

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL CASE NO. 72 OF 2014

BETWEEN

STANBIC BANK (T) LTD -----PLAINTIFF

VERSUS

RADI SERVICES LTD -----DEFENDANT

JUDGMENT

SONGORO, J

Stanbic Bank (T) Limited, the plaintiff filed a suit claiming a sum of USD 82,338.28 being un- paid outstanding loan from Radi Services Limited the defendant. In the plaint the plaintiff`s bank claim that, it issued loan to support defendant business but the loan has not been repaid. Plaintiff therefore prayed for the following orders;-

- a) That, the defendant be ordered to pay a sum of USD 82, 3338.28 being outstanding loan plus interests.
- b) The defendant be ordered to pay interest on the decretal sum at the court rate.
- c) That, the defendant be ordered to pay costs in full.
- d) That, the defendant be ordered to pay any other reliefs the Honourable court shall deem just and fit to grant.

In response to the plaintiff claims, Radi Services Limited the defendant filed a written statement of defence and opposed the claims on the ground that, the granted loan was fully paid.

Also the defendant company contested that, the plaintiff failed to observe terms of credit facility agreement. It was the defendant further reply that, since the plaintiff`s claims has no merit, defendant applied that, the plaintiff suit be dismissed for lack of merit. In light of the plaintiff claim and defendant defence the court in consultation with the parties drew the following issue for determination.

- 1) Whether the defendant has cleared by payment all the loan facility extended by the plaintiff.
- 2) To what reliefs

So, the plaintiff suit was decided on the basis of the above mentioned agreed issues. During the hearing the plaintiff was represented by Mr Fredrick Mbise, Learned Advocate; while the defendant was represented by Mr. Deogratias Ogunde, Learned Advocate.

To start with, the Plaintiff bank called **John Lukiko who testified as PW1** and informed the court that, he is a Manager Recovery of the plaintiff's bank. He then told the court that, defendant's company was granted a loan of USD 64,000 through a loan term facility letter dated 23/8/2005. The loan facility letter was signed by Mr. Abdallah H. Abdallah and Rick E Kikoti for and on behalf of Radi Services Limited, the defendant.

PW1 maintained in his witness statement that, as a security for granted loan, the defendant pledged a debenture. He further stated that, on the 27/12/2005 the credit facility was renewed and defendant was granted another temporary overdraft facility of USD 70,000 plus a revolving fund of USD 199,000. Also PW1 claimed that, by 24/1/2008 part of the loan was still un-paid and outstanding balance remained to be a sum USD 64,390.89

The witness then maintained in his testimony that, since part of the loan remained unpaid for a long time by the defendant, the plaintiff's bank relying on the Bank of Tanzania Financial Institutions(Management of Risk Assets) Regulation, 2008 on the 24/4/2010 write-off the debt from the defendant bank statement with an intention of keeping off bad debts from the balance sheet to avoid overstatement. The witness explained that, the defendant write off debt was transferred to bank profit and loss account for recoveries measures. The witness maintained in his evidence that, the write off of the defendant debt, did not mean that, there was a waiver of payment of debt.

PW1 then told the court that, the even in April, 2010 he contacted and reminded Mr. Abdallah H. Abdallah, the director of Radi Services Limited about the debt and he

paid shs 10,000,000/= as part of the loan and the paid amount was posted into the bank profit and loss account as per banking practices. PW1 maintained that, the defendant claim that, the entire loan has been re- paid is not true and the truth of the matter is a sum of USD 64,390 remained un-paid continue to attract interests. . Mr. Lukiko indicated that, by 31/3/, 2010 before the loan was written off the outstanding balance was USD 82,338.28

To support the plaintiff claim of USD 82,338.28 PW1 tendered a term loan facility which was admitted as Exhibit P1, Deed of Debenture admitted as Exhibit P2, A Certificate of Registration of Charge was admitted as Exhibit P3, Banking Facility Letter was admitted as Exhibit P4 and a deed of variation was admitted as Exhibit P5.

Other exhibits tendered by the PW1 was a Certificate of Registration of a Charge, Exhibit P6 a Bank Statement of Radi Services Ltd which was admitted as Exhibit P7, and a Notice to the defendant to pay outstanding loan was admitted as Exhibit P8. PW1 was then cross examined by defence counsel, and a he finally closed his testimony and the plaintiff case was closed.

