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

COMMERCIAL CASE NO 99 OF 2015

BETWEEN

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

VERSUS

NAM ENTERPRISES LTD ----------1ST DEFENDANT
ALEX STEPHEN LUKUMAY ----------2ND DEFENDANT
ELIAS STEPHEN LUKUMAY----------3RD DEFENDANT
NAMMNYAKI STEPHEN LUKUMAY----------4TH DEFENDANT
STEPHEN KORDUNI LUKUMAY----------5TH DEFENDANT

JUDGEMENT

SONGORO, J

Stanbic Bank Tanzania Ltd, the plaintiff instituted a suit claiming that, it granted several loans and overdraft facilities to NAM Enterprises Limited, the 1st defendant and so far part of the loan has remained outstanding and unpaid

Further, the plaintiff claim that, Alex Stephen Lukumay, Elias Stephen Lukumay, Namnnyaki Stephen Lukumay and Stephen Korduin Lukumay the 2nd, 3rd 4th 5th defendants who guaranteed the 1st defendant to secure loans and credit facilities also have defaulted to repay the loan as per their promises as guarantors. Plaintiff is therefore praying for orders against all defendants as follow;-

1) Judgment be entered in favour of the plaintiff to the sum of USD 2,479, 005.58.

2) Interest on the aforesaid amount accruing from the outstanding loan of 24% per annum from the date of institution of the suit until the date of judgment be granted.

3) Interest as above on the decretal sum post judgment be granted

4) Such further orders or reliefs the court deems just, equitable and convenient.

In his response, to the plaintiff`s claims, five defendants filed a joint written statement of defence and denied all plaintiff`s claims.

Further, defendants opposed plaintiff claims by stating that, in amalgamation of loans, the plaintiff`s bank committed errors and mistakenly treated some of defendant`s withdrawals, as overdraft. So, the plaintiff was therefore put on strict proof.

The court after considering the plaintiff claims and defendant defence in consultation with counsels from both sides, it framed the following as issues for determination;-

a) Whether or not there was loan facilities which was availed by the plaintiff to the defendant and what were its terms.

b) Whether or not there was a breach of terms of the loan facilities by either party

c) Whether or not the loan facilities have been repaid in full,

d) What reliefs are parties entitled too.

So, the plaintiff suit was heard and concluded on the basis of the above mentioned agreed issues.

During the hearing of the suit, the plaintiff was represented by Mr. Dilip Kesaria, Learned Advocate while defendants were being represented by Mr Muganyizi and Mr. Stephen Mosha Learned Advocates.

In pursuing its claim, the plaintiff bank called only one witness namely Shanul Fernades who testified as PW1, and tendered several exhibits.

In her testimony PW1 introduced herself as a Business Solution and Recovery Manager of the plaintiff`s bank. Then relying on paragraph 3 of her witness statement PW1 informed the court that, on or about 12/7/2011 the plaintiff bank granted the 1st defendant the following loan facilities ;-

i. A sum of USD 1,000,000/= as Medium Term Loan granted on 12/7/2011
ii. An existing Vehicle Assets Finance (VAF) of shs 683,207,539.84.
iii. An existing overdraft facility of shs 250,000,0000/=
iv. An existing performance guarantee of shs 36,046,200
v. An existing term loan of USD 342, 521.15
vi. Temporary overdraft facility limit of shs 160,000,000/= and USD 50,000
vii. Additional credit facility of shs 90,000/= to finance the purchase of trucks and trailers which was repayable within 30 months.

Further, PW1 stated in paragraph 4 of her witness statement that, granted loans and credit facilities issued to the 1st defendant was to be re-paid on monthly instalments and defendants pledged securities to secure re-payment of granted loans and overdraft facilities. .

The witness clarified that, pledged securities to the plaintiff`s bank were mortgaged property on plots No 46/1a/A/2 and 46/Ib/IA/B Pugu Road which has a Title No 186075/26, two debentures instruments and unlimited personal guarantees of four defendants namely Alex Stephen Lukumay, Elias Stephen Lukumay, Namnyaki Stephen Lukumay, Stephen Korduni Lukumay to cover whatever amount which may be due from the 1st defendant bank liabilities and other expenses

It was part of the testimony of PW1 that, the 1st defendant who was a borrower failed to comply with repayment of credit facilities on monthly instalments and loans as per his promises in credit facilities letter. And by the moment the suit was filed a sum of USD 2,479, 005.58 was still outstanding. The witness also insisted that, even the 2nd 3nd 4th and 5th defendants who were guarantors of the 1st defendant were aware of the default but failed to re- pay the outstanding loan as per their deed of guarantees.

