

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

COMMERCIAL CASE NO 128 OF 2015

BETWEEN

TEMA ENTERPRISES LIMITED -----PLAINTIFF

AND

EUPHRACIE MATHEW RIMISHO
T/A EMARI PROVISION STORE -----1ST DEFENDANT
BLANDINA MATHEW RIMISHO -----2ND DEFENDANT
EMAR COMPANY LIMITED -----3RD DEFENDANT

JUDGMENT

SONGORO, J

Tema Enterprises Limited, the plaintiff instituted a suit claiming that, sometimes in the year 2013 granted two loans of shs 150,000, 000/= and 130,000,000 to Euphracie Mathew who is also trading as Emari Provisions Store, the 1st defendant and Blandina Mathew Rimisho. The plaintiff claims the granted loans were secured by post-dated cheques issued by the 3rd defendant. The plaintiff contest the loan has remained un-paid and is praying for the following orders against defendants -

- 1) That, the defendants jointly and severally be compelled to pay the plaintiff a sum of shs 385,600,000 being the outstanding loan and interests.
- 2) That, the defendant be compelled to pay the plaintiff an interest on the principal sum at the agreed rate of 5% compound per months from 28th October 2013 up to the date of judgment
- 3) The defendants be ordered to pay punitive damages to the sum of shs 100,000,000/= for the plaintiff`s suffering caused by defendant`s refusal neglect to repay the agreed sum.
- 4) Also defendants be ordered to pay cost of the suit, and
- 5) Any other reliefs which the court deems fit and proper.

In reply to plaintiff claims, Euphracie Mathew trading as Emari Provisions Store, Blandina Rimisho and Emar Company Limited, the 1st, 2nd and 3rd defendants filed a joint written statement of defence and opposed all claims in the plaint.

In further reply, the 1st defendant denied to have entered into any loan agreement with the plaintiff, the second defendant claim is not a legal entity therefore may not enter into any contract and the 3rd defendant also claim that, has no any legal relationship with the 1st defendant. So all defendants prayed that, the plaintiff`s claims and the suit be dismissed for lack of merit with costs in their favour.

In the view of the plaintiff claims and defendant`s denial to all claims, the court in consultation with the parties frame four agreed issues for determination being;-

- 1) Whether there was a loan agreement between the plaintiff and defendants
- 2) Whether all defendants are indebted to the plaintiff
- 3) Whether the plaintiff suffered any damage from the defendants
- 4) To what reliefs are parties entitled

So the plaintiff suit was heard and decided on the basis of the above mentioned agreed issues. During the hearing of the suit, the plaintiff was represented by Mr. Mussa Kiobya Learned Advocate; while Defendants were represented by Mr. Edward Chuwa, Learned Advocate.

In pursuing his claim the plaintiff called Leonard Massawe who testified as PW1. Relying on his witness statement, he told the court that, he is an operation officer of the plaintiff company. He then stated that, on the 18th April 2016 while in his office at Keko Magurumbasi he saw the 1st and 2nd defendant entering their office, met Elizabeth Massawe. Then PW1 said Elizabeth Massawe granted a loan of shs 150,000,000/= to the 1st and 2nd defendants as per their request. PW1 maintained in his witness statement

that, he saw with his naked eyes the 1st and 2nd defendants receiving a sum, after signing the loan agreement. PW1 said the signed loan agreement, was later endorsed by a lawyer. The witness did not tender any Exhibit.

The testimony of PW1 that, the 1st and 2nd defendants signed a loan agreement of shs 150,000,000/= was also supported by Thadeo Teddy Karua an Advocate who attested the agreement and who testified as PW2. The witness also stated in his witness statement that, he is an Advocate of the High Court. Further PW2 stated that, he prepared and attested the contract between the plaintiff and 1st and 2nd defendants which was in connection with a loan agreement. He then explained in the 1st agreement the plaintiff granted a loan of shs 150,000,000 plus interests and there was additional loan of shs 130,000,000/= PW2 explained that, the 1st defendant was required to make payment for outstanding loan by cheques not later than 28th October 2013.

