

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**(IN THE DISTRICT REGISTRY)**  
**AT MWANZA**

**LAND APPEAL No. 43 OF 2022**

*(Arising from the Land Application No. 151 of 2021 of the District Land and Housing Tribunal for Mwanza at Mwanza)*

**DIAMOND TRUST BANK (T) LTD ----- APPELLANT**

**VERSUS**

**BENARD PETER-----1<sup>st</sup> RESPONDENT**

**FLAVIANA MTATINA (Administratrix of the Estate**

**Of James Justine Joachim @Jonas James Kaijage) -----2<sup>nd</sup> RESPONDENT**

**JUDGMENT**

*Last Order date: 28.09.2022*

*Ruling Date: 06.10.2022*

**R.B. MASSAM, J.**

The Appellant DIAMOND TRUST BANK (T) LTD is appealing against the decision of the District Land and Housing Tribunal (DLHT) of Mwanza at Mwanza in Application No. 151 of 2013 which was dismissed. The records revealed that, the 1<sup>st</sup> respondent lodged the Land Application No. 151 of 2013 before the DLHT of Mwanza at Mwanza following the action of the appellant who wanted to attach his house to recover the loan secured by James Justine Joachim, the deceased. It goes that, the deceased secured

a loan from the appellant at a tune of Tshs. 40,000,000/= whereas the respondent mortgaged his house plot No. 444 block F located at Nyamanoro with the certificate of title No. C.T.17086. on 06.01.2013 **James Justine Joachim** died. The first respondent approached the appellant and notified him over the death of their customer and made follow-up for the administrator to be appointed. Before they could settle how the payments could be furnished after the death of **James Justine Joachim**, the appellant gave notice to the 1<sup>st</sup> respondent on his intention to attach the security pleaded for the payment of the loan secured. He approached the DLHT with the following prayers:-

1. An order for a permanent injunction to restrict the respondent (now the appellant) or his agents not to attach the house located at plot No. 444 block of Nyamanoro, Ilemela.
2. That parties be ordered to meet and form a better way of repayment of the loan.
3. Costs of the case.
4. Any other relief that this honourable court can deem fit and just to grant.

The DLHT granted the applicant prayers except for the costs of the application. The appellant was aggrieved and filed this instant appeal with six grounds of appeal that: -

1. The Learned Trial Chairperson erred in law and fact in holding that the borrower/ principal debtor is now deceased without proof.
2. In the alternative, and without prejudice to the above ground the Learned Trial Chairperson erred in law and fact in holding that the principal debtor/borrower is now a deceased person while the principal debtor/borrower James Justine Joachim varies with the name that appears in pears in the death certificate and administratorship form.
3. The learned trial Chairperson erred in law and in fact for failure to hold that the Principal Debtor's death does not discharge the Respondent (the Guarantor) from his liability. In the particular, the Learned Trial Chairperson erred in law and in fact in holding that the terms he credit facility were varied upon the Respondent is discharged from the guaranteed agreement.

4. Learned Trial Chairperson erred in law and in fact by discharging the Mortgage over Plot No. 444, Block "F" registered under CT.17086 executed by the 1st Respondent in favour of the Appellant which renders the Appellant unsecured creditor hence unable to recover the outstanding amount.
5. The Learned Trial Chairperson erred in law and fact in ordering the Appellant to arrange with the Respondents how they will repay the outstanding amount without considering whether the Administratrix has already been discharged or not.
6. The Learned Trial Chairperson erred in law and fact to base his judgment on assumption that since the borrower died five months after the loan was advanced to him his business did not yield any profit and thus the Appellant is only entitled to recover the advanced amount of TZS.40,000,000/= without interest and any cost.

The matter proceeded orally between parties whereas the appellant was represented by Mr. Kyariga Advocate and the respondents afforded the service of Mr. Dionis Mwasi advocate.