PW1 maintained in her testimony that, due to the defendants failure to repay the loans as per terms of the loan agreement, the loan and deed of guarantees the outstanding loan even after amalgamation the amount due is USD 2,800, 000 and has continued to attract interests and to be secured by the same securities and guarantors.

PW1 closed his testimony by informing the court that, all defendants have defaulted to pay the outstanding debt and are liable

To prove plaintiff s ` that, 1st defendant was granted loans and overdraft facilities, PW1 tendered Loan Facility Letter which was admitted as Exhibit P1, Then relying on clause 6.1 of Exhibit P1 the witness explained that, defendants securities which were pledged to secure the loan included a mortgage on Plots No 46/1a/A/2 and 46/1b/1AB of Pugu Road Dar es Salaam. PW1 also tendered a deed of debenture of fixed and floating assets of the company.

Next, PW1 tendered as exhibit deeds of Unlimited personal guarantee which includes letters, of Alex Stephen dated 9/6/2010 which was admitted as Exhibit P2, guarantee letter of Elias Stephen Lukumay dated 9/6/2010 which was admitted as Exhibit P3, guarantee letter of Namnyuki Stephen Lukumay date 9/6/2010 which was admitted as Exhibit P4, guarantee letter of Stephen Korduin Lukumay dated 9/6/2010 which was admitted as Exhibit P5 and guarantee letter of Martha Stephen Lukumay dated 9/6/2010 which was admitted as Exhibit P6. All five deeds of personal guarantees of the 2nd 3rd 4th and 5th defendant's bear's signatures, and passport size of photograph of each guarantor.

Other exhibits which PW1 tendered were credit facility letter dated 13th April 2012 which was admitted as Exhibit P7, a term loan letter dated 4/11/2013 which was admitted as Exhibit P8 , A bank facility letter and Deed of variation dated 4/11/2013 which was admitted as Exhibit P9, credit facility letter –Variation Agreement which was admitted as Exhibit P10, and a bank statement of the 1st defendant of Accounts No 9120000489911, 912000462363 and 912000156335 which were collectively admitted as Exhibit P11.

Furthermore, PW1 tendered copies of two default notices dated 9/4/2014 alleged to have been sent to defendants, requesting defendants to remedy the default which was admitted as Exhibit P12, Eco Bank letters addressed to the plaintiff`s bank which were admitted as Exhibits P13 and P14.

Next, PW1 was cross examined by Mr Muganyizi Learned Advocate of defendants and maintained in her testimony that, granted loans were amalgamate into one term loan and still un-paid by defendants.

After PW1 testified the plaintiff bank closed its case on the 15/5/2017 and defendants were invited to lead their evidence in support of their defence. But upon the closure of plaintiff case, Mr. Muganyizi Learned Advocate of defendants prayed for an adjournment, so that, he may bring defence witnesses to testify. Acting on request of the defence counsel, court made an order adjournment of the case to 20/6/2017 so that, defendants may bring their witnesses to testify

Thus, on 20/6/2017 when the case was called for the defence hearing, Mr. Muganyizi made a U-Turn and reported that, he was unable to proceed with defence and assign two reasons. First, he prayed to amend the written statement of defence.

Secondly, he reported that, has only one defence witness Julius Mugaragu who is sick and admitted at the hospital for treatment. Thus when was asked by the court to disclose the name of hospital which Julius Mugaragu was admitted, so that, the court may put its record properly, Mr. Muganyizi replied that, he did not have any answer in which hospital the witness was admitted for treatment. He further claim to have received information on sickness of his witness from the "what sap message". However, the court granted time to Mr. Muganyizi to find out in which hospital the witness was admitted and hearing was adjourned to the afternoon where he reported that, the witness was admitted at Msasani Peninsula Hospital after experiencing headache pains.

Upon being satisfied that, Mr Julius Mugaragu was sick and was admitted due headache and pains, the court adjourned the defence case up to 23/6/2017 at 9.30 am with an order that, the defence witness attend the hearing for being cross examined and re-examination respectively. In respect of prayer of amending written statement of defence the court noted the prayer was objected by Mr. Kesaria, and the court made an order that, it will issue a ruling and directive on the 23/6/2017 when the suit is due for the defence hearing.

Thus on the 23/6/2017 when the case was called for defence hearing and guidance on whether the leave to amend a written statement of defence should be made, only Mr Dilip Kesaria, Learned Advocate of the Plaintiff appeared and was present in court. Surprisingly, Mr. Muganyizi, and Mr. Stephen Mosha Learned Advocates were absent. Further, more, Mr. Julius Mugaragu the defence witness and defendants were all absent. None of them even communicated with the court as to why they failed to attend the court session which was fixed in the presence of both the plaintiffs and defendants

Due to the fact that, the suit was fixed for defence hearing and defendant were absent together with their counsels and witness, Mr. Kesaria prayed for dismissal of the defendant defence and insisted that, judgment be entered in favour of the plaintiff bank.