Also a fact that, plaintiff granted a loan of shs 130, 000,000 to the 1st and 2nd defendant was supported by Huba Chilipachi who testified as PW3 and claim that, was Branch Manager of Stanbic Bank, Industrial Pugu Branch, who knew Elizabeth Massawe, since 1994

The witness then said in 2003 while she was a Branch Manager was approached by Elizabeth Massawe accompanied by the 1st and 2nd defendant while in possession of a cheque of 130,000,000/=. DW1 then said the plaintiff withdraw a sum of shs 130,000,000 and granted the sum to the 1st and 2nd defendants.

PW3 then said she gave Elizabeth Massawe and defendants a piece of paper and they drafted a handing over note in her presence, and all Elizabeth and 1st and 2nd defendant signed it in her presence. Finally PW3 testified that, a signed paper was left in her custody but was later taken by Elizabeth Massawe. PW3 did not tender any Exhibit.

After, PW3 finished her testimony, the plaintiff called Elizabeth Massawe who testified as PW4 and informed the court that, she is the Managing Director of the plaintiff company.

The witness told the court that, on the 18th April 2013 she granted to the 1st defendant a loan of shs 150,000,000 which attracted interest of shs 26,400,000. She also claim to have signed a loan agreement.

PW4 then said few days after the 1st defendant was granted loan, he applied for another loan and was granted a second loan of shs 130,000,000/= in the presence PW3 the Branch Manager of Stanbic Pugu Road Branch. She maintained in her witness statement that, the loan transaction was reduced in writing.

The witness then said as a security for the granted loan, the 1st defendant issued several post-dated cheques which were dated 18/5/2013. PW4 claims 12 cheques which were guaranteed as security for granted loan were deposited to Exim Bank and were returned dishonoured.

PW4 concluded in his testimony that, the granted loan was supposed to be fully re-paid by 28th October 2013 but was not re-paid. Also she claims even 12 cheques which were issued as security for the loan were deposited into Exim Bank and were dishonoured.

Next PW4 maintained that, despite several demands, the granted loan of shs 386,600,000 has remained un- paid to date. To substantiate her points that, defendants, issued eleven cheques of Akiba Commercial Bank paid to the plaintiff as security for un - paid loan and were dishonoured , PW4 tendered copies of 11 cheques which were collectively admitted as Exhibit P1.

Further to substantiate that, the plaintiff has a loan agreement with the 1st defendant PW4 also tendered a document which has a title of Mkatoba wa Kulipa Deni dated 8/10/2013 which was admitted as Exhibit P2 and she closed her testimony.

After PW4 closed her testimony, the plaintiff suit was closed. So the defence case was opened and Euphracie Mathew Rimisho appears and testified as DW1. In her testimony DW1 explained that, he is the sole proprietor of Emari Provision Store which is registered under Business Registration and Licencing Agency.

The witness then added that, the Emar provision store as an entity is doing business of whole sales of beers, spirit and cigarettes. DW1 maintained that, Blandina Mathew Rimisho and Emar Company Limited the 2nd and 3rd defendants are not members of Emari Store Provisions.

She then explained that, the Agreement between Tema Enterprises Ltd and Emar Provision Store on the loan of shs 150,000,000 was executed and signed by Blandina Mathew Rimisho. However, DW1 stated in witness statement that, Blandina Mathew Rimisho who executed the agreement is not a member of Emar Provision Stores, also is not a shareholder of EMAR Company Limited. He then explained that, Emari Provisions Stores and Emar Company Limited are two different entity, therefore has no legal authority to sign any contract on behalf of the 3rd defendant`s company. So DW 1 refused that, has not borrowed any money from the plaintiff.

