**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: NDIKA, J.A., KENTE, J.A., And MAKUNGU, J.A.)**

**CIVIL APPEAL NO. 115 OF 2016**

**HAPPY KAITIRA BURILO t/a IRENE STATIONERY ..... FIRST APPELLANT**

**EPHRAIM SAMWEL MAGULLA ..... SECOND APPELLANT**

**VERSUS**

**INTERNATIONAL COMMERCIAL BANK (T) LTD. ..... RESPONDENT**

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

**(Mansoor, J.)**

**dated the 18th day of March, 2016**
**in**
**Commercial Case No. 66 of 2013**

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# JUDGMENT OF THE COURT

25th April & 18th May, 2022

## NDIKA, J.A.:

Happy Kaitira Burilo t/a Irene Stationery and her husband, Ephraim Samwel Magulla, the first and second appellants respectively, lost to the respondent, International Commercial Bank (T) Ltd., in an action instituted in the High Court, Commercial Division at Dar es Salaam by the respondent for an outstanding loan, interest thereon and costs of the suit. The trial court (Mansoor, J.) entered judgment dated 18th March, 2016 in the respondent's favour for the sum of TZS. 505,377,987.11, it being the outstanding loan and interest as at the time of filing of the suit (26th June,

2013). The court also awarded the respondent interest on the aforesaid outstanding amount plus costs of the suit. Being resentful, the appellants have now appealed to this Court.

The essential facts of the case are as follows: as can be gleaned from the amended plaint, on 5th March, 2012 the respondent granted a term loan facility of TZS. 450,000,000.00 to the first appellant to be repaid in monthly instalments within a period of thirty-six months. The facility was secured by a legal mortgage on a residential property comprised in Certificate of Title No. 113294, Plot No. 1829/29, Msasani Peninsula, Kinondoni, Dar es Salaam in the name of the second appellant, who also executed a personal guarantee. In further commitment towards execution of the letter of offer of the loan facility, the first appellant executed a deed of spousal consent to the mortgage as wife of the second appellant in compliance with the provisions of the Law of Marriage Act, Cap. 29 R.E. 2002 and the Land Act, Cap. 113 R.E. 2002.

The respondent claimed that the appellants breached the loan agreement by failing to repay the loan despite persistent demands. On 24th December, 2012, the respondent issued and served on the second appellant in his capacity as the mortgagor a statutory default notice by which it demanded immediate repayment of the loan. By June, 2013 when

the suit was filed, the outstanding principal and interest had accumulated to TZS. 505,377,987.11.

It is averred further that while the loan remained outstanding, the respondent learnt that the appellants had fabricated or caused to be fabricated and executed documents that were lodged in the Land Registry culminating in the discharge of the mortgage fraudulently and unlawfully. In particularizing the alleged fraud, the respondent pleaded that the appellants did the following:

> *"(i) Prepared and or caused to be prepared and presented to the Land Registry Authorities a scanned copy of the security document, namely Title No. 113294, which was then endorsed as an original copy (sic) to secure mortgage.*
>
> *(ii) Presenting the said scanned copy of the security title to the plaintiff [the respondent herein] so as to suggest that the said title which the plaintiff was keeping was genuine.*
>
> *(iii) Keeping the original [Certificate of] Title No. 113294 duly endorsed with the mortgage instead of handing it over to the Plaintiff for its custody as mortgagee.*
>
> *(iv) Soon after breach of the mortgage conditions and after default notice was issued, the 1st defendant [the first appellant herein] executed a forged document purporting to be a discharge of the mortgage in question and presented it to the Land Authorities with the original title which she was keeping and consequently discharged the mortgage knowing that the loan was still outstanding.*

*(v) Making false statement and [presenting] to the Land Authorities to the effect that the loan facility in question has already been settled and consequently facilitated the discharge uslng forged documents without the plaintiff's knowledge."*

The respondent claimed that none of its officers executed or caused to be executed any of the documents that facilitated the fraudulent discharge of the mortgage while the loan in issue remained outstanding. It was also pleaded that the respondent had learnt that following the fraudulent discharge of the mortgage, the appellants subsequently approached another bank, Exim Bank, and successfully secured another loan facility for over TZS. 400,000,000.00, which also remained unliquidated.

