

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

LAND CASE NO. 68 OF 2016

ALFRED ELIAU SAYOLOI.....PLAINTIFF

VERSUS

1. JOSEPH PETER MASSAWE.....1ST DEFENDANT

2. JOEL MCHOMVU ELIENEZA.....2ND DEFENDANT

3. SIDAY LEMAOO MBAMAY.....3RD DEFENDANT

4. WILSON T. MGONJA.....4TH DEFENDANT

JUDGMENT

22/07/2021 & 03/09/2021

GWAE,

The plaintiff Alfred **Eliu Sayoloi** has filed this suit against the defendants namely; **Joseph Peter Massawe, Joel Mchomvu Elieneza, Siday Lemaoo Mbamay and Wilson T.Mgonja** (to be referred to 1st, 2nd, 3rd and 4th defendant respectively) jointly and severally for the following reliefs;

1. An order that, the land/house which is located at Plot No. 65, Olosiva village, Arumeru District with Title Number 27544, Land Office Number 308115 is the property of the plaintiff.

2. Nullification of the transfer of the plaintiff's house to the 1st and 3rd defendants.
3. Declaration that the suit premises was illegally sold and transferred to the 1st and 3rd defendants.
4. Declaration that the suit premises was illegally sold and transferred to the 1st and 3rd defendants.
5. Payment of 36,900,000/= being rent from January 2013 to the date of filing this plaint October 2016 and other amount from the day of filing this plaint to the day of payment of the said amount at equal rate of Tanzanian shillings 450,000/= per month for all the months till the money is paid and the house handed back to the plaintiff.
6. General damages.
7. Costs of this suit be provided.

The facts giving rise to the suit as understood from the parties' pleadings can be briefly stated as follows: That, on 23/05/2012 the plaintiff and the 1st defendant entered into a loan agreement where the 1st defendant agreed to advance a one-month loan to the plaintiff at the tune of USD 23,000 to be repaid with an interest of USD 2000. In securing the loan, the plaintiff offered his house with Tittle Number 27544, Land Office Number 308115, Plot Number 65 located at Olosiva village, Arumeru District as security

Thorough his plaint, the plaintiff stated that at the time of servicing the loan the 1st defendant provided him with an account number 02J1034072000, the account to which the money for loan servicing should be deposited into, however when the plaintiff went to deposit the money, he discovered that the account belonged to the 2nd defendant. Upon making an inquiry to the 1st defendant as to the status of the bank account, the 1st defendant informed the plaintiff that the bank account belonged to his business associate, thus, there was no problem, and therefore the plaintiff was to use the said account in overhauling the loan facility.

The plaintiff also alleged that to have serviced the loan facility in the said bank account at the tune of USD 15,000 and the remaining USD 10,000 was paid to the 4th defendant under the 1st defendant instructions. Upon completion of servicing the loan facility, the plaintiff demanded from the 1st defendant his title deed be discharged from the mortgage however the 1st defendant kept him waiting. He eventually found out that the 1st defendant had already transferred the ownership of the said mortgaged property into his name and then sold it to the 3rd defendant. It is from the transfer and selling of the security, the plaintiff is claiming that he had suffered damages both generally and specifically as he had to incur costs of renting another house where he had spent more than 36,900,000/=and more so he alleged to have suffered both mentally and physically.

In their written statement of defence to the plaintiff's claims, the 1st and the 2nd defendants filed their joint written statement of defence while the 3rd and 4th defendants did not file their written statement of defences nor did they enter appearance. The 1st defendant alleged to have entered into a free interest loan agreement with the plaintiff in the sum of USD 23,000. The defendants also admitted to have allowed the plaintiff to repay his loan through the bank account of the 2nd defendant, however it is their contention that by 23rd June 2012, the plaintiff defaulted to repay his loan as per the loan agreement and therefore as agreed in the loan agreement on the 24th June 2012 the ownership of the mortgaged house shifted to the 1st defendant and he was free to dispose the same. The 1st defendant and 2nd defendant further contended that the plaintiff's claims that he had repaid the whole amount is not true as the plaintiff's repayments were made several months after the due date had lapsed. It was therefore the contention of the 1st defendant that the plaintiff was in breach of a loan contract and he cannot therefore blame the defendants over his own inactions to the contractual terms.