Mr. Kyariga learned to advocate for the appellant was the first to toss the ball. He prays to consolidate the 1 and 2 grounds of appeal and submit separately grounds 3,4,5 and 6. He started referring this court to the case of **Makubi Doga vs Ngodongo Maganga Civil appeal No. 78** of 2019 which held that the first appellate court is entitled to re-evaluate the evidence on record and arrive at its own decision, he also prays this court to adopt the same principle.

Submitting on the 1<sup>st</sup> and 2<sup>nd</sup> consolidated grounds of appeal, the trial tribunal erred to hold that the principal borrower is now deceased without proof. He asserts that, the law is clear that who alleges must prove and the burden does not shift until the party that the onus lies discharge the burden. He cited the case of **Pauline Samson Ndawanga vs Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017. He avers that according to that the borrower was James Justine Joachim and on pages 39 to 45 of the trial tribunal records it shows that James Justine died but they brought nothing to prove including the death certificate.

Again, he asserts that another name of the deceased come up when the 1<sup>st</sup> respondent filed a case that the deceased had another name by Jonas James Kaijage. He insisted that the appellant does not know the name of Jonas James Kaijage. He claims that, the name of the borrower

was James Justine Joachim as it appears on the bank statement exhibit DE4 and the trial chairman was wrong to hold that the borrower was the deceased while the form No. 4 which was issued for the administrator was to administer the estate of Jonas James while the death certificate it was shown that the deceased was Jonas Justine Kaijage. He pointed another contradiction that on the application by the administrator stated that she was administering the estate of James Justine Joachim @Jonas James Kaijage, the names which are different from the death certificate and the certificate of administration (form No. 4). He insisted that the application in DLHT was not conformity with either the death certificate or the certificate of administration therefore the trial chairman erred to hold that it was the 1<sup>st</sup> respondent whose estate was administered.

He went on that, the trial chairman relied on the exhibits with contradictions without the same be tendered as exhibits at a trial. He referred this court to the case of **Total Tanzania vs Samwel Mgonja** Civil Appeal No. 70 of 2018 which stated that the annexure attached to the plaint or WSD are not evidence. Submitting on the contradiction of names, he cited the case of **Ally Ramadhan Bauda vs Raza Husein Ladha Damji** Civil application No. 525 /17 of 2016 that the names belongs to one person should be harmonised before filing the case. He

avers that, the 2<sup>nd</sup> respondent was not the administrator of the principal debtor. He, therefore, prays for this court to allow grounds no 1 and 2 of the appeal.

Submitting on the 3<sup>rd</sup> ground of appeal, that the trial tribunal erred in discharging the guarantor from his guarantee for the reason that the borrower was advanced the loan in accordance with the loan facility that the property in dispute was a guarantee of the loan and not the life of the borrower. He insisted that the liability of the property put as security continues until the loan is paid. Insisting, he cited the case of **Exim Bank Tanzania Ltd vs Dascar Limited and Another** Civil Appeal No. 92 of 2009 and the case of **MTK Uganda Ltd vs Housing Finance Bank Ltd**. The court held that the purpose of the guarantor is to ensure that in case the borrower dies or fails to pay the debt, the guarantor will pay the loan. He referred to the mortgage agreement that both the borrower and the guarantor are jointly and severally liable. Referring to Exhibit DE1 and DE2, the guarantor did not dispute to its terms. He also referred this court to the case of **Simon Kichele Chacha vs Aveline M. Kilawe** Civil appeal no. 160 of 2018, that parties are bound by their pleadings. He insisted that, discharging the guarantor from the liability will be altering the terms of the mortgage agreement.

He also cited the case of **Edwin Simon Mamuya Simon vs Adam Jonas** Civil Case No. 19 of 1983 TLR and the case of **UMCO Ltd vs SALU** Ltd Civil Appeal No. 91 of 2015 where among others it was held that when the agreement is put in writing no oral evidence that will be given in contradiction. He also referred to sections 100 and 101 of the Evidence Act, insisting that the death of the borrower did not alter the terms of the agreement entered and discharge the duty of the guarantor for the reason that the guarantor guarantees the loan and not the life of the borrower. He therefore prays the court to allow ground no 3 and 4.