Also contested that, EMAR Provision store has not issued any cheque for security on unpaid loan. He added cheques which were issued were not connected in any way with the granted loan. To support his defence DW1 tendered a Certificate of Registration No 139611 of Emar Provision Store which was admitted as Exhibit D1, and Extract from the Register was admitted as Exhibit D2.

After DW1 testified, defendants called Blandina Mathew Rimisho who testified as DW2. In her testimony the witness said she has no any relationship with Emar Provision Store and has no any authority to act on behalf of Emar Provision Store, and is not a party to the agreement signed on 18th April, 2013, or agreement signed on the 8th October 2013.

She further maintained that, she did not witness any loan agreement between Tema Enterprises Limited and Emari Provision Store.

After DW 2 testified, the defendant called Anthony Thomas Msangya who testified as DW3, and stated that, he is a principal officer of Emar Company Ltd, the 3rd defendant. DW 3 then maintained that, his company has never issued or authorised the issuance of any cheque in favour of the plaintiff as security for un-paid loan.

Further, he contest that, he did not even execute any agreement with the plaintiff, and closed his testimony without tendering any Exhibit. After DW3 closed his testimony, the defence case was closed.

After the plaintiff and defendant cases were closed, both counsels with the leave of the court were invited to make their closing submissions.

Submitting **on the issue of whether or not there was a loan agreement** between the plaintiff and defendants, the plaintiff`s counsel relying on the testimony PW1 and PW2 submitted that there is evidence from established that a sum of shs 150,000,000 was first granted as loan to Euphracie Mathew Rimisho DW1 and Blandina Rimisho, DW2.

Also he submitted that Huba Chilipachi PW3 also in her capacity as Branch Manager of Stanbic witnessed a sum of shs 130,000,000 granted to Euphracie Rimisho DW1 and Blandina Rimisho, DW2.

The counsel then submitted that bearing in mind there is an agreement and post- dated cheques which secured the loan which were duly signed by DW1 and the shareholder of the 3rd defendant`s company guaranteeing payment he prayed to find that there was a loan agreement which also appears on Exhibit P2.

Submitting on the 2nd issue of whether or not the defendants are indebted to the plaintiff, the plaintiff counsel relied on the testimony of Elizabeth Massawe PW4 which is supported by a document with a title of Mkataba wa Kulipa Deni dated 8/10/2013 Exhibit P2 which established the 1st defendant took the loan and agreed to pay.

On the loan taken, the counsel submitted that there is also the evidence of PW1, PW2 and PW3 which established that at a different occasion DW1 and DW2 approached PW4 and secured a sum of shs 150,000,000/- Also there is evidence of PW3 and PW4 which established that DW1 approached the plaintiff and secured additional loan of shs 130,000,000.

Then he submitted that Exhibit P2 establishes that the granted loan which was secured has not been paid, and a fact that the 3rd Defendant issued post -dated cheques which were never contested before, implies that he guaranteed the repayment of the loan. It was the plaintiff argument that since the 3rd defendant is a company and it allowed the 1st defendant to issue cheques certainly has an authority to act on behalf of the Company. Responding to a point whether or not plaintiff suffered any damages, the plaintiff counsel submitted that the granted loan was not paid for years and it is certainly the plaintiff was denied to use and invest his money which are in the hands of defendants. So by virtue of Section 73 of the Law of Contract Act Cap 345, the plaintiff has suffered loss and is supposed to be compensated by defendants.

Moving on a point of what relief are parties entitled the counsel submitted that the plaintiff has proved his claims on the balance of probability therefore is entitled to reliefs prayed in the plaint including repayment of shs 385,600,000.

Also, the defence counsel in closing submission, he stated that from the presented evidence there was no valid loan re-payment agreement between the plaintiff and the 1st defendant. The counsel then submitted that alleged loan contract of shs 150,000,000 was a manufactured agreement. In respect of the second loan of shs 130,000, 000 the

defence counsel contested that, was not proved on the balance of probability because the exact date of the second loan was not pleaded in the plaint.