In the premises, the respondent prayed for a declaration that the purported discharge of the mortgage effected in October 2013 is of no legal effect and that an order be issued requiring the Registrar of Titles to rectify the land register by cancelling the said discharge and any subsequent entries relating to that discharge and ultimately restore to full force the mortgage registered in favour of the respondent on 7th March, 2013. Besides, the respondent sought declaration that the appellants were in breach of the terms and conditions of the loan facility letter of 5th March, 2013, the consequence of which was that TZS. 505,377,987.00 was

outstanding at the time of filing of the suit. Finally, the respondent prayed for interest and costs of the suit.

The appellants' response to the suit as expressed in their joint amended written statement of defence was a complete denial of liability. While they acknowledged the existence of the loan agreement and mortgage arrangements, they denied that the first appellant had failed to repay the loan. Apart from specifically denying to have ever been served with any statutory default notice by the respondent, they claimed that they fully repaid the loan whereupon the original certificate of title was handed back to them by the respondent's officers who, then, facilitated the discharge of the mortgage. They vehemently repulsed the allegation that the discharge was procured by fraud.

The trial court framed two issues for trial, namely, **one**, whether the discharge of the mortgage was fraudulent; and **two**, to what reliefs are the parties entitled.

In establishing its case, the respondent relied on the testimony of its Head of Credit Department, John Ngasa (PW1). In support of his evidence, PW1 tendered eight documentary exhibits: one, term loan letter dated 5th March, 2012 as proof of the loan agreement between the first appellant and the respondent (Exhibit P1); two, a mortgage deed upon which the

second appellant charged his property to secure the loan (Exhibit P2); three, a personal guarantee made by the second appellant as additional security (Exhibit P3); four, the first appellant's consent to the mortgage (Exhibit P4); five, a statutory default notice dated 20th December, 2012 served on the second appellant vide the Daily News of 24th December, 2012; six, a bank statement for the loan account No. 01/04/601416/05 in the name of the first appellant for the transactions conducted between 14th March, 2012 and 1st June, 2013 showing TZS. 505,377,987.11 as the outstanding loan as at 1st June, 2013 (Exhibit P6); seven, an undated discharge of mortgage form by which the mortgage in dispute was discharged (Exhibit P7); and eight, original certificate of title No. 113294 in the name of the second appellant.

On the other hand, the case for the appellants' was solely based on the first appellant's evidence supplemented by three exhibits: one, the statutory notice of default issued by the respondent vide the Daily News (Exhibit D1); two, an undated discharge of mortgage form by which the mortgage in dispute was discharged (Exhibit D2); and three, a police loss report dated 10th May, 2014 as proof of loss of bank slips evidencing the remittances made by the first appellant to repay the loan (Exhibit D3).

In her judgment, Mansoor, J. rightly found it undisputed that the first appellant took the term loan of TZS. 450,000,000.00 as evidenced by the loan facility letter (Exhibit P1) and that the said loan was secured by the legal mortgage over the property in the name of the second appellant with the first appellant consenting to the charge. She also took the view, rightly so, that the sticking issue in the matter was whether the entire outstanding loan was paid. If so, then, whether the mortgage was properly discharged.

In determining the above issues, the trial court found for the respondent. It held that there was no documentary or other proof that the first appellant repaid the loan. It further found on the totality of the evidence on record that the discharge of mortgage form lodged in the Land Registry (Exhibit P7 – also Exhibit D2), which was undated and unsealed, was plainly unauthentic as it contained forged signatures of two senior officers of the respondent bank. In the premises, the court entered judgment and decree in the respondent's favour as stated earlier.

The appellants have cited four grounds of complaint in the appeal. **First**, they fault the learned trial Judge for failing to analyse the evidence on record that the whole outstanding loan was repaid and the mortgage discharged. **Secondly**, they allege that the learned trial Judge failed to

evaluate Exhibits D2 and D3. **Thirdly**, they claim that the learned trial Judge failed to evaluate the evidence that the discharge of the mortgage was done by the bank. **Finally**, they contend that the learned Judge wrongly held that the discharge of the mortgage was fraudulent.

