rose Miyago Assea, Commercial Court (Unreported)*, subsequently, the High Court differed and undertook the broader and canon approach in the case of *Bank of Africa Tanzania Limited against Naif Salum Balhabou and 2 Others, Commercial Case No 140 of 2017, Mwandambo, J. (as he then was)* that, *Borrowers are duty bound contractually to repay the loan whether the money is from the secured properties or elsewhere.* Finally, the Court of Appeal led by the Chief Justice in the case of *CRDB Bank Limited against Issack B. Mwamasika and 2 Others, Civil Appeal No. 139 of 2017 (Unreported)*, has warned Guarantors that, they put themselves in a risk to repay the loan if the principal debtor defaults.



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