In respect of dishonoured cheques alleged to have issued by the 3rd defendant as security for loan, the defence counsel argued that the 3rd defendant denied to have entered into any agreement of guarantee in favour of the 1st and 2nd defendants.

The counsel also pointed out that even the plaintiff testimony on granting of loan was inconsistent with the truth because, PW1 while giving his testimony the witness box was shaking. Another fault of the plaintiff evidence the defence counsel stated PW3 testimony on the dates when shs 130,000,000 was withdrawn, is not certain. PW 3 told the court that the loan of shs 130,000,000 was granted on the 18th April 2013 while PW2 stated that the loan was 5th April 2013. He further faulted the prosecution evidence on the second loan that even a document signed at the bank while shs 130,000,000 was being handled was not presented in court as Exhibits.

The Defendant counsel then contested that post-dated cheques may not be used as security for guarantee of the loan. He also added that EMAR Company Limited going by the case of Solomon Versus Solomon [1897] AC the company is considered as a separate legal entity from its shareholders or owners therefore may not be responsible with act committed by the 1st and 2nd defendants.

Finally, the defence counsel argued that the plaintiff claims of unpaid loan and damages against defendants was not proved. He prayed for the dismissal of the suit.

The court considered plaintiff`s claims of unpaid loans of shs 385,600,000. and defendant`s denial and fully agree that that it is trite law, under Section 110 (1) and (2) of the Evidence Act, 1967, Cap 6 R.E. 2002 that 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.

Therefore since it is the plaintiff who is claiming that three defendants are indebted to the sum of shs 385,600,000, under the provision of Section 110 (1) and (2) of the Evidence Act Cap 6 the burden of proof on shoulders of the plaintiff to prove his claims. And the level of proof is that of the balance of probability.

Now turning to the 1st agreed issue of whether or not there was a loan agreement between the plaintiff and the defendants the court revisited the testimonies of Leonard Massawe PW1 and Elizabeth Massawe PW4 and they all in their testimonies told the court that 1st defendant approached the plaintiff and took a loan of shs 150,000,000. Also PW3 and PW4 further stated that the plaintiff granted the 1st defendant additional loan of shs 130,000,000. Next they further stated in their testimonies that two granted loan carried interests and was due for payment. On their part DW1 and DW2 denied that there was no such agreement and loans were never granted to the 1st defendant.

Quite frankly I assessed and weigh the testimonies of PW1,PW2 and PW4 and find to be more credible and reliable for reasons that are supported by Exhibit P2 a document which has a title of "Mkataba wa Kulipa Deni" which its translation in my view is an Agreement to pay debt. The agreement which was admitted as Exhibit P2 was signed and attested by the 1st defendant before Advocate Thadeo Teddy Karua on 8/10/2013, who agreed to have attested the agreement and pointed out that the 1st defendant signed agreement and agreed to pay the debt.

It is the court observation that if Exhibit P2 was a forged document, and 1st defendant did not sign the agreement as defendants and their counsel maintains certainly defendants has more than sufficient time to take legal measures on alleged forged agreement including report the matter to the police force, so that investigation on authenticity of the agreement and signature of the 1st defendant appearing in the agreement would have been conducted and a tangible report to be submitted.

The common sense dictates that, anyone who genuinely believe that, his signature has been forged on the Loan Agreement involving millions of shillings, is bound by his conscience to report to the Police, so that, investigation on the signature may be commenced.

Instead the court find the 1st defendant long silence on the details of Exhibit P2 and its content give credence to the testimonies of PW1, PW2 and PW4 that the 1st defendant entered into agreement, signed Exhibit P2 and fully accepted to bound by its terms.