However the court found since Julius Mugaragu who was the only defence witness, his witness statement was filed in the court pursuant to Rule 49(1) and (2) of the High Court Commercial Division Procedural Rule GN 250 of 2012 and the statement was his "examination in chief" was absent and the court had no specific date from the defendants when the witness will be available for cross examination and re-examination, I decided that a statement be retained the so that, it may be considered in line with Rule 56(1) and (2) of the High Court Commercial Division Rule GN 25O of 2012.

So the court decline to dismiss the defence and witness statement of Julius Mugaragu ... as prayed by Mr. Kesaria. Instead it decided to proceed with subsequent legal steps of retaining the defence and witness statement of Julius Mugaragu because there was no certainty of on the date the witness will appear before the court for cross examination. The court took that, path on the basis that, this is one of the oldest case in the Commercial Registry, there was no room for any party to dilly dally with progress of the case.

So, pursuant to Sub Rule (2) of Rule 56 of the High Court Commercial Division Procedure Rules, GN 250 of 2002 the witness statement of Julius Mugaragu was retained to remained to part of defendant`s defence so that, it may be used by counsels and the court, in remaining court subsequent steps and deliberation. In deed Rule 56(2) of the High Court Commercial Division Procedural Rules states and I quote that,

> *"Where a witness fails to appear for cross examination, the court shall strike out his statement from the record, unless the court is satisfied that, there are exceptional reasons for the witness failure to appear"*

Further Rule 56(3) of the High Court Commercial Division Procedural Rules GN 250 of 2002 further states that,

> *"Where the court admits a witness statement of a witness who has failed to appear for cross examination, lesser weight shall be attached to such statement"*

So the witness statement of Julius Mugaragu was retained for consideration by counsels of both sides and the court. Also on the same day of 23/6/2017 the court issued a ruling and guidance allowing defendants to amend their written statement of defence pursuant to Rule 24(1) of the High Court Commercial Division Procedural Rules GN 250 of 2012, and not to introduce new claims or cause of action. But since defendants and their counsels were absent the court ruling and guidance on amendment of written statement of defence was an academic exercises due the fact of absenteeism of the defence counsels and defendants themselves.

After the court issued its ruling and guidance which was not picked up by defendants and their counsel because they were all absent, the court proceed with case to the next legal step and made an order inviting counsels from both sides to make their closing submissions and file them because there was cause for delay because all parties were aware that this is one of oldest case in the commercial registry.

To start with Mr Kesaria submitted that, the plaintiff`s bank called Shanul Fernandez who testified as PW1 and tendered several exhibits. He then addressed the 1st agreed issue of whether or not the loan facilities were granted to the 1st defendant, by referring to the testimony of PW1 and Exhibits P1 and P7 has proved that, the 1st defendant was granted with a loan facilities which were later amalgamated into one term loan. So on the 1st issue Mr. Kesaria submitted that, the testimony of PW1 and Exhibits P1 and P7 proved that, the loan was granted to the 1st defendant by the plaintiff bank.

Moving to the 2nd agreed issue of whether or not there was a breach of the terms of loan facility letter, the plaintiff counsel submitted that, the loan was supposed to be re-paid within 36 months in 36 equal instalments of USD 31,799.34 plus interest. The counsel then submitted that, the instalments have not been paid as per agreement and deed of guarantees. So for each month were instalment remained unpaid, defendants breached the terms of the agreement.

Submitting on the 3rd issue of Whether or not the loan facilities have been repaid, the plaintiff counsel explained to the court that, going by the bank statement of the 1st defendant Exhibit P9 and P11 they shows that, the total outstanding loan is USD 3,024,052 . So the entire loan has not been fully re-paid.

Commenting to the witness statement of Julius Muragarugu who insisted that, the loan was fully repaid, and the plaintiff claim is not legally tenable, Mr Kesaria submitted that, the value of statement of Julius Muragarugu its value is too low because its veracity was

not tested in court by way of cross examination due to his none appearance. Therefore he prayed his examination in chief contained in the witness statement be disregarded by the court.

In respect of 4th issue of what reliefs are parties entitled too, Mr Kesaria submitted that, the plaintiff has proved his claims on the balance of probability and is entitled to reliefs prayed in the plaint.

On the part of Mr. Muganyizi Learned defence counsel after being reminded by this court through Mr. Stephen Mosha Learned Advocate, he filed closing submission on the 5/1/2018.