Before commencement of trial, the following issues were framed by the court after consultation of the parties' advocates;

1. Whether the loan was repaid as per the loan agreement entered by the plaintiff and 1st defendant.

2. Whether the loan agreement entitled the 1st defendant to a possession of the mortgaged premise.
3. Whether the alleged plaintiff's default to repay as per loan agreement entitled the 1st defendant to both possession of the mortgaged premise and money paid to the 1st defendant through an account owned by the 2nd defendant held at CRDB and 4th defendant.
4. Whether the plaintiff failed to repay USD 23,000 by 23/06/2012.
5. To what relief are the parties entitled.

In proving his case, the plaintiff summoned a total of five (5) witnesses and four (4) exhibits namely; an affidavit of names, driving licence, 5 pay in slips and a valuation report. On the part of the defendants, it was the 1st defendant only who testified, the 2nd, 3rd and 4th defendants did not enter appearance despite the fact that they were duly served.

The plaintiff who testified as PW5 under the lead of his counsel, **Ms. Edna Mndeme** testified that on 23/05/2012 he was seriously in need of money; he thus went to the 4th defendant so that he could lend him some money. Unfortunately, the 4th defendant had no money to lend the plaintiff but directed him to the 1st defendant who advanced him a loan of USD 21,000 to be repaid in a one-month period with an interest of USD 2000 making a total of USD 23,000, in furtherance of advancing the said loan the plaintiff was also required to put his house as security. The loan agreement was witnessed by other independent including William G. Laiser, PW4.

On 22/06/2012 the plaintiff was given an account by the 1st defendant to which he would use in repaying the money, however when he went to CRDB Mlimani City the account number given to him revealed the name of 2nd defendant, the cashier having noticed the difference in names returned the amount paid (USD 23,000). The plaintiff then unsuccessfully traced the 1st defendant to inquire the status of the said bank account on the material date, it was until 2/07/2021 when the plaintiff met the 1st defendant, after their discussion, the plaintiff and the 1st defendant agreed that the plaintiff to repay a total of USD 25,000 by December 2012 in the same bank account bearing the name of the 2nd defendant. The payments made by the plaintiff were as follows; on 04/07/2012-USD 3000, on 08/08/2012 – USD 8500, on 26/08/2012-USD 9000, on 02/11/2012-USD 1500 and on 30/12/2012. The plaintiff, subsequently to the said repayment, gave the 4th defendant USD 10,000 as per the 1st defendant's directive in the presence of PW2. A piece of evidence that was supported by PW1, Robert Saidurani Pay in slips and a note of receipt of USD 10,000 by the 4th defendant were received and collectively marked as PE3.

The plaintiff went on testifying that he had repaid the whole loan however the 1st defendant fraudulently smuggled his house and consequently they were evicted from the said house and he had to rent another house where he was paying the rent of Tshs. 450,000/= per month. This caused him to suffer

psychological torture and mental relinquish, the plaintiff thus prayed for reliefs as sought in his plaint. The plaintiff's evidence is supported by one Robert Salduran Lukumay (PW1) who testified to be the one who was sent by the plaintiff to take to the 4th defendant the USD 10,000. According to him he handed to the 4th defendant the amount stated, and the upon receipt the 4th defendant signed to acknowledge the receipt.

In his defence, the 1st defendant who was under the legal representation of the learned counsel, **Mr. John Shirima** representing also the 2nd defendant who did not enter appearance during trial, admitted to have entered into a loan agreement with the plaintiff, the loan agreement was received and marked as exhibit "DE1". The defendant went on adducing that, according to the loan agreement the plaintiff took a loan of USD 23,000 which was to be paid on 23/06/2012 and the same was secured by a plot located at Sakina Plot No. 65. The defendant further stated that, the plaintiff was also to surrender to him the certificate of title and a transfer of the Certificate of Title so that in case of default it would be easier for him to make a transfer of ownership.

The 1st defendant went in stating that on 23/06/2012 the plaintiff was supposed to repay the loan; however, he did not do so and that on 24/06/2012, the defendant called the plaintiff who did not respond to his calls nor did he make any repayments and that following the plaintiff's default to repay, he made the transfer

of the mortgaged property to his own ownership. The 1st defendant also disputed to have received money from the 2nd defendant's account, he also contested to have authorized the payment of the USD 10,000 to the 4th defendant nor the payment to be made through the 2nd defendant's bank account. The 1st defendant insisted that he legally acquired the mortgaged house and thus urged this court to dismiss the suit.

It is now time for this court to determine the issues aforementioned.

1st issue, whether the loan was repaid as per the loan agreement entered between the plaintiff and the 1st defendant.