The defendants inaction and long silence on reporting to the police details of *Mkataba wa Kulipa Deni'* which appears to be signed on 8/10/2013 and was even known to defendants since 4th November, 2015 when the suit was filed the court find a claim that the agreement was forged one has no basis. More the court find even in the defence evidence no particulars of forgery were advanced to convince the court that the agreement was forged.

Now turning to detail of a document "Mkataba wa kulipa Deni" Exhibit P2 appears to be signed Euphracie M Rimisho who also trade as EMAR Provision before Mr. Thadeo Teddy Karua who attested the agreement. The same agreement was signed by Elizabeth Massawe for Tema Enterprises.

In Exhibit P2 Euphracie. M. Rimisho who was trading as Emari Provisional Store the 1st defendant fully agreed that is the "Debtor" and "Tema Enterprises Ltd" is claimant (Mdai). Since the loan is still unpaid that is their status. Having found Exhibit P2 is an agreement duly signed and attested by the plaintiff and 1st defendant I find parties to are bound by it and oral evidence tending to vary or contradict has no place

And as pointed out in the case between Shinyanga Emporium Ltd. v. Lugeleka HCD 1970 Mnzavas Ag. J. that it is firmly established as a rule of law that parol evidence cannot be admitted to add to, vary or contradict a deed or other written document. The same legal position was even stated in the case between National Bank of Kenya Ltd v Pipeplastic

Samkolit (K) Ltd and another [2002] 2 EA 503 (CAK). In which was stated that a court of law cannot rewrite a contract, between the parties. Parties must understand that the sole duty of the court is just to enforce what was agreed upon

The court noted that there is point raised by the defence counsel that there is contradiction between the testimonies of PW 3 and that of PW4 on the exact date a sum of shs 130,000,000 was granted to 1st defendant as a loan. PW3 states the loan was granted on the 18th April 2013; while PW2 stated it was granted on the 5th April 2013. I have considered the alleged inconsistencies and find loan transactions are alleged to have taken place in 2013, and witness testified in court in 2017. Certainly there is a long period of time between a dates of transactions took place and a date the witness testified in the witness box. Sometimes it is not easy for a witness to capture and retain in his memory of exact date or day of a transaction or transaction which took four years back. So, that may be possible explanation on inconsistency of dates which in my view may not mean they are lying or transaction never took place.

Turning on the nature of Agreement, the court Exhibit P2 was an agreement to pay the outstanding debt which its terms referred to two loans of shs 150,000,000/ and shs 130,000,000 which were granted previously, and were due for re- payment.

So, what is contained in Exhibit P2 is an agreement on re-payment of debt which envisages that the loan was taken, its re-payment period is due and parties agreed to work on framework of re-payment terms and conditions to avoid further default.

With the above clarification and evidence which is before the court I conclude on 1st agreed issue by finding and deciding that there was an agreement between the plaintiff and 1st defendants on repayment of loans which also infers there were loan agreements as envisaged by PW4 and Exhibit P2.

Turning to the second agreed issue of whether or not defendants are indebted to the plaintiff, the court finds in Exhibit P2 Euphracie M. Rimisho the 1st defendant and

admitted to have been indebted to the plaintiff. In deed on paragraph 2 of the preamble of Exhibit P2 states;

KWA KUWA mpaka sasa MDAIWA amekwisha limbikiza deni la jumla ya shilling za kitanzania shs 385,600,000 ikiwa ni jumla ya deni lake kiasi cha pesa za kitanzania shs 150,000,000 na Kiasi cha pesa za kitanzania shs 130,000,000 ambazo alichukuan katika awamu pili tofauti pamoja na riba ya mwezi ya kiasi cha pesa za kitanzania 26,400,000 ambazo kwa kipindi cha miezi mine hajalipa riba yeyote ambayo infanya deni kuwa shs 385,600,000/= ...

In view of the preamble No 3 and clause 1 of Exhibit P1 Mkataba was Kulipa deni, which is written in Kiswahili its literal translations means that Euphracie M. Rimisho the 1st defendant was indebted to shs 385,600,000/= as the debtor .