Submitting on the 5<sup>th</sup> ground of appeal, that the trial tribunal erred ordering the appellant to arrange with the respondent on how the loan should be paid without considering the guarantor was discharged or not. He avers that according to the records, the administrator was appointed on 18.02.2013 and the decision from the tribunal was delivered on 14.06.2021 which makes 8 years and no evidence that the administrator is still administering the estate. For the reason that the administrator did not make follow up to his name, he prays this ground to be allowed.

On the sixth ground of appeal that since the borrower died within six months after he was advanced with loan he could make no profit, he claims that were a mere assumptions for the loan of 40,000,000/=



advanced was required to be paid within one year. He went on referring to exhibit DE1 clause 1.0.1 that the guarantor agrees to pay the loan in default of the borrower. He went on that for that reason, the guarantor was notified until 28.11.2014 when the bank right off the loan whereas at that time the loan stood at 75,858,829/44. Referring to the case of **Simon Kichele Chacha vs Avelina M Kilawe** he insisted that the guarantor signed the agreement with a sound mind so the court can not vary the terms. He also refer to the case of **Lulu Victor Kayombo vs Oceanic Bay Ltd & Another** Consolidated Civil Appeal No. 22 & 155 of 2020 CAT where it was stated that it was not the duty of the court to redraft the clause of the agreement but to enforce the terms when the parties are in dispute. He insisted that it was not the duty of the chairman to reframe the terms of the agreement but to enforce them when parties are in dispute.

Lastly referring to the decision of this court in **Sophia Simon vs Azania Bank Ltd** Civil Case No. 23 of 2019, he insisted that the bank is required to proceed with the recovery of the loans. In the final he prays the court to allow the appeal set aside and quash the orders of the DLHT and hold that the appellant is entitled to recover the loan by disposing of

the property pleaded as security to the loan. He prays this appeal to be allowed with costs.

Replying to the appellant's submissions, Mr. Dionis Mwasi learned counsel on the 1<sup>st</sup> ground of appeal that the death of the borrower was not confirmed, he avers that, there are two things to be considered that one, notice was sent to the guarantor in 60 days dated 21.08.2013 which means that the bank knew the borrower was no more and second, the officer who was dealing with the loan did not testify that the account of the borrower was closed and not right off. He avers that they were directed to open a new account the circumstance showed that the borrower was not alive and there is no evidence on record that the appellant bank tried to look for the borrower on the first five months after he was given the loan rather they traced the guarantor after a year. He insisted that the tribunal was right.

On 2<sup>nd</sup> ground, he replied that the appellant learned counsel raised a new issue of names which was not an issue before the trial tribunal

He went on submitting on the 3<sup>rd</sup> and 4<sup>th</sup> ground on the issue of liability of the guarantor, he cited section 81 of the law of Contract Act, that the borrower did not default but he died therefore the loan was

supposed to be taken care by the administrator of the estate of the deceased and not the guarantor.

Submitting on the 5<sup>th</sup> ground of appeal, he avers that the chairman was right to hold that parties were to settle for they had no idea if the probate case was closed or not.

In ground No 6 of the appeal, he submitted that the duty of the administrator was to pay the loan and the guarantor to be discharged. He prays the appeal to be dismissed for the trial tribunal was right.

Re-joining, the appellant learned counsel submitted that the respondent did not object that the guarantor did guarantee the borrower and the guarantor can only be discharged by the realisation of the security for the loan in default.

On the 2<sup>nd</sup> and 3<sup>rd</sup> ground, he referred to section 127(1) of the Land Act that notice of default has to be given to the mortgagor and the guarantor and the bank deal with the guarantor and on page 63 of the court proceedings show that the account was right off and not closed. He went on that the bank knows nothing that the borrower died and he has different names.