Ahead of determining the merits of the appeal, we are enjoined to deal with a frontal challenge taken up by Mr. Richard Madibi, learned counsel for the respondent, that the appeal is incompetent on account of the record of appeal being non-compliant with rule 96 (1) (d) of the Tanzania Court of Appeal Rules, 2009 ("the Rules").

Mr. Madibi elaborated that the incompetence is due to the incompleteness of the record as the transcript of the first appellant's cross-examination and re-examination is omitted from the trial court's record of proceedings at pages 358 up to 395 of the record. It was his contention that the omitted part of the evidence was a core document and that without it this Court would find it difficulty to re-appraise the totality of the evidence on record so to arrive at its own findings. Although initially the learned counsel moved us to strike out the appeal, he relented when we referred him to rule 96 (7) of the Rules vesting the Court with discretion to grant leave to the appellant, *suo motu* or upon application by the appellant, to lodge a supplementary record of appeal for the purpose of

perfecting the record of appeal by including the omitted document. On that basis, he urged us to order the appellant to lodge a supplementary record of appeal perfecting the existing record of appeal.

Replying, Mr. Samuel Shadrack Ntabaliba, learned counsel for the appellants, disagreed with his learned friend and urged us to dismiss the preliminary objection raised.

Having scanned the record of appeal, we agree with Mr. Madibi that the record of appeal is deficient. What we see on the record is the first appellant's witness statement at pages 263 to 271 of the record of appeal but the transcript of her cross-examination and re-examination is manifestly omitted from the trial proceedings. We also agree with Mr. Madibi that the omitted document is a core document and that ordinarily without it the Court would find it difficult to re-appraise and re-appreciate the entire evidence on record. While we had an option to order the perfection of the record in terms of rule 96 (7) of the Rules as Mr. Madibi suggested, we declined the said invitation for two reasons: first, we took into consideration that we could access the omitted portion of the proceedings by perusing the original trial record in custody of the Registrar of the Court. Secondly, we took into account that we are enjoined to give effect to the overriding objective of the Appellate Jurisdiction Act, Cap.

141 R.E. 2019, stipulated by sections 3A and 3B thereof, which is to facilitate the just, expeditious, proportionate and affordable resolution of all disputes governed by that law. We were wary that ordering the filing of a supplementary record would have necessitated adjournment of the hearing to another date; a course that would have been inimical to the demands of justice. This appeal, which has been in the Court's docket since 2016, deserves no further delay but speedy resolution.

Adverting to the merits of the appeal, we wish to observe at the outset, having carefully read the written submissions for and against the appeal, that the four grounds of appeal we reproduced earlier raise two issues for our determination, as was the case before the trial court. While the first and second grounds posit the question whether the outstanding loan was repaid, the other two grounds raise the issue whether the mortgage was properly discharged.

In addressing the above issues as the first appellate court, we are enjoined by rule 36 (1) (a) of the Rules to re-appraise the evidence on record and draw our own inferences and findings of fact subject, certainly, to the usual deference to the trial court's advantage that it enjoyed of watching and assessing the witnesses as they gave evidence. See, for

instance, **Jamal A. Tamim v. Felix Francis Mkosamali & The Attorney General,** Civil Appeal No. 110 of 2012 (unreported).

We are also alert that in determining whether the trial court decided the case correctly or against the weight of the evidence on record, we think it is necessary to reiterate the basic rule that he who alleges has the burden of proof as per section 110 of the Evidence Act, Cap. 6 R.E. 2019 ("the Evidence Act"). Equally essential is the standpoint that the standard of proof in a civil case is on a preponderance of probabilities, meaning that the court will sustain such evidence that is more credible than the other on a particular fact to be proved – see **Paulina Samson Ndawavya v. Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017 (unreported). In that case, the Court also elucidated that the burden of proof never shifts to the adverse party until the party on whom the onus lies discharges his burden and that the burden of proof is not diluted on account of the weakness of the opposite party's case.