In his submission the defence counsel relying on witness statement of Julius Muragarugu and written statement of defence, he submitted that, the plaintiff`s claim are not legally tenable because they arises from failure on the part of the plaintiff`s bank to harmonize and reconcile repaid sum and up to-date the 1st defendant`s bank accounts.

He further clarified that, failure to harmonize the 1st defendant bank account on repaid, sum by the plaintiff`s bank that necessitated parties to make un- acceptable deeds of variation which were not in favour of the 1st defendant. It was the argument of the defence counsel that, while the 1st defendant was making some repayment of the loan, there was improper and mistreatments in offsetting payments made in the 1st defendant`s bank account.

Turning to the 1st agreed issue if loans were granted to the 1st defendant, the counsel submitted that, there is no dispute that, four types of loan were duly granted to the 1st defendants which were (1) USD 1,000,000/=, VAF loan of the year 2011 was granted, (2) Also in April, 2012 a sum of USD 900,000 was granted as Vehicle and Assets Finance was granted, (3) on 4th November 2013 there was amalgamation and restructuring of loan facilities into one Term Loan of USD 2,346,609.

Submitting on the 2nd agreed issue of whether or not there was a breach of terms of loan facilities, the defence counsel submitted that, there was no breach which was committed by defendants. Instead the defence counsel submitted it the plaintiff bank who committed breach of loan agreements by erroneously and wrongly treated a liquidated credit of USD 900,000 as an overdraft facility which ultimately generated unnecessary errors of interests on the part of the 1st defendant. He also contested that, generated errors of unnecessary interest in the plaintiff loan account were reported to the plaintiff bank but were not worked upon.

Also defendants submitted that, in the course of re-paying the loan they experienced number of setbacks and eventualities in their business which were brought into the attention of the of the plaintiff bank but were not taken into account. Further the defendants submitted that, defendants applied for the Vehicle and Assets Financing facility but were wrongly offered a temporary overdraft which was converted into Vehicle and Assets Financing. The defence counsel submitted that, the plaintiff bank also forget to convert the temporary overdraft into vehicle and assets financing as agreed hence leading to escalation of unnecessary interest and costs in the 1st defendant bank account.

Also the defence counsel submitted that, the 1st defendant applied for an invoice discount of USD 450,000 and the plaintiff promised to disburse it, but surprisingly the plaintiff bank disbursed only a sum USD 250,000 contrary to what was agreed upon

Furthermore the defence counsel submitted that, when the 1st defendant was served with a default notice in August 2015 the plaintiff erroneously billed the 1st defendant a sum of USD 490,000 as a result there was no sign of decrease of outstanding loan and the 1st defendant were claiming re payment of a loan which was never advanced to them.

Next, the defence counsel faulted the plaintiff claim on outstanding loan that, is not accurate for reason that the plaintiff bank has been issuing conflicting figures. He cited in one 1st instance, the plaintiff bank was claiming a sum of USD 2,539,000 while in a letter Ref No NM/PM/NAM –INV2013 /11/040 was claiming a sum USD 2,346,609. He then indicated that, such discrepancies on the outstanding loan were never reconciled even today and that amount to breach of term of loan agreement.

Commenting on repayment of outstanding loan, the defence counsel submitted that, the granted loan and credit facilities were repaid to the extent of USD 2,303,599.43, and the outstanding balance is of USD 604,131 which is not legally payable due to unfair dealings of the plaintiff bank against 1st defendant.

On what reliefs are parties entitled too, defendants counsel submitted that, defendants were unable to re pay the granted loan smoothly because the plaintiff bank failed to honour some of the terms of agreement, and the court should compensate defendants a sum of USD 604, 131.00.

In addition, the defence counsel prayed that since no court fees were paid on plaintiff`s Exhibits which were tendered and admitted in court as per Item 18 of the 1st Schedule of Court Fees Rule GN 187 of 2015 , he prayed that, the court should not rely on the exhibits on the ground that no court fees were paid. To support his argument the defence counsel cited a decision in Civil Case No 220 of 2012 between Betam Communications Tanzania Limited Versus China International Telecommunication Limited and others where Hon. Mruke J dismissed the plaintiff case for want of payment of court fees. So the defence counsel also pray that, the plaintiff case and claims be dismissed for lack of merit. So in brief the above were plaintiff and defendants points in their closing submissions.

The court considered the plaintiff claims and defendant defence and arguments contained in closing submissions and find the suit is based on allegations of breach of loan and overdrafts agreements. Like any civil claim I find under Section 110 (1) and (2) of the Evidence Act Cap 8 [R.E 2002] the burden of proving each and every allegations contained in the plaint is on the plaintiff`s bank and the required level of proof is that, of balance of probability.