Regarding to a contention that Emar Company Limited the 3rd defendant is **"the debtor"** the court finds in Clause 3 of Exhibit P1 Euphracie M. Rimisho as debtor promised and accepted to issue post-dated cheque " as guarantee for un paid debt " In deed the statement in the agreement read as follows;

"Pande zote mbili katika Mkataba huu zinakubaliana kwamba ili kuondoa usumbufu ambao unaweza kujitokeza hapo mbele MDAIWA ataweka hundi ya malipo ya baadae (POSTDATED CHEQUE) yenye jina la biashara ya MDAIWA kama dhamana ya mkopo huu. Pia hundi hiyo itawakilishwa na MDAIWA Kwa MDAI siku ya kusaini Mkataba huu"

Then PW1 acting on his promise of paying post-dated cheque PW 4 told the court that the 1st defendant issued to her 12 post-dated cheque of ACB Commercial Bank Ltd. which bear the name of Emar Company Limited and the value of each cheque was shs 10,000,000/=.

The plaintiff and defendants arguments on paid cheques are at variance. Elizabeth Massawe PW4 in paragraph 8 of her witness statement maintain that the post-dated

cheques were issued as security for un paid loan; while Euphracie Mathew Rimisho DW1 stated in paragraph 8 of his witness statement that Cheques of EMAR Company Limited have no connection with the purported loan. Then DW1 explained that the cheques were issued for purchase of beer and after were returned un paid, EMAR Company Limited paid cash money.

I have considered all argument of PW4 and DW1 about 12 cheques and finds 12 cheques admitted as Exhibit P1 were issued to the plaintiff before the signing of the Exhibit 2. However the court find the plaintiff did not have any business with Emar Company Limited the 3rd defendant which may lead to the payment of dozens of cheques which has huge sum of money of shs 120,000,000/=

The court further find in the absence of any business between the plaintiff and 3rd defendant I am convinced with the testimony of PW1 which is also supported by item 3 of Exhibit P2, that cheques were issued as security for granted loan even before the parties signed Exhibit P2.

And the court followed the words of the defendant`s defence that cheques were paid for purchased of beers after being dishonoured EMAR Company Limited paid cash money to the plaintiff, and find if those words were true defendants would have annexed in the written statement of defence, or in witness statement of defence, receipts or bank pay slips or invoices showing the amount which was paid in cash in lieu of cheque, and defendants would have applied to retrieve their dishonoured cheques from the plaintiff hands.

In other words the defendants would have made a follow up in a way of letter to compel the plaintiff to return to them bounced cheques and those letter would have been tendered in court as Exhibits.

In the absence of proof of payment of cash money on the amount stated in 12 cheques or defendants letter notifying the plaintiff that cash money has been paid in lieu of

dishonoured cheque, that gives credence to a testimony of PW4 that cheques were issued by 3rd defendant as security for unpaid debt which was obtained remained to be more credible and convincing. A list of dozens of cheques which the plaintiff tendered as Exhibit P1 which Emar Company Limited paid Tema Enterprises Limited are as follows;-

	CHEQUE	DATE OF ISSUANCE	SUM
1.	090820	18/7/2013	10,000,000
2.	090795	18/5/2013	10,000,000
3.	090797	18/5/2013	10,000,000
4.	090794	18/5/2013	10,000,000
5.	090798	18/5/2013	10,000,000
6.	090799	18/5/2013	10,000,000
7.	090810	18/5/2013	10,000,000
8.	090793	18/5/2013	10,000,000
9.	090801	18/5/2013	10,000,000
10.	090802	18/5/2013	10,000,000
11.	090804	18/5/2013	10,000,000
12.	090805	18/5/2013	10,000,000

It follows therefore, the action of EMAR Company Limited of releasing and issuing twelve (12) cheques of shs 10,000,000 in favour of the plaintiff when read together with details of Exhibit P2, lead to a conclusion that cheques were issued to convince the plaintiff to believe that the 3rd defendant has furnished security for payment on monies which its value is stated in 12 cheques.