We begin with the first issue. On this issue, Mr. Ntabaliba contended that the first appellant, testifying as DW1, established in her evidence that the whole outstanding loan was repaid immediately after the second appellant was served with the statutory default notice on 24th December, 2012 (Exhibit D1). He also referred us to DW1's evidence that the bank

pay in slips evidencing the remittances made into the loan account No. 01/04/601416/05 were stolen along with her belongings on 13th May, 2014 after her office was broken into. The loss was reported to the Officer Commanding, Kariakoo Police District, Dar es Salaam who issued a loss report dated 13th May, 2014 (Exhibit D3).

Mr. Ntabaliba went on to argue that DW1 adduced that after the loan was fully repaid, the respondent's officers, Baseer Mohamed and Ajith Govinda, the Chief Executive Officer and the General Manager – Credit respectively, executed the discharge of mortgage instrument (Exhibit D2). The instrument was lodged at the Land Registry, culminating in the discharge of the mortgage. The learned counsel faulted the trial court for failing to find that both documents (Exhibits D2 and D3) constituted veritable proof that the loan was fully repaid.

On the other hand, Mr. Madibi countered that the respondent established through the testimony of its officer (PW1), backed up by the bank statement for the loan account (Exhibit P6), that the loan was never repaid. He submitted that DW1 did not produce any bank statement reflecting the alleged repayment, her excuse for not doing so as stated during cross-examination being that she could not seek and obtain from the respondent any statement because she had lost confidence in it. He

added that DW1 failed to mention the exact date on which she allegedly remitted the money (TZS. 449,196,008.02) nor did she produce any correspondence between her and the respondent on the alleged repayment and discharge of the mortgage. The learned counsel contended further that Exhibits D2 and D3 did not advance the appellants' case.

We have reviewed the evidence on record in the light of the contending submissions of the learned counsel. For a start, as rightly argued by Mr. Madibi, the respondent's case rests on PW1's testimony, backed up by the bank statement for the loan account No. 01/04/601416/05 in the name of the first appellant (Exhibit P6), that the loan was never repaid. The statement evidently shows all the transactions conducted during the material period (between 14th March, 2012 when the loan amount was released and 1st June, 2013) and indicates that the sum of TZS. 505,377,987.11 remained outstanding as at 1st June, 2013. It is noteworthy that Exhibit P6 was neither controverted in cross-examination nor challenged by production of any other documentary proof in rebuttal. We find it implausible DW1's claim that she could not produce any bank statement reflecting the alleged repayment of the loan because she had lost confidence in the bank and therefore she could not seek and obtain from it any statement of her loan account. Since the respondent bank had

a statutory and contractual obligation to issue the first appellant a bank statement upon demand, we see no reason why it would have not honoured such a request.

The foregoing apart, we are settled in our mind that the appellants' evidence is not worthy of belief for two reasons. First, while DW1 adduced that she repaid the whole outstanding loan immediately after the second appellant was served with the statutory default notice on 24th December, 2012 (Exhibit D1), she and her co-appellant had denied in paragraph 4 of their amended written statement of defence to have ever been served with any such notice. Settled is the principle of law that parties are bound by their own pleadings and that any evidence produced by any of the parties which does not support the pleaded facts or is at variance with the pleaded facts must be ignored – see **James Funke Ngwagilo v. Attorney General** [2004] TLR 161. See also **Lawrence Surumbu Tara v. The Hon. Attorney General and 2 Others,** Civil Appeal No. 56 of 2012; and **Charles Richard Kombe t/a Building v. Evarani Mtungi and 3 Others**, Civil Appeal No. 38 of 2012; and **Barclays (T) Ltd. v. Jacob Muro**, Civil Appeal No. 357 of 2019 (all unreported). The aforesaid material contradiction is compounded by DW1's failure in cross-examination to state with exactitude as to when she remitted the money,

which, standing at TZS. 449,196,008.02, was colossal by any yardstick. All this brings her credibility to question.