In response to the plaintiff`s claim, the defendant defended himself by summoning Abdallah Hashim Abdallah who testified as DW1. Relying on his witness statement DW1 told the court that, plaintiff bank extended a loan facility which was used to support business of supplying and installation of generators to several institutions like TANESCO, TAMESA, the Court of Appeal of Tanzania , Ministry of Education and Institute of Accountancy Arusha and others. DW1 then told the court that, payments from the above mentioned institution was supposed to be paid through the defendant bank account which was on the plaintiff`s bank.

On mode of repayment of the loan, DW1 told the court that, plaintiff`s bank has an obligation of deducting the claimed sum directly from the defendant`s bank account. Then DW1 stated the loan was fully repaid and they even received an auditor`s report which shows were not indebted by the plaintiff bank.

DW1 maintained in his defence that, as per their agreements all payments of services rendered to above mentioned institutions were being channeled through the plaintiff's bank and the bank uses to make deductions. The witness relying on auditor's report supplied to them they are not indebted. It follows therefore that, the plaintiff is estopped from claiming the prayed amount.

To substantiate his point that, they received an audit report DW1 tendered a letter from TANSBOT Auditors dated 28/1/2010 which was admitted as Exhibit D1, A reconciliation Bank Statement which was admitted as Exhibit D2.

After DW1 closed his testimony the defendant called Waziri Magendo who testified as DW2 who told the court in his witness statement he working in the auditor firm known as TANSBOT.

The witness then said he wrote a letter to Stanbic Bank reference No TAL/STANBIS/01/11/ requesting to be furnished the outstanding debt of Radi Services Limited for the year ended 31st December, 2010 and were informed by the plaintiff bank that, the outstanding debt is zero. It was part of DW2 testimony that, based on information and statements received the plaintiff bank they prepared audited accounts of defendant's showing that, they have no debited to the plaintiff bank.

To support the defendant's defence that, the defendant is not in-debited, DW 2 tender a letter reference TAL/STANBIC /01/11 dated 3/1/2011 which was admitted as Exhibit D2 which it states the defendant is not in-debted. The DW2 was cross examined and re-examined and close his defence.

After DW2 Closed his testimony the Defendant's case was closed. After plaintiff and defendant's closed their cases with the leave of the court were allowed counsels from both side to make their closing submissions.

Submitting on behalf of the plaintiff Mr. Fredrick Mbise, on the 1st issue of whether or not defendant paid for all his loan relying on the testimony of PW1 and Exhibit P1, he

explained that, the defendant was granted a loan of USD 64,000, which was secured by debenture which was payable within six months from 23/8/2005.

Next the plaintiff's counsel also relying on the testimony of PW1 and Exhibit P4 pointed out that, on the 22nd May 2006 the defendant was granted temporary overdraft facility of USD 70,000 and additional revolving fund of USD 199,000.00 was granted to the defendant to support his business.

The plaintiff counsel then relying on the testimony PW1 submitted that, after the defendant received the said loan, he did fully comply with re-payment terms. He then indicated by 24th January 2008 a sum of USD 113,945.58 cent was paid and the sum of USD 82, 338, 28 cents remained un- paid. The counsel relying on the testimony of PW1 submitted that, due to the defendant consistent default in paying the outstanding loan, the plaintiff relying on Rule 7 of the Bank of Tanzania of the Financial Institutions (Management of Risk Assets) Regulation, 2008 write off the debt from the defendant bank account, and indicated the balance as zero cent. Mr. Mbise relying on PW1 submitted that, write off of debt was done by the plaintiff in order to abide by Bank of Tanzania Regulation which requires banks to avoid overstatement of income.

He then clarified that, the act of writing off debts in the defendant bank account to read zero cent was just is a mere an accounting procedure and was not waive of the outstanding debt.

The plaintiff's counsel relying on a court decision in Commercial Case No 198 of 2002 between the National Bank of Commerce Ltd Versus Universal Electronics and Hardware Ltd and two others TLR 2005 at page 257 whereby Hon. Kalegeya J (as he then was) insisted that, the writing off of debt was just an internal mechanism intended to clear the bank books of accounts but not to discharge customers' liability, Mr Mbise prayed to the court to find that, the defendant's liability on outstanding loan is valid and payable.

