IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE SUB- REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

PC CIVIL APPEAL NO. 205 OF 2020

(Arising from the decision of the Temeke District Court in Civil Appeal No. 97 of 2019 by Hon. Ngeka, RM dated 12th February, 2020)

MENEJA ACCESS BANK MKUNGUNI ..... APPELLANT

VERSUS

SAID ABDALLAH UKIWA.....RESPONDENT

JUDGEMENT

ITEMBA, J.

The appellant herein above, had advanced a loan to one Fatuma Juma (the principal debtor) to a tune of Thirty Million Shillings (TZS. 30,000,000/=) to which the respondent herein had guaranteed.

It has been alleged that, the principal debtor had put collateral of her motor vehicle make Volvo, her house and the house belonging to the appellant purposely to secure such loan. It is ably worth notably that, the title deed of the respondent was procured as security upon a request by Principal debtor for the reason that, the principal debtor's house was a squatter with no tittle deed. Furthermore, as records divulge from the testimony of the respondent, the three parties had agreed that, in case of

default in payment, the appellant would have sold the principal debtor's house.

What transpires from the testimonial version in the trial Court's records is that, the appellant (SU1) and his witness (SU2) stated that, prior to the advancement of a loan of TZS. 30,000,000/=, the principal debtor was having an outstanding balance of TZS. 20,000,000/=. It was further stated that the principal debtor's house was sold by the appellant and the said outstanding amount was paid upon sale.

Upon realizing that, the respondent took initiative course to file a suit before Mbagala Primary Court and claimed for his title deed be returned to him. He successfully procured the order to that effect, however the disgruntled appellant herein did file an appeal before the District Court of Temeke. Crestfallenly to the appellant, the appeal was decided in favour of the respondent henceforth, this appeal.

To be specific, the appellant has approached this Court with four grounds of complaints, namely: -

1. *That the Honourable trial Magistrate of the appellate Court grossly erred in law and in fact in her judgment by entertaining an appeal in favour of the respondent without taking into consideration to the 1st ground of appeal that the trial court had no jurisdiction in terms of subject matter.*

2. *That, the Honourable trial Magistrate of appellate Court grossly erred in law and in fact in her judgment by improper ordering the appellant to sale the car within three months and if the same is not sold, the title deed be given to the respondent while the said car was not even pledged as loan security.*
3. *That the Honourable trial magistrate of the appellate Court grossly erred in law and in fact in her judgment by ordering the release of the respondent's title deed without regarding that, the liability of the guarantor and/or surety is co-extensive with that of the principal debtor.*
4. *That, the Honourable trial magistrate of the appellate Court grossly erred in law and in fact by holding that all three grounds of appeal are of no merit.*

Hearing of the matter, which took the form of written submissions, evinced the appellant represented by Humphrey Mwasambona, learned counsel, whilst the respondent enjoyed the services of Mr. Yuda Dominic Mushi, learned advocate. As to the records, the 4th ground of appeal was not argued by the appellant which I believe because the same is intertwined to each ground as it is the appellant's grievance that caters on the generality of determination by the 1st appellate Court.

Setting the ball rolling was Mr. Mwasambona. With regards to ground one of appeal, learned counsel contended that the matter was a land dispute and thus the Primary Court had no jurisdiction to adjudicate the same. He

cited section 167 (1) of the Land Act, [Cap 113 R.E: 2019] which mentions the land Courts to which the Primary Court is not among. He further cited the case **Exim Bank (T) Ltd v Agro Impex (T) and Others,** Land Case No. 29/2008 where this Court held that in deciding the issue of jurisdiction, there are two points which have to be taken into consideration before, that is *one,* looking at pleaded facts and *two,* looking at the relief claimed. And according to him, since the matter emanates from landed property and the relief sought is the recovery of title deed thereon, that the matter is a land dispute. To emphasize on the fundamentality of courts' jurisdiction in determining matters which they preside over, the appellant's counsel cited the decision of **Melisho Sindiko v Julius Kaaya** (1977) LRT No. 18, where the Court made it certain that anomaly as to jurisdiction renders nullity of the proceedings and decision thereof.

On ground 2 of appeal, Mr. Mwasambona did not have much to say rather than to state that, the appellate Court had erred in law and fact by dealing with the property of the principal debtor that to say, a motor vehicle make Volvo which was not pledged as security.