Secondly, although the appellants bemoaned that the trial court did not properly evaluate Exhibits D2 and D3, we are at one with Mr. Madibi that these exhibits, which we have carefully examined, do not advance the appellants' case. Beginning with Exhibit D2 (the discharge of mortgage), assuming for a moment that it is authentic, its contents are plainly not proof of repayment of the loan. For clarity, we reproduce its relevant part:

> "We, **INTERNATIONAL COMMERCIAL BANK (TANZANIA) LIMITED**, a limited company registered in Tanzania and carrying on banking business under the provisions of the Banking and Financial Institutions Act, 2006 whose registered office situate at Morogoro Road/Jamhuri Street, of P.O. Box 9362, Dar es Salaam, Tanzania, being the owner of the **Mortgage Deed** dated **5th March, 2012** which was registered on 7th March, 2012 under Filed Documents No. 141737 **HEREBY DISCHARGE** the said mortgage."

The above text, in our view, tells it all. It basically states that the said instrument was executed by the respondent bank to discharge the mortgage. On its own it does not expressly state nor does it necessarily mean that the loan secured by the mortgage had been repaid.

Exhibit D3 (the police loss report) is equally of no moment. For all it is worth it is proof that DW1 reported to the police the alleged loss of the

bank pay in slips. It is certainly not veritable evidence of the existence of the alleged bank pay in slips or the alleged remittance of TZS. 449,196,008.02 in settlement of the outstanding loan. Thus, Exhibits D2 and D3 do not advance the appellants' case, which is consequently left hanging in the balance as it now relies solely on DW1's word of mouth that the alleged repayment was made. Like the trial court, we do not find her an honest and credible witness.

In view of the foregoing discussion, we find it preponderant, based on PW1's testimony and the unassailed bank statement (Exhibit P6), that the appellants did not repay the loan and that TZS. 505,377,987.11 remained due as at 1st June, 2013. Consequently, we share the trial court's finding to that effect, which we hereby uphold. The first and second grounds of appeal fail.

We now turn to the question whether the mortgage was properly discharged.

Mr. Ntabaliba contended for the appellants, based upon PW1's evidence, that the instrument of discharge of mortgage would normally be processed by the respondent. On that basis, it was posited that Exhibit D2 was processed and executed by the two senior officials of the respondent and that it was finally lodged at the Land Registry where it was acted

upon. The learned counsel argued further that it was unproven by the respondent that Exhibit D2 was forged primarily because no expert evidence was led to that effect. He also faulted the trial court for holding the instrument forged on the reason that it was undated and unsealed. For one thing, he said, the document, being a photocopy, could not show the respondent's seal that must have been embossed on the original.

Replying, Mr. Madibi supported the trial court's finding that Exhibit D2 was, on its face, forged as it is undated and unsealed. He contended that the appellants gave no evidence to substantiate its authenticity, which they could have done by calling as witnesses the two officials, who allegedly executed the instrument.

We have carefully scrutinized the record of appeal in the light of the contending submissions of the learned counsel. Ahead of resolving the question at hand, we wish to state that in line with the principle of "who alleges must prove" enshrined in section 110 of the Evidence Act which we cited earlier, the onus of substantiating fraud in the instant case lay on the respondent who alleged that the discharge of the mortgage was procured fraudulently. Moreover, since any allegation of fraud imputes criminal conduct, its proof must be to a standard higher than a mere preponderance of probabilities applicable in civil cases – see our decision

in **Yeriko Mgege v. Joseph Amos Mhiche**, Civil Appeal No. 137 of 2017 (unreported) citing the decision of the defunct Court of Appeal for East Africa in **Ratilal Gordhanbhai Patel v. Lalji Makanji** [1957] EA 314 and that of this Court in **Omari Yusuph v. Rahma Ahmed Abdukadr** [1987] TLR 169. Indeed, in **Ratilal Gordhanbhai Patel** (*supra*), for instance, it was stated that:

> *"Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required."*

In the beginning, we agree with Mr. Ntabaliba that in the ordinary course of things, as admitted by PW1, the mortgage discharge instrument (Exhibit D2) would have been drawn and executed by the respondent. The trial court noted that fact but it went on to find the said exhibit a sham not just because it was undated and unsealed. It also took into account PW1's testimony, which it found credible, that the signatures appended to the instrument purporting to be those of the respondent's officers, Baseer Mohamed and Ajith Govinda, the Chief Executive Officer and the General Manager – Credit respectively, were false. In our judgment, the trial court cannot be faulted for its reliance on PW1's evidence in the absence of any

opinion from a handwriting expert. That evidence, which was based on his familiarity with the two officers' handwriting, was reliable in terms of section 49 (1) and (2) of the Evidence Act as elaborated by the High Court (Msumi, J., as he then was) in **Joseph Mapema v. Republic** [1986] TLR 148, which we cited in **Raymond Adolf Louis & Two Others v. Republic**, Criminal Appeal 120 of 2019 (unreported). In **Joseph Mapema** (*supra*), it was held that:

> *"For the purpose of enabling a court to decide the author of any piece of handwriting in dispute, the opinion of a person who is conversant with the handwriting of the disputing author is as good as, if not sometimes better than, that of a handwriting expert. In any case, Section 49(1) of the Evidence Act makes admissible opinion evidence of handwriting by anyone acquainted with another's handwriting."*

See also the decision of the Court in **DPP v. Shida Manyama @ Seleman Mabuba**, Criminal Appeal No. 285 of 2012 (unreported).

It is manifest that PW1's testimony during cross-examination on the authenticity of the instrument was spontaneous and coherent. We wish to let the record of appeal, at page 392, speak for itself:

> *"I don't agree that this document was prepared by the bank as the officers who signed the document are no longer working with the bank and they are not their signatures.* ***The document is not dated nor sealed. The document should have a seal. The seal cannot be seen on a copy.***
>
> *"The document was signed by [Baseer Mohamed]. I know him; he was the CEO ... he left in 2015 ... Ajith Govinda, I know him. He was working as Risk Manager of the bank. The signatures are not of [Baseer Mohamed] or Ajith Govinda. I don't have signatures identification knowledge but* ***I have worked with them as my bosses for a long time. I know their signatures.*** *"* [Emphasis added]

We note that PW1 conceded, rightly so, that Exhibit D2, being a photocopy, could not show the respondent bank's seal even if the said instrument in original had been affixed with the seal. Nonetheless, PW1's testimony that the said document bore fake signatures and that it did not originate from the respondent is cogent, credible and reliable. Oddly, DW1 offered no rebuttal in her evidence. Put differently, she led no evidence signifying the authenticity of the said exhibit.

The foregoing view is also fortified by logic. Since it is unassailable that the appellants did not repay the loan, they could not, in the ordinary course of things, have the mortgage discharged by the respondent. It is thus open to reason that Exhibit D2, seeming to be a mortgage discharge instrument, must have been a sham. We, therefore, uphold the trial court's finding that Exhibit D2 was a forged document and that the discharge of the mortgage was fraudulently procured. The third and fourth grounds of appeal are devoid of substance. We dismiss them both.

Accordingly, and for the reasons stated above, we find no merit in the appeal, which we hereby dismiss with costs.

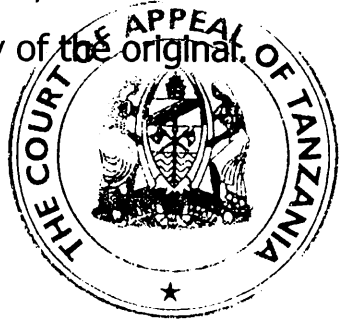
**DATED** at **DAR ES SALAAM** this 17th day of May, 2022.

G. A. M. NDIKA
**JUSTICE OF APPEAL**

P. M. KENTE
**JUSTICE OF APPEAL**

O. O. MAKUNGU
**JUSTICE OF APPEAL**

The judgment delivered this 18th day of May, 2022 in the presence of the Mr. Paul Mtui, learned counsel for the appellant and Mr. Richard Madibi, learned counsel for the respondent, is hereby certified as a true copy of the original.




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