Perhaps before answering this issue, it is prudent to re visit the terms and conditions of the loan agreement entered between the plaintiff and 1st defendant received in this court as DE1. The said loan agreement appears to have been executed on the 23rd May 2012 between the plaintiff and the 1st defendant where the plaintiff took a free interest loan of USD 23,000 on the terms that; **firstly**, that, security of the loan is a house with Title No. 27544, Land Office No. 308115 Plot No. 65 located at Olosiva village, Arumeru District, **secondly**, that, the money (loan) ought to be repaid on the 23rd June 2012 and **thirdly, that**, the plaintiff signed the transfer forms which kept under the custody of an advocate so that in case of default the 1st defendant will be able to make transfer of the mortgaged property to his ownership.

Having scrutinized the terms and conditions of the loan agreement, the question that follows is whether the plaintiff repaid the loan on 23/06/2012 as agreed in the loan agreement (Paragraph E (i) of the loan agreement). The answer to this question can be easily derived from the parties' pleadings, evidence and exhibits. The plaintiff when testifying alleged that on the due date of repayment he went to CRDB Bank Mlimani City to deposit the money to the account number which he was given by the 1st defendant only to be discovered by the cashier that the account number did not bear the name of the 1st defendant but of the 2nd defendant, consequently the plaintiff could not deposit any amount of money as full or partial loan repayment on that day. To support his testimony the tendered a pay in slip dated 23/06/2012 with the account holder's name Joseph Peter Massawe. The plaintiff further stated that after consultation with the 1st defendant as to the status of the account number which he was given, the 1st defendant permitted him to use the said account as it belonged to the 2nd defendant whom he alleged to be his associate in business. Subsequently, the plaintiff continued to repay the loan through the 2nd defendant's account and the same is evidenced by four pay in slips with divert dates collectively marked as "PE3".

The 1st and 2nd defendant, through their joint written statement of defence, did not dispute the fact that the plaintiff was allowed to repay his loan through the 2nd defendant's account however while testifying the 1st defendant denied to have

allowed the plaintiff to make payments through the 2nd defendant's bank account and alleged that he has not received any money from the plaintiff and that there was no proof that he was paid by the plaintiff. I am alive of the cardinal principle that, in judicial or quasi- judicial proceedings, parties are bound by their own pleadings (See the decision in the case of **James Funke Gwagilo vs. The Attorney General** [2004] TLR 161.

The 1st defendant is therefore bound by what he stated in his written statement of defence such that whatever will be said on evidence which is contrary to his pleadings must be considered by the court as an afterthought. How comes the 1st defendant to have admitted permitting the plaintiff to repay the loan through the 2nd defendant's account vide his written statement of defence whereas in a witness box to have lucidly and miserably denied that fact. This being the position, I am legally justified to hold that the 1st defendant was well aware of the repayment as he is the one who authorized the same to be deposited into the 2nd defendant's account and to the 4th defendant.

This finding takes me to answer the first issue in affirmative that the plaintiff had the intention of repaying his debt on the 23/06/2012 as agreed in the loan agreement however the was obstructed by the circumstances that were beyond the plaintiff's control and justifiably for him not to make repayment as agreed in the loan agreement and he cannot therefore be said to have intentionally defaulted

repayment on the 23/06/2012 as it the observation of the court that the plaintiff was conned or defrauded.

2nd issue, whether the loan agreement entitled the 1st defendant to possession of the mortgaged premise.

In order to safely answer this issue, it is apposite to have part of the loan agreement reproduced hereunder;

“Mkopeshwaji atasaini Transfer Forms za hati ya kiwanja na maendelezo yake, zitabaki mikononi mwa wakili aliyeandaa mkataba huu ili mkopeshwaji akishindwa kurudisha mkopo, katika tarehe iliyotajwa, mkopeshaji aweze kusajili (Transfer) mali hiyo kwa jina lake. Iwapo atashindwa kurudisha mkopo kwa tarehe tajwa kwa kutia sahihi katika makubaliano haya, mkopeshwaji anamruhusu wakili aliyetayarisha makubaliano haya kumpatia mkopeshaji nakala zote mbili za transfer ili mali hiyo isajiliwe katika jina la mkopeshaji.”

From the above quoted part of the loan agreement, it is apparent clear that the 1st defendant was entitled to make a transfer of the mortgaged property upon default by the plaintiff to repay the loan as mutually agreed, therefore the possession of the mortgaged property by the 1st defendant could not come mechanically or merely because the 1st defendant was in possession of transfer deeds duly signed by the plaintiff but upon proof of the plaintiff's default to repay as agreed.