So dozens of cheques issued by EMAR Company Limited the 3rd defendant was nothing else but a promise from the 3rd defendant to pay the loan on amount stated in cheques. Impliedly the 3rd defendant bind himself to discharge the 1st defendant debt liability as surety on the amount stated on cheque, and in that respect he entered into a contract of guarantee as stated under Section 78 of the Law of Contract Act. The section defines a contract of guarantee as follows;-

“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 defines Consideration for guarantee as follows;

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.

Relying on the above mention Section, the court would like to state that a contract of guarantee was implied entered by the 3rd defendants who was not a party to Agreement Exhibit P2 and impliedly grant guarantee on repayment of third parties liabilities by issuing a cheques.

So, the court find even a defence in the case of Solomon v Solomon and Company [1897] AC 22 that a company is a separate legal entity which defendants are relying upon may not apply to shield 3rd defendant`s company on its own cheques and action of issuing cheques to guarantee payments of the plaintiff`s debts.

So long the 3rd defendant`s issued dozens of cheques , his action amounted to a promises to discharge third party liability. So, honestly by issuing 12 cheques to the plaintiff of shs 10,000,000/= Emar Company Limited, the 3rd defendant was accepting to discharge the liability of the 1st defendant.

The defendant defence on issued cheques that, were issued by a person who is not authorized would have been valid, if the 3rd defendant would brought in court the Memorandum and Article of Association of Emar Company Limited which shows Euphracie M. Rimisho or any other person who issued cheques was not the director or the principal officer of the company or was unauthorized to issues cheques for and on behalf of the company.

In the alternative the 3rd defendant would have brought evidence which shows cheques did not originate from Emar Company Limited. The cheques themselves bears the name of Emar Company Limited, and DW1 in the witness statement confirmed that it was issued to the plaintiff but was for purchase of beer, after being dishonoured cash money was paid.

The court has interpreted what is stated in clause 3 of Exhibit P2 and dishonoured cheques Exhibit P1 and find the issuance of cheques by Emar Company Limited was a promise made to the plaintiff and he believe that his liability has been secured and the 3rd defendant`s company was bound to honour paid amount stated in the cheques.

The 3rd defendant`s company altitude of passiveness on issued cheques originating from his own company, in my view signified that , the 1st defendant did not have any quarrel with issued cheques and that was his promise.

Courts in several decisions including a decision of EDWIN SIMON MAMUYA VERSUS ADAM JONA MBALA [1983] T.LR 410 at 414 whereas Lugakingira J (as then was) emphasized 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 as then was stated that;-

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

So going by cited case, the 3rd defendant by issuing dozens of cheques to the plaintiff he became a surety of un-discharged loan to the amount stated in 12 cheques, therefore has a duty of honoring his obligation as a guarantor. So as a gurantor, the 3rd Defendant becomes a co- principal debtor with the 1st defendant and is also indebted to the plaintiff. So, to conclude on the issue of in –debtteness of the defendant, I find and decide that the

1st and 3rd defendants are liable to pay the plaintiff debts for reason which I have explained above.

On the part of Blandina Mathew Rimisho the 2nd defendant I noted and assessed paragraph 2 and 4 of witness statement Elizabeth Massawe and find her role was just to accompany the 1st defendant in loan transactions. Such evidence is in-sufficient to establish any liability against her. So is not in-debted and not liable.

Turning to the 3rd agreed issue whether the plaintiff suffered any damages the court find from clause 2 of Exhibit P2 the 1st defendant agreed to pay the entire loan of shs 385,600, 000/= by 28/10/2013, but the loan has remained un-paid. Even 12 cheques paid by 3rd defendant has remained un- paid. Defendants fault of paying the loan which was due for payment way back 28/10/2013 that has denied the plaintiff an opportunity of using the monies in business or in investment opportunities.