However, before going into the merit of the case, the court find it is ideal to address a point of objection raised by the defence counsel in his closing submission in regard to plaintiff exhibits. In his closing submission the defence counsel applied to the court to dismiss plaintiff exhibits and its contents for reason that, no court fees were paid on Exhibits as envisaged by Item 18 of the 1st Schedule of Court Fees Rule GN 187 of 2015. He prayed and insisted that the court should not rely on the plaintiff exhibits on the ground no court fees were paid.

I have carefully considered the objection raised on the plaintiff exhibit and the key issue for determination in my view is whether the court may entertain the objection which has been raised. The court responses on the said objection is that, Courts have on several decisions, including a decision in the case of Frank M. Marealle versus Paul Kyauka Njau [1982] T.L.R No 32 frequently stated in making decisions, it is prudent for a court to confine itself to issues which were framed in the pleadings. The point of objection raised on the plaintiff exhibits was not part of framed issues for determination. It was raised after agreed issues were framed therefore on the basis of the above cited case it will be improper for the court to make any decision on issue which was not framed at all.

Also, Order 1 Rule 13 of the Civil Procedure Code Cap 33 [R.E 2002] requires all objection in be raised at the earliest possible time. In my view such objection was supposed to be raised and addressed when exhibits were being tendered and admitted in court. Since no such objection on exhibits was raised, the only proper assumption is that, such objection

is deemed to have been waived. For reason explained above, I hereby dismissed defendant objection which is based on item 18 of the 1st Schedule of Court Fees Rule GN 187 of 2015 on ground that, for not being raised at the appropriate time, it was waived and it fails.

With that, legal position in mind, I straight proceed to address the 1st agreed issue of whether or not there were loans and overdraft facilities which was granted by the plaintiff`s bank to the defendants, and what were its terms

Upon perusing the 1st agreed issue I find it has two limbs to be considered. The first one is on whether there are loans or overdrafts which were granted to the 1st defendants. The second limb is if the answer is an affirmative on granting loans then , what were terms governing granted loans and overdrafts.

In respect of the first limb of whether there are loans and overdrafts which were granted to the 1st defendant the court find from the testimony PW1 and Exhibit P1 there are allegations and evidence that that, NAM Enterprises Limited, the 1st defendant borrowed a sum of USD 1,000,000/= as Medium Term Loan granted on 12/7/2011 from the plaintiff`s bank . Secondly, the 1st defendant was also granted an existing Vehicle Assets Finance (VAF) of shs 683,207,539.84. Thirdly, he was granted overdraft facility of shs 250, 000, 0000/= thirdly, the 1st defendant was granted performance guarantee of shs 36,046,200, fourthly, term loan of USD 342, 521.15. Fifth, was granted a temporary overdraft facility limit of shs 160,000,000/= and USD 50,000.

Quite frankly the court find the issue whether or not the 1st defendant was granted loan and overdraft facilities is a question of fact which need to be proved by facts and exhibits. Upon perusing the testimony of PW1, the court find her testimony that the 1st defendant was granted loan appears to be credible because supported by clause 1 of the Exhibit P1 which list six types of loan as Term Loan of USD 1,000,000. VAF of shs 683,207, overdraft

shs 250,000,000, Performance Guarantee of shs 36,046,200.Term Loan of USD 342,521 and Temporary Overdraft of Shs 160,000,000 and USD 50,000.

Quite frankly I find and decide that the issue whether the 1st defendant was granted with overdraft facility and term loan has been proved by the testimony of PW1 and Exhibit P1.

Now moving to second limb of 1st agreed issue of what were the terms of loans, and overdrafts facilities the court find the terms and conditions of overdraft facilities are mainly found in letter of credit facilities and agreements signed by the plaintiff`s bank and defendants. They may not be found on parties submissions.

Thus when I perused Exhibit P1 the court finds the plaintiff bank as a lender was under contractual term to grant loans and overdraft facilities to the 1st defendant which were applied by the borrower who is the 1st defendant. Also the 1st defendant as borrower in Exhibit P1 promised to repay loans and overdraft facilities plus interests which due within agreed time. According to Clause 4.1 of Exhibit P1 the repayment period clause stated that;--

The Loan is to be repaid in full by not later than 30th June 2013

Also in Exhibit P1 which has repayment clause of the loan of loan by the 1st defendant, was signed at page 7 by Elias Lukumay as Managing Director of the 1st defendant and Namnyaki S. Lukumay, who introduced as the director.

Another key term governing granted loans and overdraft facilities was that, the 2nd 3rd 4th and 5th defendants Exhibit P2, Exhibit P3, Exhibit P4, Exhibit P5 and Exhibit P6 each of them granted Unlimited personal guarantee to the plaintiff`s bank to pay outstanding sum and expenses which the 1st defendant default to pay .