3rd issue, whether the alleged plaintiff's default to repay the loan as per the loan agreement entitled the 1st defendant to both possession of the mortgaged property and moneys paid through the 2nd defendant's account and those paid to the 4th defendant.

As discussed in the 1st issue, it is vividly clear that the plaintiff on the due date was willingly and readily to make repayment of the loan however he was prevented to do so as the account number given to him did not belong to the 1st defendant. The fact which he could easily ignore as the he could be counted negligent. More so, it is evidenced that the plaintiff being permitted, he continued making deposits in the 2nd defendant's account, to the tune of USD 15000. The remaining USD 10,000 was paid to the 4th defendant who acknowledged receipt of the said amount which was to cover the whole debt, the receipt note (PE3). Consequently, this court is fully satisfied that the 1st defendant was fully paid his money although on different dates and modes. By necessary implication, that is why more money that is USD 2000 was added. Therefore, the 1st defendant had no justifiable reasons at this stage to deny the repayments which were done in his favour through the 2nd defendant's accounts taking into account the fact that he authorized such repayments to be done through the 2nd defendant's account.

The 1st defendant, under these circumstances and evidence adduced during trial, cannot benefit from both possession of the mortgaged property and the amount of money paid to him through the 2nd defendant account. If at all the 1st defendant was so faithfully and believed that the plaintiff defaulted repayment he would have acted upon the mortgaged property as directed in the loan agreement and cancelled all the repayments done by the plaintiff but his acts having both the money and the mortgaged property imply that he had some fishy and fraudulent business against the plaintiff.

On the 4th issue, whether the plaintiff failed to repay the loan on the 23rd June 2012 as per loan agreement.

This issue should not curtail me as the same is answered by 1st issue above, it is plainly clear that the plaintiff intended to repay as per the agreement but his failure was justifiable under circumstances.

On the last issue on reliefs that they parties are entitled

The plaintiff sought for an order that the mortgaged property to be declared his property, as explained above, had the plaintiff defaulted payment on the agreed date that is 23/6/2012 intentionally this court would have held otherwise, however as he was prevented to make payments on the due date by the circumstances which were caused by the 1st defendant it cannot be said that the plaintiff defaulted payment with malice, had it been not for the 1st and 2nd

defendants' admission in their joint written statement of defence that they allowed the plaintiff to deposit such amount of money into the 2nd defendant's account the plaintiff would have no evidence to justify his repayments to the 2nd defendant account.

In the end result, this court is of the view that so long as the plaintiff discharged his obligation of loan repayment, and since there is no evidence disputing that the amount of money was not paid, the plaintiff is entitled to have his property placed under mortgage back to his ownership. Any transaction done by the 1st defendant to the 3rd defendant is declared a nullity.

On the relief of specific damages, the plaintiff sought for payment of Tshs. 36,900,000/= being the amount of rent he had incurred from the time he was evicted from his house January 2013 to the time of filing the suit. According to him the amount of rent he was paying was Tshs. 450,000/= per month. Unfortunately, the claim of this relief has not been proved at all. It is a cardinal principle that, specific damages must be specifically pleaded and proved. In **Masolete General Supplies vs African Inland Church** (1994) TLR 192, in the case of **Masolete General Agencies** (supra) it was observed that:

“Once a claim for a specific item is made, that claim must be strictly proved, else there would be no difference between specific claim and a general one; the trial judge

rightly dismissed the claim for loss of profit because it was not proved”

See also the case of **Zuberi Augustino vs. Ancent Mugabe** (1992) TLR 132.

Since in our present case, it is the plaintiff who claimed for this relief, he was therefore duty bound to give proof of the same in his favour, having failed to do so, the specific damages sought cannot be granted by this court. The same are thus dismissed.

The plaintiff also sought for the relief of general damages, the defendants have exhibited some unwarranted behaviors, as general damages are awarded at the discretion of the court and taking into account that the consequences of the action complained of and fraud exhibited. The plaintiff is awarded Tshs. 10,000,000/=being general damages.

The final court order that, the plaintiff’s case succeeds to the extent explained above. Costs of this case shall be jointly and severally borne by the defendants.

It is so ordered.



A handwritten signature in blue ink, appearing to read "M. R. Gwae", with a long horizontal line extending to the right.

M. R. GWAE
JUDGE
7/09/2021