On grounds no 3 and 4 he insisted that the guarantor did not discharge his duty as the guarantor for reason that the loan was not paid

to release him. Adding on the grounds no 5 and 6, he insisted that the court was required to enforce terms and not to vary or redraft terms. He maintains his prayer that this appeal to be allowed.

After the submissions from both parties learned counsels, I am now placed to determine this appeal before me and the point for determination is whether this appeal has merit. This is the first appellate court and as submitted by the appellant learned counsel, I am aware of the principle of law referred to in his cited case of **Makubi Doga vs Ngodongo Maganga** (supra) that this court can re-evaluate the evidence on record and come up of its findings.

That being the position, I will now start determining the 1<sup>st</sup> and 2<sup>nd</sup> grounds of appeals as consolidated by the appellant's learned counsel that the trial tribunal erred to hold that the borrower is dead for the reasons that no proof of death was exhibited to the trial tribunal and the trial tribunal relied on annexure (a death certificate) that bears different names with the name of the borrower on the loan facility exhibit DE1.

Going to the records, there are four versions of the names of the borrower including first, James Justine Joachim which appears on the loan facility and the name known to the appellant. Second, the name of Jonas Justine Kaijage appears on the death certificate, third the name of Jonas James

which appears on the form No. 4 which is the certificate of administration and the fourth name which is Jonas James Kaijage which is the name used in the matter. The appellants learned counsel concern which I also find it legal is the consequence of the variation of names without legal justification. Evaluating how the contradiction appears as against the name of the borrower I find that, first, while the borrower appears by the name of James Justin Joachim, it is on records that the death certificate (annexure iv) appears that the name of the person who died was Jonas Justine Kaijage the names which without legal explanation connotes that they are two different persons. Second, the 2<sup>nd</sup> respondent who is claim to be the administrator of the estate of the borrower James Justine Joachim, was appointed and given form No. 4 to administer the estate of Jonas James (annexure iv) the name that differs to that of the borrower. Thirdly, the 2<sup>nd</sup> respondent appears on this case as the administrator of the estate of James Justine Joachim @ Jonas James Kaijage the names that did not confirm to the death certificate or the certificate of administration. It was neither the 1<sup>st</sup> respondent who was PW1 nor the administrator who was named as the 2<sup>nd</sup> defendant at the trial court who take effort to clear out the contradiction. Based on what is on record, I agree with the appellant learned counsel that there is no proof that it was

indeed the borrower who died as claimed. Despite of what is found, annexed in records that was the point of elaboration above, my findings in this point is that, PW1 was the only witness at the trial court did not exhibit that the borrower one James Justine Joachim died and defaulted to repay the loan was a result of his demise. I hold that position for the reason that, though the administrator was named as the 2<sup>nd</sup> defendant, she did not appear before the tribunal and the annexures annexed to the plaint remain untendered before the trial tribunal. In that regard, even if I could rule out that the names refer to the borrower, still no proof that Flavian Mtatiwa was the administrator of the estate as his name appears on the case or as per the death certificate and certificate of administration of the estate for they form no part of the trial court records. It is the settled principle of law that annexures are not evidence. This was stated in **Abdallah Abas Najim vs. Amin Ahmed Ali [2006] TLR 55** that: -

*"Annexures to the plaint are not exhibits in evidence; they cannot be relied upon as evidence and cannot be the basis of the decision; As the annexures to the respondent's plaint were not tendered in court as exhibits and were not tested in evidence, it was improper for the learned Regional Magistrate to base his judgment on those annexures".*

Similarly, in **Japan International Cooperation Agency v. Khaki Complex Limited** Civil Appeal No. 107 of 2004 CAT, the Court concisely stated that: -

*"This Court cannot relax the application of Order XIII Rule 7 (1) of the Civil Procedure that a document which is not admitted in evidence cannot be treated as forming part of the record although it is found amongst the papers in the record".*

There is no denying except for the documents of the appellant exhibit DE1 to DE5 which formed a party to the record for they were clearly tested for admission and subsequently admitted to the evidence. The annexures on the applicant plaint are not part of the records and it was wrong for the trial tribunal to rule out in the judgment as reflected on page 10 of the trial tribunal judgment that indeed the borrower died. To this end, I find merit in this ground.

