

A sigh of relief for financial institutions as restrictions' on recovery lifted.

The Court of Appeal recently in the case of CRDB Bank Plc versus True Colour Limited and Another, **Civil Appeal No 29 of 2019** overruled the position taken by the High Court of Tanzania (Commercial Division) in **Bank of Africa Tanzania Limited versus Rose Miago Asea Commercial Case No.138 of 2017**.

The High Court of Tanzania (Commercial Division) had decided in the Rose Miago case, that Lenders are not allowed (even through courts) to recover loans by means other than the value of the security accepted when the loan was issued.

The assumption is that once a security is accepted and the Borrower defaults, the Lender is only allowed to recover the amount equal to the value of the security. If the value of the security at the time of recovery is short of the outstanding defaulted amount, then the Lender is not allowed to seek alternative assets of the Borrower for purposes of satisfying the outstanding defaulted amount.

The Rose Miago decision entailed the following:

1. Financial institutions stood to suffer losses on the unpaid accrued interests and penalties in case the value of the charged interest is lower than the outstanding defaulted amount.
2. If the value of the security charged depreciates for some reasons, the Lender should be happy with the value fetched even if the value may result into a nil payable amount.
3. The decision of the Court disregarded facility agreements as independent arrangements in which Borrowers are liable over and in addition to the signed mortgage deed and other security agreements.

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The Court of Appeal in **CRDB Bank Plc versus True Colour** has reversed that position by making two major observations:

1. Firstly, It overruled the High Court decision by cementing and serving a crucial authority to other Courts.

The Court observed that, the High Court decision in **Rose Miago** was neither premised on any provision of the law nor judicial precedent.

In its own words the Court stated “we have noted however that, the said decision is not based on any provision of the law leave alone section 133 of the Land Act,1999. Besides, it is not premised on any judicial precedent. Seemingly, it was based on the trial judge’s interpretation of clause 3.01 (a) of the relevant Mortgage Deed” .

2. Secondly, the Court pronounced the position taken in **Rose Miago’s** decision as erroneous.

It stated that “Much as we appreciate, as correctly submitted for the first Respondent that, a mortgage is made for the purpose of securing the repayment of the loan, it is not the law that; in the absence of negligence or bad faith, a mortgagee who fails to realise the full loan from proceeds of the mortgage is barred from claiming the outstanding balance. The common banking practice has been to the contrary and there are many authorities to that effect” .

The Court of Appeal was also inspired by another persuasive decision of the high Court in the **National Bureau De Change Ltd versus Tanzania Petroleum Products Ltd and others (2002) TLR 430** decision.

The decision stated “In such a situation there is nothing barring the decree holder from looking around in search of the judgment debtor’s other property to satisfy the decree. Mr. Galikano suggests in a situation where no one shows a spec of interest in the mortgage property, hence failing to attract any buyer at all, The decree holder would remain with a dead decree and be barred from looking for other means of executing the same on the judgment debtor, even if the latter has other obvious properties or is loaded with fat accounts? The absurdity of this needs no orchestration.”

3. The Court concluded by stating that the trial judge was wrong in relieving the first Respondent from paying the outstanding loan balance.
4. From this decision, secured Lenders can now seek Court’s orders to go for other properties of the Borrowers in the event the value of the security falls short of the amount owed.

What should Mortgagees do?

- i. Ensure that the prescribed procedure for recovery is duly followed and ensure that the qualified Auctioneer is appointed to carry out the public auction.
- ii. Avoid committing negligence or act on bad faith when realizing the facility secured by a mortgage, since such negligence would be a defence against the Lender/mortgagee by the Borrower/mortgagor to recover any other outstanding amount.