In the defence counsel closing submission the court noted, the defendant claim that there some shortfalls which effected and hampered repayment of granted loans and overdraft, and unnecessary errors and set back in their business which negatively affected repayment of the loan and leading to escalation of unnecessary interest and costs. Also, the defendants complained they once applied for invoice discount of USD 450,000 but the plaintiff bank disbursed only a sum of USD 250,000 contrary to what was agreed upon. I have considered the above mentioned points but the court find parties to litigation including the defendants must be aware that, where there is written agreement like credit facilities letter signed by both parties the sole duty of the court is that which was stated in cases of Osman v Mulangwa [1995–1998] 2 EA 275 (SCU) and Jiwaji v Jiwaji [1968] EA 547 being to give effect to the clear intentions of the parties as stipulated in terms of their agreements. It is trite law stipulated in the case of National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd and another [2002] 2 EA 503 (CAK) that parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.

Therefore to conclude on the second limb of the first issue the court find and decide that, from the testimony of PW1, Exhibit P1 and P8 the 1st defendant agreed on repayment of the loan and overdraft facilities on monthly instalments and the loan was also secured by mortgage, debentures instruments, and personal guarantees of the 2nd 3rd 4th and 4th defendant. On the deed of guarantees it was agreed that in the event the 1st defendant default to repay the loan or overdraft in full then five guarantors agreed to repay the loan in full.

Moving to the 2nd agreed issue of whether or not there was a breach of the terms of the loan and facilities agreement by either parties, the court found from the testimony of PW1 that, the 1st defendant as a "borrower" breached the terms of loan and overdraft facilities agreement on repayment of the loan. Also PW1 claim that, the 2nd 3rd 4th and 5th defendants breached the terms and condition of deed of guarantees which required to pay the plaintiff bank the outstanding loan in full. .

In the defence counsel closing submission the court noted, the defendant claim that there some shortfalls which effected and hampered repayment of granted loans and overdraft, and unnecessary errors and set back in their business which negatively affected repayment of the loan and leading to escalation of unnecessary interest and costs. Also, the defendants complained they once applied for invoice discount of USD 450,000 but the plaintiff bank disbursed only a sum of USD 250,000 contrary to what was agreed upon. I have considered the above mentioned points but the court find parties to litigation including the defendants must be aware that, where there is written agreement like credit facilities letter signed by both parties the sole duty of the court is that which was stated in cases of Osman v Mulangwa [1995–1998] 2 EA 275 (SCU) and Jiwaji v Jiwaji [1968] EA 547 being to give effect to the clear intentions of the parties as stipulated in terms of their agreements. It is trite law stipulated in the case of National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd and another [2002] 2 EA 503 (CAK) that parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.

Therefore to conclude on the second limb of the first issue the court find and decide that, from the testimony of PW1, Exhibit P1 and P8 the 1st defendant agreed on repayment of the loan and overdraft facilities on monthly instalments and the loan was also secured by mortgage, debentures instruments, and personal guarantees of the 2nd 3rd 4th and 4th defendant. On the deed of guarantees it was agreed that in the event the 1st defendant default to repay the loan or overdraft in full then five guarantors agreed to repay the loan in full.

Moving to the 2nd agreed issue of whether or not there was a breach of the terms of the loan and facilities agreement by either parties, the court found from the testimony of PW1 that, the 1st defendant as a "borrower" breached the terms of loan and overdraft facilities agreement on repayment of the loan. Also PW1 claim that, the 2nd 3rd 4th and 5th defendants breached the terms and condition of deed of guarantees which required to pay the plaintiff bank the outstanding loan in full. .

On the other hand defendants through witness statement of Julius Mugaragu and submissions of the defence counsel argues that, a sum of USD 2,303,599.43 was re-paid and the outstanding balance so far is of USD 604,131 which is not even legally payable due to unfair dealings.

I have considered the defendant defence as explained in the witness statement of the defendant made by Mr Julius Mugaragu on repayment of the loan or USD 2,303, 599.43 and find "repayment of the loan was a promised made by the 1st defendant in Clause 4.1 of Exhibit P1 where it was agreed that, the Loan is to be repaid in monthly instalments of USD 59,516.0 each month and the entire sum to be full by 30th June 2013, the I find and decide that 1st defendant was under contractual obligation to repay each monthly instalment.

As pointed earlier since re-payment of loans and overdraft facilities is *a question* of fact, the 1st defendant or other defendants was supposed to lead credible evidence which shows payments of monthly instalments and the entire loan has been repaid in compliance with clause No 4.1 and 4.2 of Exhibit P1; repayment clause of Exhibit P7; and repayment clause No 4.1 and 4.2 of Exhibit P8
Failure to produce any credible and reliable evidence on repayment of monthly instalments as per Exhibits P1 and P8 or which establish the entire loans and overdraft were fully repaid that give credence to the testimony of PW1 that, there is outstanding loan there has been a breach the terms stipulated in clauses No 4.1 and 4.2 of Exhibit P1; and clause No 4.1 and 4.2 of Exhibit P8 on repayment of the loans and overdrafts.