Based on my findings, and in fact in line with the 3<sup>rd</sup> ground of appeal guided by the principle in **Diamond Motors Limited Vs K-Group (T) Limited Civil Appeal** NO. 50 OF 2019 CAT that this being an appellate court can interfere with the trial court findings and evaluate the evidence adduced and make its decision. I am content with what transpires at the trial tribunal, the evidence adduced and the judgment and orders of the

tribunal. In line with the 3<sup>rd</sup> ground of appeal, the trial tribunal erred discharging the guarantor from his guarantee for the reason that the borrower was advanced the loan under the loan facility that the property in dispute was a guarantee of the loan. The appellant insisted that the liability of the property put as security continues until the loan is paid. The respondent opposed to the appellant's assertion claiming that the tribunal was right.

In the trial tribunal records, the appellant tendered exhibit DE1 the loan facility and DE2 the mortgage agreement between the 1<sup>st</sup> respondent and the appellant. In DE1, it is not disputed that the borrower secured a loan and the 1<sup>st</sup> respondent was a guarantor. Among of the terms of the loan facility was item No. 7 which provides for the security of the loan and the house in dispute was security as provided for under item 7(i) and the 1<sup>st</sup> respondent in person under item 7(iii). In exhibit DE2 which is the agreement between the appellant and the 1<sup>st</sup> respondent on clause 1.01 reads:-

*"...the mortgagor hereby covenants to the bank in case the borrower fails to pay the amount outstanding on the facility secured hereunder on the due dates of payment and discharge all obligations and liabilities..."*



It is therefore the principle of law that parties in the agreement are bound by their agreed terms. This was stated in the cited case of **Lulu Victor Kayombo vs Oceanic Bay Ltd & Another** Consolidated Civil Appeal No. 22 & 155 of 2020 CAT, that it was not the duty of the court to redraft the clause of the agreement but to enforce the terms when the parties are in dispute. I agree with the appellant's learned counsel that it was not the duty of the chairman to reframe the terms of the agreement but to enforce them as appears in exhibits DE1 and DE2 respectively. The 1<sup>st</sup> respondent cannot evade responsibility that arose out of the agreed terms and failure to honor his agreed terms after the notice was duly issued by the appellant over the default of the borrower exhibit DE3. I also find this ground with merit.

In the circumstance, and based on the law any party that wanted the court to rule in its favour must give evidence as to the existence of such facts. Section 110 (1) of the Evidence Act, Cap. 6 [R.E 2019] that: -

*"... Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

It is my finding that the evidence in the record does not support the judgment of the trial tribunal and the orders given. From what I have

encountered above suffice to dispose of this appeal and determining other grounds will be of academic relevance but will not change the stand of this appeal which stood allowed. In the process I proceed to allow the appeal, the judgment of the trial tribunal is hereby quashed and I order the appellant to proceed with the recovery of the loan from where it ended.


It is so ordered.

**Dated at Mwanza** this 7<sup>th</sup> day of October 2022.



  
**R.B. MASSAM**  
**JUDGE**  
**07/10/2022**

**COURT:** Judgment delivered on the 06<sup>th</sup> day of October 2022 in the presence of Mr. Kyariga Advocate for the appellant and Mr. Kyariga holding brief for Mr. Dioniz for the respondent.

  
**R.B. MASSAM**  
**JUDGE**  
**0/10/2022**