Commenting on testimony of DW2 that, the defendant company is not in-debted the plaintiff's counsel prayed to the court to disregard it because the witnesses while being

cross-examined admitted that, is not a certified accountant or auditor and was still studying CPA studies but is working in the accountant firm which made an inquired defendant debt from the plaintiff`s bank.

So it was the plaintiff counsel views that, DW2 lack requisites qualification of making and submitting account and audit reports. Therefore, he prayed to the court to disregard the testimony of DW2 on in-debteness of the defendant and decide issue No 1 by finding that, the defendant has not cleared its re-payment of outstanding loan facility extended by the plaintiff bank.

Turning to the second issue of what relief are parties entitled to the plaintiff`s counsel indicated that, since there is evidence that, the loan has not been fully repaid, and the debt was not written off or waived the defendant be ordered pay the outstanding sum of USD 82,338.28.

On his part, Mr.Mafwele for the defendant submitted on 1st issue by insisting that, the there is no doubt that, Radi Service Ltd was granted loan by the plaintiff`s bank and defendant has cleared all his debts on granted loan.

To support his point the counsel referred the court to a plaintiff report submitted to Transcott Auditors report ending 31st December, 2009 Exhibit D1 which shows the bank is not in-debted. He then explained that, a letter which was issued reads the bank accounts of defendant has a zero debt which means the defendant was not in-debted

. Relying on a decision in the case of Ramadhani Nyoni Versus Haule and Company 1996 TLR decided by Hon Mkwawa J (as then was) the counsel argued that, procedural rules should not be used to defeat justice, and bank technicalities should not be used to deprive the defendant`s rights.

Also the Defendant`s counsel relying on Section 123 of the Evidence Act Cap 6 [R.E 2002] insisted and prayed that, the plaintiff bank should be estopped from denying what it stated to DW2 that, the defendant is not indebted. On a plaintiff claim that, defendant

paid a sum of shs 10,000,000 to the plaintiff's bank and that, shows the defendant is indebted, the defendant's counsel maintained the alleged sum was not even reflected in the defendant bank statement which was tendered. Therefore, the defendant is not indebted to the plaintiff.

On what relief are parties entitled the defendant submitted that, the plaintiff failed to prove its claims beyond any reasonable doubt. So the plaintiff case should be dismissed.

The court considered plaintiff's claims of unpaid loan of USD 82,338.28 and defendant denial and observe that, it is trite law that, under Section 110 (1) and (2) of the Evidence Act, 1967, Cap 6 R.E. 2002 whoever request a court to give judgment in his favour as to any legal right on the existence of any fact which he asserts, must prove that, the fact exist. The same legal position was stated by the Court of Appeal of Tanzania in a decision in the case of Wolfango Dourado V. Tito Da Costa, ZNZ Civil Appeal No. 102 (CA) (unreported) where the court insisted that;

"Whoever alleges a fact, unless it is unequivocally admitted by the adversary has to prove it, albeit on the balance of probability".

Guided by the above cited legal principle the court find that, a burden of proof on claims raised in the plaint, lies on the plaintiff's bank.

With that, clarification I revisited the 1st agreed issues of whether defendant is in-debted to the plaintiff bank. In further perusing the testimonies of PW1 and DW1 the court find both witnesses agreed that, the defendant was granted loan. PW1 and DW 1 testimonies that, the defendant was granted loan is supported by Term Loan Facility Letter reference FM/PT/RAD/23/08/2005 Exhibit P1 which shows a term loan of USD 64,000 was granted.

Then the court find Paragraph 4.1 of Exhibit P1 it was agreed that, there will be short loan and its term of re-payment in the following words;

The short term loan is to be repaid in full payment at the end of six months period after the drawdown date. Interest shall be serviced

through the Borrower`s account held with the bank on monthly basis.

Further paragraph 5.1.1 of Exhibit P1 it was agreed that;

Interest on the Short Term Loan will be charged at United States Dollars Bank`s Base Lending Rate plus 2.25 i.e 9% per annum. The Bank`s base Lending Rate prevailing from time to time currently at 6.75%

Likewise court finds the testimony of PW1 that, defendant was granted additional two loans is supported by Banking Facility Letter dated 22nd May, 2006 Exhibit P4 where temporary overdraft facility of USD 70,000 and a Revolving Contract Financing of USD 199,000 was granted to the defendant with a purpose of financing the borrower working capital and for the purpose of financing borrower specific contracts. Also item 3.1 of Exhibit P4 there was a promise of repayment which read as follows

"The facilities are payable strictly on demand in which event the relevant facilities shall immediately become due and payable and the Bank shall not be obliged to give any notice in making, or prior to, demand".