As was stated in the case between Mwalwange v. Mwalwajo 1972 HCD No 78 by Mwakasendo Ag J that a claim for damages is awarded once it is proved that there is loss or injury which has been suffered. Now in the present claim the court find the amount which was withheld from payment is huge sum of shs 385,600,000 and was held from October, 2013 which is a long period of time.

Due to the fact that amount withheld was huge sum of money and was un paid for about four year and the plaintiff made several attempts to recover his outstanding loan without any success I answered issue No 3 by finding and deciding that the plaintiff suffered loss and injury and under Section 78 of the Law of the Contract Act Cap 345 [R.E 2002] is entitled to damages. In deed the section provides as follows

“When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties

knew, when they made the contract, to be likely to result from the breach of it”.

Bearing in mind the 1st defendant did not honour his promise in Exhibit P2 to pay a sum of shs 385,600,000 and 3rd defendant did not honour his promises of paying to the plaintiff a sum which was guaranteed in post-dated cheques the court find the denied the caused loss and injury to the plaintiff on not paying monies which would have been used in business and investment. So the plaintiff is entitled to damages.

Turning to the point what reliefs are parties entitled too, the court find the 1st defendant as a default borrower who promise to pay debt of shs 385,600,000 as shows in Exhibit P2 is liable to pay the outstanding debt. Also the court find the 3rd defendant as the one who issued cheques and guarantee part payment of debt is also liable as "surety", and co "principal debtor" who guaranteed part payment of the loan. On the claim for damages the court has find that the 1st and 3rd defendants caused loss to the plaintiff. And the basic rule of measuring damages is stated in several court decisions like in the case between WWWF World Wide Fund for Nature and Another, Versus World Wrestling Federation Entertainment, All E.R. 2008 Vol 1 it was stated that

The basic rule in contract is to measure damages by that sum of money which will put the Plaintiff in the same position as he would have been in if the contract had not been broken.

The same position was stated in the case of AA.S SAJAN VERSUS CRDB [1991] TLR 44 at 49 where it was stated that

The cardinal principle in awarding damages is "restitution in integrum that is the law will endeavour , so far as money can do it, to place the injured persons in the same situation as if the contract had been performed.

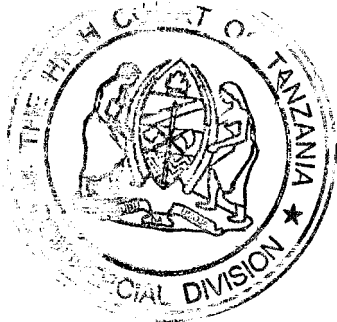
Thus bearing in mind the amount withheld as debt was shs **385,600,000 and** withheld for about 4 years as per Exhibit P2, I hereby order the 1st and 3rd defendants to the plaintiff a sum of shs 30,000,000 as loss and damages caused to the plaintiff.

So I hereby enters judgment and decree against the 1st and 3rd defendant as follows;-

- 1) The 1st defendant as a borrower and 3rd defendant as guarantor are liable to pay jointly and severally a principal sum of shs 385,600,000 as outstanding loan.
- 2) The 1st and 3rd defendant pays the plaintiff damages to the sum of shs 30,000,000/=
- 3) Further, the 1st and 3rd defendants are hereby ordered to pay the plaintiff an interests on the granted sum in item 1 at the rate of 11% per annum from the date the suit was instituted to the date of judgment.
- 4) Furthermore, the 1st and 3rd 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.
- 5) The 1st and 2nd defendants are 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 3rd day of January, 2018.




H.T. SONGORO
JUDGE.

The Judgment has been delivered in the presence of Mr. Mussa Kiobya, Learned Advocate for the plaintiff and Ms Ann Lugendo, Learned Advocate for the defendants.