In respect of ground 3, the learned counsel for the appellant did accentuate that, the first appellate Court erred to disregard the liability of the guarantor which is co-extensive with that of the principal debtor thus it

ended up making a wrong order of release of a title deed. According to him, **section 78 of the Law of Contract Act**, [Cap 345 R.E: 2019] gives a clear definition of a contract of guarantee which makes a promise of a guarantor to discharge the liability of the third person in case of default. He went further, to cite **section 80 of the same Act** which provides to the effect that, the liability of the surety (guarantor) is co-extensive to that of the principal debtor unless it is otherwise provided by the contract. In buttress to his argument, he cited the case of **CRDB BANK Ltd v Issack B. Mwamasika and 2 Others**, Civil Appeal No. 139 of 2017 (Unreported) to which the Supreme Court had held to the effect that, guarantors cannot escape the legal consequences and thus if a person execute 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.

Mr. Mushi's rebuttal submission took a serious exception to the contention raised by his rival in the contest. He began by raising a concern that, the appeal was time barred as the law requires the same to have been filed within 30 days from the date of the decision, that to say 30 days from 11th day of February 2020. According to him this appeal was filed manually on 12th day of March 2020. However, the same was filed electronically on

25th November 2020. According to him, the law under the **Judicature and Application of Laws (Electronic Filing) Rules, 2018** specific under rule 9 recognises the electronic case file (ECF) as official record of the Court and the procedures under rule 16 and 17 of the rules requires a case to be firstly filed online before being presented manually at the registry. Thus, according to him the fact that the matter was filed on 25th November 2020 electronically which is more than 30 days from the date of decision, makes this appeal time barred. Thus, he prayed this appeal be dismissed for being time barred.

As to the merit, in respect of ground one of appeal, the learned counsel for the respondent had a stance that the trial Court had jurisdiction as the matter was not a land case. According to him, as to what constitutes a land case was held in the case of **Shaaban Said Shaban vs. CRDB Bank Ltd**, Land Case No. 210 of 2004 (Unreported) where this Court held that: -

> *"In my opinion in order for the land dispute to be considered as such it must be based on claim over land, house or rent matter."*

According to Mr. Mushi, the dispute involves the breach of guarantee agreement between the Bank (Appellant) and the guarantor (respondent). That the case has nothing to do with claim over ownership of house, land or

arrears in rent and therefore Mr. Mushi had wound up that the case isn't a land case.

As to ground 2 which is a grievance that the motor vehicle was not pledged as security, here Mr. Mushi argued that, a motor vehicle was pledged as security and it could be witnessed from the testimony of the appellant's witnesses before the trial Court. That to wit from the judgement of the trial Court, (SU1) Nsajigwa Joseph had admitted that the borrower had pledged her house alongside a motor vehicle as a security to the loan she received from the bank. Besides, SU2's (Francis Kimoni) testimony also as indicated at page 2 and 3 of the said judgment was in the same line with that of SU1. For that reason, he prayed the ground to be dismissed.

In respect of ground 3 pertaining co-extensive principle, Mr. Mushi vehemently insisted that, the appellant could only be in a position and mandate to vend with the respondent's house if it finishes selling the properties of the principal debtor which are her house and the motor vehicle. He insisted that the relationship and roles of the personal guarantor and that of the borrower is not a new topic in our jurisdiction. That the Court of Appeal of Tanzania in **Evarist John Kawishe v CRDB Bank Ltd,** Civil Appeal No. 123 of 2015 (Unreported), had made it clear that the liability of the guarantor is not invoked until the creditor exhausts his remedies against the principal

debtor. According to Mr. Mushi, the case of **CRDB Bank Ltd vs. Isaack Mwamasika and Others** *(Supra)* is distinguishable to the case at hand since in that case, the properties of the principal borrower were sold and could not have fetched the outstanding amount.

In his rejoinder, Mr, Mwasamboma briefly replied to the objection against this appeal that the matter is not time barred. He eloquently submitted that the decision of the District Court of Temeke was delivered on 12th day of February 2020 and upon being aggrieved, the appellant lodged its appeal at Temeke District Court in 12th day of March 2020. That it's petition of appeal has been signed and dated by the registry officer on 12th day of March 2020. Furthermore, the exchequer receipt and bank deposit slip, clearly indicates that the payments were done on 12th March 2020. He then submitted stiffly that there are greater chances of an error when inserting and filling data in the judicial system of which it may be condemned to be a human fallacy which the Court should not be affiliated to it to deprive the dispense of justice of the parties.

As to the merit of appeal, the learned brother did maintain his portrayal position of his submission in chief.

Having carefully digested the submissions made by both parties and having thoroughly perused the records thereof; the central question of

determination is ***whether the appeal is meritorious to vary the findings of the first appellate Court.***

In determining the raised issue, I am convinced to enlighten the following observations which will assist me to dispose off the matter at hand easily.