In addition to that Exhibit P11 which is the 1st defendant bank statement shows the outstanding loans of USD 3,475,411.88 cents is still outstanding and that, amount to breached of repayment clauses. As stated in the case of Abdallah Yussuf Omar Versus Peoples Bank of Zanzibar and Another [2004] TLR 399 at P400 failure to pay

any monthly installment which is due that amount to breach. In the cited case the High Court of Zanzibar indeed stated;

> *By failing to repay any of the installment due until May, 2002 when he was served with a demand notice the Appellant was in breach of the loan repayment terms and the bank was entitled to exercise its powers of sale of the mortgaged property.*

Guided by the above cited case of **Abdallah Yussuf Omar Versus Peoples Bank of Zanzibar** the court find failure on the part of the 1st defendant to pay monthly instalments which were due as per his promises that, fully establishes that, the 1st defendant committed multiple breaches of loan agreements.

It follows therefore since the 2nd 3rd 4th and 5th defendants were under contract of guarantee to discharge debtor's liability to the plaintiff`s bank and they have not produce any convincing evidence that, they discharged their obligation as guarantors in paying monthly instalments which were due and the entire loan, I find they also breached covenants No 2 of their deed of guarantees in which they promised in deed of guarantees **Exhibit P2**, **Exhibit P3**, **Exhibit P4** and as per **Exhibit P5** to repay the outstanding loan after the 1st defendant default to repay the loan.

So to conclude on the 2nd agreed issue, I find and decide that, NAM Enterprises Limited the 1st defendant as borrower breached clause 4.1 of clause No 4.1 and 4.2 of Exhibit P1; and clause No 4.1 and 4.2 of Exhibit P8 on repayment of loans and overdrafts in full as explained above.

Likewise, Alex Stephen Lukumay, Elias Stephen Lukumay, Namnyaki Stephen Lukumay Stephen Korduni Lukumay who are the 2nd 3rd 4th and 5th Defendants who signed unlimited personal guarantees which were before Havenlight P. Bethuel, Learned Advocate on 9th June, 2010 as guarantors they breached the terms and conditions stated in clause 2.1 to 2.4 of Exhibits P2, P3, P4 and P5 which are deeds of guarantee.

In respect of the defendants concerned on the conduct of the plaintiff bank was silent when EcoBank was requesting to take over defendants loan liabilities and other arguments like the 1st defendant` experience hardship in their business, and others, the court find such argument has nothing to do with the defendants promises to pay monthly instalments and entire loan. . Since parties were bound by the credit loan agreement, overdraft facilities agreement and deed of guarantees, the plaintiff`s bank was not legally bound to accept any proposal from Eco bank who was not a party. Defendants. After, a proposal for the Eco Bank of showing interest to take the outstanding loan may not overrule the contractual promises of the defendants to the plaintiff of re-paying the loan in full. That, is all the court may say on the breach of terms and condition of the loan agreement and overdraft facility.

Turning to the third issue of whether or not the loan facilities have been fully repaid, to a certain extent, I have already addressed that, issue while dealing with the second issue, when I find and decided that, the 1st defendant as a borrower and other defendants as guarantors did not lead any convincing evidence which shows that, monthly instalments were paid as per agreed schedule and the entire loan was fully re-paid.

Without repeating too much on this point, court add that even when a deed of variation was signed there is no evidence that, the entire loan was paid. In the absence of evidence that, the loan was fully paid the court is left with the plaintiff evidence in Exhibit P11 which is the 1st defendant bank statement which establishes that, outstanding loans of USD 3,475,411.88 cents is still outstanding.

Julius Mugaragu in his witness statement he admitted that, loans were granted to the 1st defendant and repaid but the court find his witness statement was not accompanied with a proof of monthly payment instalments of loan as agreed. Also the defence witness did not appear for cross examination and re-examination so his witness statement has

lesser weight as envisaged by Rule 56(3) of the High Court (Commercial Division) Procedural Rules GN 250 of 2012, and that and gives credence to the testimony of PW1 and details of Exhibit P11 that, there is outstanding loan of USD 3,475,411.88 cents which continues to attract interests. In that, respect, I find and decide on issue No 3 that, the loan has not been fully repaid and the account shows there is an outstanding loan of USD 3,475,411. 88 cents.