So from Exhibits P1 and P4 which were loan agreement the court find both the plaintiff and defendant exchanged promises. The plaintiff promised to grant loans to the defendant. While the defendant promised to re-pay loan and interests.

The court find since from Exhibits P1 and P4 there is no dispute that, loans were granted to the defendant with a promise of re-payment the loan in full, , the court was now expecting that, the defendant to have credible evidence showing that, he fulfilled his promise of fully re-payment of the loan.

However when the court perused a defendant bank statement Exhibit D2, it found that, on the column of 22/4/2010 Radi Services Limited the defendant has a remaining outstanding balance was USD 82, 338. Then the next column in the same Exhibit D2

there is an entry which reads the remaining balance was 0 cent, without any entry indicating that, the defendant paid USD 82,338 to off-set his debt.

The court has considered the testimony of DW1 that, the loan was being deducted from their bank account and the loan has been fully repaid and the auditor report shows that, and finds any reasonable man who reads a bank statement which was submitted by the defendant Exhibit D2 would easily realized that, the outstanding debt by 22/4/2010 was USD 82,338 then the following column reads zero cent. No payment was paid to offset a sum of USD 82,338. With that, evidence even if the court consider the testimony of DW1 that, outstanding loan was debited from the plaintiff bank account, still the court has come to the conclusion that, the debt was not fully discharged because no payment be made to offset USD 82,338 which was outstanding in 22/4/2010.

It is in this respect the court find in view of the above mentioned two entries which shows defendant has a debt of USD 82,3338 and the second one shows there is remaining balance is Zero cent, convinces the court that, in the absence of any payment of USD 82,338 to offset the outstanding balance, testimony of PW1 that, the plaintiff`s bank write off a debt of USD 82,338 appearing in the defendant`s bank statements and transferred to other bank accounts for recoveries appears to be the only reasonable explanation as to why the defendant bank statement reads zero cent.

It seems to me if the granted loan has a condition of repayment like the ones appearing in Clause 4.1 of Exhibit P1 and Clause 3.1 and loans has not been fully repaid, was not and there is no any waiver on repayment of the loan, is certainly defendant was under obligation to repay the debt plus and interests which was due as per his promises.

In the absence of proof re-payment of the loan in the bank account or production of bank pay slips, or receipts, or invoices the court is left with the position that, loan plus was not fully been discharged.

The court has assessed and weighed evidence that, the defendant bank statement, Exhibit D1 read zero cent and find that, has been well explained by PW1 that, there was a write off of debt from the defendant bank statement because it was long overdue and according to the Bank of Tanzania Regulations were required to *write it off* and find other means of pursuing recovery of bad debt and being convinced as the only reasons why the defendant bank statement read zero.

On the testimony of Waziri Magendo DW2 who told the court in his witness statement that, the defendant was not in-debted I find his evidence to minimum because it not based on the defendant`s bank account Exhibit D2 which shows a debt of USD 82,336 and suddenly the account turned into zero cent without payments being made. It appears was not aware of the Bank of Tanzania Financial Regulation, which requires write off of bad debts.

This court in the case between National Bank of Commerce and Universal Electronic and Hardware Ltd and two others [2005]TLR P 258 was faced with a situation when granted loan was unpaid and the debt was write off from the bank statement. The court actually decided that, where the bank loan was granted and fully repaid even if bank account reads zero cents that, does not mean that, the bank liability was discharged. Indeed in the cited case Hon Kalegeya J (as he then was) held that;-

“The writing off the debt was just an internal mechanism intended to clear banks book , but not to discharge debtors from liability, it was an exercise allowed by the Bank Guideline Vide GN 39 OF 2001 providing debt or loss write offs but they do not discharge customers liabilities as such”

Guided by the above –mentioned court decision, I also find that, since the defendant did not fully re-pay his loan as his bank statement which shows USD 82,335 were due and payable and then the balance sheet shows the debt is zero cent, did not discharged the defendant from paying the outstanding debt.