One, I have prior considered the objection raised by the respondent which have been respondent by the appellant, but it is apparent from the record that no notice was given stating to that effect. It has been stated often than not that a preliminary objection must be raised in time and on a reasonable notice. See the case of **M/S Majembe Auction Mart vs. Charles Kiberuka**, Civil Appeal No. 110 of 2005 (Unreported).

Even though the objection in our case was raised without any alarm by the respondent, but the appellant positively responded. On this facet, I commend him for that. Be as it may, and for that reason, I proceed to address it accordingly and the question here is whether this appeal is timeous.

I wish not to be detained much here as *first,* it is generally agreed that filing of documents through the system would be considered to have been done upon submission or uploading in the system. This is in accordance to

rule 21 (1) of the Judicature and Application of Laws (Electronic Filing) Rules, GN. No. 148 of 2018, which provides as hereunder:

> *"A document shall be considered to have been filed if it is submitted through the electronic filing system before midnight, East African time, on the date it is submitted, unless a specific time is set by the court or it is rejected."*

And *second,* it is crucial to be noted here that, this assumption is not absolute, and the position set down through numerous decisions of this Court is that, where fees are payable, then completion of the filing is done upon payment of the requisite filing fees. This implies that payment of fees precedes any other requirement.

See: **John Chuwa v. Anthony Ciza** [1992] TLR 233; **Camel Oil (T) Ltd v. Bahati Moshi Masabile & Bilo Star Debt Collector**, HC-Civil Appeal No. 46 of 2020; **Misungwi Shilumba v. Kanda Njile**, HC- (PC) Civil Appeal No. 13 of 2019; and **Adamson Mkondya & Another v. Angelina Kukutona Wanga**, HC-Misc. Land Application No. 521 of 2018 (all unreported).

The cited decisions are premised on the fact that electronic filing system is merely a channel through which documents are lodged in court. This invention was not intended to dispense with other filing requirements that existed prior to the introduction of the Rules on electronic filing. To

appreciate the supremacy of paying the Court fees, the Supreme Court **John Chuwa v. Anthony Ciza** *(Supra)* made it clear that, in case of controversy as to when the matter was filed in Court between the date the document was received in the registry and the payment date, the payment date prevails. The Court said: -

> *"The judgment complained of was delivered by Mushi J on 13/6/1990. The notice of appeal was filed in time on 25/6/1990 which was within time. However, the receipt for the fees was issued on 29/6/1990 which date was out of two days.* ***According to the learned judge, the date of filing application is the date of the payment of the fees and not that of the receipt of the relevant documents in the registry. Mr. Akaro, learned advocate for the applicant, conceded that before me and I cannot fault the learned Judge there.*** **"**[Emphasis added]

Guided by the above, the fact that the exchequer receipt indicates that the payments were made timely on 12th March 2020 within 30 days from the date of the decision which was 11th February 2020 and the physical petition was ably filed in the registry on 12th March 2020 within the prescribed time of 30 days as required by section 25 (1) (b) of the Magistrates Courts Act [Cap 11 R.E: 2019], this is enough to justify that the appellant did lodge its appeal timely. As alluded, the new invention was not intended to dispense

with other filing requirements that pre-existed and for that reason, this Court cannot turn blind to see that, the petition of appeal had recognizance of this Court on 12th March 2020. Thus, I find the objection with no merit, I therefore overrule it.

Two, I am alive with the decisions of this Court and the Upper bench which emphasize on the fundamentality of courts' jurisdiction in determining matters that they preside over. Just to mention the few: **Fanuel Mantiri Ng'unda v. Herman M, Ng'unda & Others** [1995] TLR 155; **Attorney General v. LOhay Akonay & Another** [1995] TLR 80, **Auto Garage Limited v. Abdulkadir Mohamed**, HC-Civil Revision No. 3 of 2000 and **Director of Public Prosecutions v. Jitesh Jayantilal Ladwa & Another**, HC- Criminal Appeal No. 111 of 2022 (unreported).

To begin disposal of the first ground, I find it apt to quote an excerpt from the decision of this Court in **KCB Bank Tanzania Ltd vs. Ramadhani Myovela,** Civil Appeal No. 197/2018 to which in an original suit, the plaintiff claimed for recovery of the purchase price of land. It was held by my learned brother Hon. Mugeta J, that: -

> *"For the matter to be considered as the land dispute there are two indicators i.e there is either ownership of land or right to possession which includes occupation by tenancy."*

I have keenly perused the claimant's form filed by the respondent before the trial Court and it is clearly indicating that the controversy was in respect of the guarantee agreement that the respondent had with the appellant (bank) and the suit aimed purposely to pray for a surrender of his title deed which is under the possession of the bank (appellant). Nothing portrays to suggest that, it was a land dispute therefore the first ground lacks merit.