Moving to the 4th agreed issue of what reliefs are parties entitled too, the court find the 1st defendant as the borrower promised under credit facility letter to repay the entire loan as per clause 3, 4.1 and 4.2.

Likewise the 2nd, 3rd 4th and 5th defendants in clause 2.1 to 2.4 of Exhibits P2, P3, P4 and P5 which are deeds of guarantees committed themselves to discharge debtor's obligations including repayment of any outstanding loan or overdraft or expenses which are due. It follows therefore by furnishing deed of guarantee to the plaintiff`s bank they expressly entered into contract of guarantee envisaged by Section 78 of the Law of Contract Act Cap 345. Indeed Section 78 of the Law of Contract Act Cap 345 states

> A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default and the person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor"; and guarantee may be either oral or written.

Further, Section 79 of the Law of Contract Act Cap 345 states that;-

> Anything done, or any promise made, for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee.

Next Section 80 of the Law of Contract Act states that;-

> The liability of the surety is co-extensive with that, of the principal debtor, unless it is otherwise provided by the contract.

So pursuant to Sections 79, 78 and 80 of the Law of Contract the 2nd 3rd 4th and 5th defendants who entered into contract of guarantee, expressly promised to pay any outstanding loan or interests or expenses. Since they did not pay also have committed multiple default in not paying monthly instalments and the entire loan. The status of the 2nd 3rd 4th and 5th defendants after the 1st defendant defaulted to pay the loan is that, of "principal debtors like the 1st defendant.

It follow therefore the 1st defendant as a borrower and 2nd 3rd 4th and 5th defendants who are guarantors are contractual liable by virtue of Section 37 of the Law of Contract, Cap 345, to fulfil their promise of re-paying the outstanding loans and overdrafts facility including of repayment of interest, which is due. In deed Section 37 of the Law of Contract Cap 345 statutorily states 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.*

The same legal obligation of honouring contractual promises was emphasized in the case of Edwin Simon Mamuya Versus Adam Jona Mbala Edwin [1983] T.LR 410 at 414 whereas Lugakingira stated that;-

> *.....if a man gives a promise or assurance which he intends to be binding on him and to be acted on by the persons to who it was given then once it is acted on he is bound by it.*

Also in the same case of Edwin Simon Mamuya versus Jona Mbala, Lugakingira J stated that;-

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

So guided by the wording of Section 37 of the Law of Contract Act, Cap 345 cited above, and decision in the case of Edwin Simon Mamuya versus Jona Mbala, on emphasis that, parties to the contract must perform their respective promises, the court find it is trite

law for the borrower and a guarantor to fulfil their promises for re-paying any outstanding loan which is due.

. On concerned raised by the defendants that the plaintiff bank is not certain on exact outstanding loan because the bank has been claiming separate figures in various occasion, the court find the loan was granted few years ago and has been attracting interest every year. So there are figure which were being claim when loans were was granted. Then there are figures which were being given the loan was amalgamated, also there are figures were given when suit was filed, and there are figures which were given when PW1 was making her witness statement... The court find alleged discrepancies but are not fatal because always bank statements of accounts provides an amount which was due at time of a lodging claim.

Taking into account the 1st defendant bank statement of account No 9120000156335 which was admitted as Exhibit P11, shows by the moment the suit was filed in August, 2015 the total outstanding loan was USD 2,479,000.58 cents, and that, is the amount which was pleaded in the plaint as the outstanding loan. In that respect I hereby find the plaintiff has proved his claim of outstanding loan on the balance of probability that, there is outstanding loan which remained unpaid. Subsequently I hereby enter judgment against all defendants severally and jointly as follows;

1) That, the 1st defendant as a borrower and 2nd 3rd 4th and 5th defendants as guarantors are severally and jointly ordered to pay the plaintiff`s bank a sum of USD 2,479,000.58 cents and outstanding debt.

2) That, the defendants are jointly and severally ordered to pay the plaintiffs bank an interest of 11 % per annum on the claim amount from the date the suit was instituted to a date of judgment.

3) Further all defendants are jointly and severally ordered to pay the plaintiff`s bank an interest of 12% per annum on the decretal sum from the date of judgment to the date the decretal sum will be paid in full.

4) Next by order of this court the plaintiff bank is at liberty to exercise its mortgage and debenture rights as per the terms of debenture and mortgage instruments.

5) That, defendants are severally and jointly ordered to pay the plaintiff`s bank the costs of pursuing the suit.

Dated and Delivered at Dar es Salaam on the 5th day of February, 2018.

H.T. SONGORO
JUDGE.

The Judgment has been delivered in the presence of Mr. Zakaria Daud Learned Advocate of the plaintiff bank, Mr. Stephen Mosha, Ms Claudia and Mr Kaiser Msosa Learned Advocates of defendants.