I will also add the general rule on repayment of bank loan is that, a debtor must repay fully his debt to bank, and must ensure his payment has been fully acknowledged by receipts or pay slips or in his bank statements.

Since I find there was no any entry in the defendant`s bank statement Exhibit D2 which shows USD 82,335 was fully repaid the court answer on the 1st agreed issue by finding and deciding that, the defendant is indebted to the plaintiff bank to the sum of USD 82,336 as they appears in Exhibit D2.

I will add that, even if the bank write off the debt from the defendant bank statement, it is plain clear as per the case of Jacobs Versus Batana and Generals plantations Trust (1924) 1 XH . 287 cited in the National Bank of commerce ltd Versus Universal Electronics and Hardware Ltd and two others 259 at page 264 that, the principle of estoppel is inapplicable as it cannot be used to stop one from asserting his rights So the court find and decides that, defendant is indebted to the plaintiff bank.

Moving to the second and last agree issue of what reliefs are partied entitled too, the court find on the strength of Clause 4.1 of Exhibit P1 and 3.1 of Exhibit P4 , defendant promised to repay loans , but as per Exhibit D3 a bank statement a sum of USD 82,336 remained due and un paid to-date. Bearing on mind Clause 4.1 of Exhibit P1 and clause 3.1 of Exhibit P4 the defendant agreed to repay the loan. So due defendant promises of repaying the loan, pursuant to Section 37 of the Law of Contract Cap 345 was contractual bound to fulfil his promises of repaying the loan. In deed the section stated that, and I quote;

The parties to a contract must perform their respective promises, unless such performance is dispensed with or excused under the provisions of this Act or of any other law.

Therefore going with the provision of Section 37 of the Law of Contract Act, which requires parties to the contract to fulfil his promise, I find the defendant was contractual bound to fulfil his promises of paying his monthly instalment due from loan granted without fail.

Courts in several decisions including a decision in a case of Edwin Simon Mamuya Versus Adam Jona Mbala [1983] T.LR 410 at 414 consistently insisted that;

“Once the parties bind themselves in contract for a lawful consideration they are obliged to perform their respective promise
“

Guided by the above mentioned decision I also find the defendant by promising to repay granted loan in full as per clause 4.1 of Exhibit P1 and clause 3.1 of Exhibit P4, he was under obligation to fulfil his respective promise of fully repaying the loan and interests due.

For the above stated reasons, the court find and decide in 2nd agreed issue by stating that, since the defendant who was a borrower was under contractual obligation to fulfil his promise of repaying the loans in full plus interest, but the promise to repay the loan was not fulfilled.

By failing to repay his monthly instalments the defendant committed series of breaches on items 4.1 of Exhibit P1 and clause 3.1 of Exhibit P4 which required to pay his monthly instalments. Taking into account defendant bank statement Exhibit D3 shows that, by 22th April 2010, the defendant has an outstanding un -paid arrears of USD 82,336 which was not fully paid, but was transfer to other accounts for recovery I find the bank has proved its claims of USD 82,336. 28 as outstanding debts on the balance of probability on outstanding loan. So I hereby enters judgment and decree against the defendant as follows;-

- 1) The defendant pays the plaintiff bank a principal sum of USD 82,336.28 as outstanding loan.
- 2) Further, the defendant is hereby ordered to pay the plaintiff an interests on the granted sum at the rate of 11% per annum from the date the suit was instituted to the date of judgment.
- 3) Furthermore, the defendant is ordered to pay the plaintiff an interests of 12 % per annum on the decretal sum from the date of judgment to the date decretal sum will be paid in full.
- 4) Next the court orders that, the plaintiff's bank is at liberty to exercise its right under debentures instruments or any security or guarantee and realized its debts which are due.
- 5) The defendant is ordered to pay the plaintiff costs of pursuing the suit.

Finally the court decides that, the plaintiff suit succeeds as explained above, Right of appeal is fully explained to the parties

Dated and Delivered at Dar es Salaam on the 2nd day of January, 2018.



A handwritten signature in dark ink, appearing to be "H.T. Songoro".

H.T. SONGORO
JUDGE.

The Judgment has been delivered in the presence of Mr. Sylvester Korosso, Learned Advocate holding a brief of Mr. Ogunde, Learned Advocate of the defendant, Mr. Abdallah Principal officer of the plaintiff company, and in the absence of the plaintiff bank and Mr. Mbise Learned Advocate