

The court has reaffirmed its position in shelving the rule on Non-Recourse Loan as the Court of Appeal of Tanzania gives a go ahead for Lenders to impound personal assets of Borrowers if the sale proceeds of charged securities is insufficient to satisfy the debt.

The Court of Appeal recently in the case of Bank of Africa Tanzania Limited versus Rose Miago Asea, **Civil Appeal No 214 of 2019** overturned 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**.

In this decision 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.

In its decision the High court judge observed that, by signing the Mortgage Deed, the Lending bank has accepted that the security charged was sufficient to secure all or such sums that would be due and owing by the Borrower to the lending bank.

The assumption made by the High court trial judge is that the value of the security was sufficient to cover the amount specified in the facility letter. If consequently it is found that the value of the security falls short the amount specified in the facility letter or if the Lender disposes the security at the price less than the specified amount, the Lender must blame itself for undervaluing the security either before or at the time of sale. It cannot come back to the court to seek to recover the loan by means other than the security accepted.

The High court's 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 trial 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 Bank of Africa Tanzania Limited versus Rose Miago Asea, Civil Appeal No 214 of 2019 in which the appellant bank was represented by B&E Ako Law, has reversed that position by making three 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 trial judge erred in holding that the Appellant could not claim from the Respondent, the balance of the outstanding credit facility which remained after receipt of the realised amount from the sale of the mortgaged property. The court has made it clear that the Borrower have an obligation of repaying the whole amount in the credit facility including interests and penalties in case of default of repayment in accordance with the agreed schedule.

2. The Court has reaffirmed its position in its other previous decision one of them being in the **National Bureau De Change Ltd versus Tanzania Petroleum Products Ltd and others (2002) TLR 430** that in absence of evidence of bad faith or fraud in the conduct of the auction, the Lender has the right to claim for the balance of the outstanding amount from the Borrower. This position is in line with the position taken by the same court in its previous decisions one of them being in **CRDB Bank Plc versus True Colour Limited and Another, Civil Appeal No 29 of 2019.**

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 during auction.

Points to take home?

- i. Borrowers to ensure compliance to the terms of the facility agreement and repayment schedules.
- ii. Borrowers to take the notices and demands issued by the Lenders seriously and work into servicing their loan obligation.
- iii. By not paying the loan in terms of the agreed schedule, Borrowers will expose not only their charged securities but also other assets in case charged securities are insufficient to recover the entire outstanding liability.
- iv. Lenders to 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 by the Borrower/Mortgagor to recover any other outstanding amount