Three, the doctrine of estoppel as stipulated under the provisions of section 123 of the Tanzania Evidence Act, Cap 6 R.E 2019 estops parties from denial of their previous statements over matters in Court. Looking at the evidence in record, (SU1) Nsajigwa Joseph when testifying on the 26th July 2018 had testified to the effect that the principal borrower had pledged her house alongside a motor vehicle as a security to the loan at a tune of TZS. 30,000,000/= she received from the bank. Another witness paraded by the appellant was (SU2) Francis Kimoni whom on the very same date before Mbagala Primary Court when asked the question of clarification by one gentleman assessor he said that, I quote: -

> *"dhamana za mkopo zilikuwa ni nyumba mbili, ikiwemo moja ya mdai na gari aina ya volvo…"*

From the above extract and the testimonial version of the SU1, I have all reasons to believe that the appellant denial at this stage that the motor vehicle make volvo was not one of the collaterals for the loan guaranteed by the respondent, is a U-turn and the doctrine of estoppel clearly estops them from denying their testimonies which they gave before the trial Court. Thus, the second ground of appeal is baseless and unfounded indeed.

Four, it is trite law that, the rationale behind the idea of guarantee is that, the guarantor or surety undertakes to be answerable to the creditor in the event the principal debtor fails to pay the debt by making good to the same. This principle of law is reflected in **section 80 of the Law of Contract Act**, [Cap 345 R.E 2019] which provides that: -

> *"The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract."*

This principle was well elaborated by the Court of Appeal in the case of **Exim Bank (T) Limited v Dascar Limited and Another,** Civil Appeal No 92 of 2009 (Unreported), where the Upper bench cited with approval the case of Supreme Court of India in **Bank of India Ltd Vs. Damodar Prasad,** IR 1969 SC279**,** in which it was held that: -

> *"Under this Act, save as provided in a contract, the liability of the surety is co extensive with that of the principal debtor… this meant that the surety thus becomes liable to pay the entire amount. This liability is*

immediate. ***It is not deferred until the creditor exhausts his remedies against the principal debtor."***

The same position was met in the more recent decision of **Evarist John Kawishe** *(Supra)* where the Supreme Court had the following to say:

> *"At this juncture, we think it is instructive to go along the important holding of the Supreme Court of India in* ***Bank of Bihar Ltd vs. Daniodar Prased****, IR 1959 SC 279 when interpreting section 128 of the Indian Contract Act, 1872 which is pari materia with section 80 of the Law of Contract Act, Cap 345 R.E 2002. In that case it was stated that under the 1872 Act, save as provided in a contract, the liability of the surety is co-extensive with that of the principal debtor. The Supreme Court went further and stated that this means that the surety thus becomes liable to pay the entire amount and that this liability is immediate. The Supreme Court also observed that* ***the liability is not deferred until the creditor exhausts his remedies against the principal debtor.*** *(See also a book on Banking Law by R.N. Chandhary (2009) Pgs. 259-261)* [Emphasis is added]

In the present case, there is no doubt that the respondent only guaranteed a loan to a tune of TZS. 30,000,000/= given to the principal debtor. From the testimonial version of the appellant's witnesses, both SU1 and SU2 testified to the effect that the respondent guaranteed for a TZS.

30,000,000/= loan. It had been contended that; the principal debtor had an outstanding amount of TZS. 20,000,000/= but nothing portrays from the evidence of both parties which suggest that either the respondent (guarantor) knew on existence of such outstanding amount or he did guarantee for such outstanding loan.

Besides, the principal debtor had put collateral of her motor vehicle make Volvo, her house and the house belonging to the appellant purposely to secure such loan of TZS. 30,000,000/=. As observed, the principle stipulated above from the case laws is that, the liability as to the guarantor is exercised after the bank has exhausted its remedies against the principal debtor. The records are perceptible that the house by the principal debtor had already been sold at a tune of TZS. 20,000,000/=. Thus, to say, the outstanding is TZS. 10,000,000/=. It is expected that, the motor vehicle make Volvo which is a property of the principal debtor and a collateral for the TZS. 30,000,000 loan, be sold and the amount remain thereafter will be appropriate covered by the respondent (guarantor). This is as primarily required in as far as the co-extensive principle entails. Thus, for this reason I find the third ground of appeal hollow and I dismiss.

On the basis of the foregoing, I find the appeal lacking in merit hence I dismiss it with costs, and I hereby uphold the decision of the District Court of Temeke.

Order accordingly.

DATED at **DAR ES SALAAM** this 24th day of November, 2022.

L. ITEMBA

JUDGE

24/11/2022