

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT MWANZA

COMMERCIAL CASE NO 20 OF 2015

MASS TRADING CO LTD.....PLAINTIFF

VERSUS

CRDB BANK PLC.....DEFENDANT

JUDGMENT

MRUMA, J.

The Plaintiff a business entity established under the laws of Tanzania has filed a suit against the Defendant, the CRDB Bank PLC a finance institution praying for the following orders:-

- i) Court's declaration that the Plaintiff is indebted nothing by the Defendant;
- ii) Issuance of a permanent prohibitory order restraining the Defendant for her intended sale of the Plaintiff properties as listed under her demand notice dated 30/3/2015,
- iii) Issuance of an order against the Defendant for immediate release of all documents withheld by the Defendant in relation to the intended sale of the Plaintiff's properties,

- iv) Refund of all the Plaintiff's money paid to the Defendant to service the alleged restructured loan,
- v) Costs of this suit and the traditional prayer of "other relief(s) the court may deem fit to grant".

On being served with the plaint, the Defendant filed her written statement of defence disputing all the claims of the Plaintiff. The Defendant set up a counter claim praying for the following orders:-

- i) Payment by the Plaintiff in the main suit (who is the Defendant in the Counter- Claim) to the Defendant in the main suit (who is the Plaintiff in the counter-claim) of Tshs.933,898,224.83 being the principal amount and accrued interest as at 23rd July 2015;
- ii) Payment by the Plaintiff in the main suit (who is the Defendant in the Counter Claim) to the Defendant in the main suit (who is the Plaintiff in the Counter-Claim) of interest on the principal amount at the agreed rate of 16% per annum from 23rd July, 2015 up to the date of judgment,
- iii) Payment by the Plaintiff in the main suit (who is the Defendant in the Counter-Claim) to the Defendant in the main suit (who is the Plaintiff in the Counter-Claim) of interest on the decretal sum at the court rate from the date of judgment up to the date of payment in full; and costs of the suit and;

- iv) The tradition prayer of "Any other/further order as may be just under the circumstances".

In these proceedings the Plaintiff in the main suit (Mass Trading company) is represented by Mr. Musa Kasimu Advocate while the Defendant in the Main suit (the CRDB Bank PLC) enjoyed the service of Ms. Marina Mashimba, Advocate.

During the trial each party called one witness each. **Mr. WILLIAM MASUBI CHIMAGULI (PW1)** testified for the Plaintiff while **Mr. STEPHEN JOHN CHILLUMBA (DW1)** testified for the Defendant.

At the commencement of the trial Court framed four issues in respect of the suit and another four issues in respect of the Counter- Claim. The issues in respect of the main suit which were agreed by the parties are as follows:-

- 1) Whether or not the Plaintiff was denied direct access to cash withdraw of the loaned money;
- 2) If the answer to the first issue is in the affirmative what were the consequences suffered by the Plaintiff;
- 3) Whether or not the Defendants bank delayed to release the loan mobilization funds, and if so what were the consequences on the part of the Plaintiff;

4) Whether or not T.shs 314.7 Million given by the Government to the Plaintiff as Rescue Compensation Package was a relief to the Plaintiff's capital or was intended to offset her restricted loan,

Issues on the counter claim are as follows:-

- 1) Whether or not in 2008/2009 cotton season the Plaintiff in the Counter Claim (who Defendant in the in the suit), declared not to involve in cotton business anymore,
- 2) Whether or not it was correct for the Defendant (Plaintiff in the counter claim) to use the Plaintiff (i.e. Defendant's in the counter claim) compensation package to offset part of the Plaintiff's outstanding restructured loan,
- 3) Whether after the set - off the Plaintiff has any outstanding against the Defendant,
- 4) To what reliefs are the parties entitled.

Before I make analysis of the facts and evidence on record I find it crucial to review albeit briefly, the background of the matter.

The kernel of the suit as per the plaint revolves around an allegation that the Defendant enticed the Plaintiff who was doing merchandise business to trade in cotton. The Plaintiff was so persuaded by being invited in several seminars organized by the Defendant's Bank. Following that persuasion the parties entered into a business arrangements in which the Defendant agreed to provide working capital to the Plaintiff. Pursuant to

that agreement, several loans were made available to the Plaintiff for purposes of carrying out the cotton trade. Unfortunately the business was not easy as the Plaintiff was made to believe by the Defendant. The Plaintiff partly blames the Defendant for difficulties she encountered in the business and he also spread her cry to the World's economic crisis that hit the world during that period of time. The plaintiff states that the crisis was so hard to the extent that he could not continue with the business.

It is further statement of the Plaintiff that in realizing the hardship which cotton dealers were facing in their businesses the government offered financial rescue package whereby the Plaintiff benefited to the tune of Tsh.314.7 Million. However, to her dismay the amount was converted by the Defendant and was used to restructure the loan while according to her the amount could have been used as a working capital.

Furthermore the Plaintiff states in her plaint that the amount advanced by the government and which was used by the Defendant to restructure the loan was sufficient to clear her outstanding debt with the Bank therefore there is no debt pending in her. She stated that the demand notices issued by the Defendant to her with intention to dispose of her properties on the auspice of default in paying of T.sh.911.2m allegedly outstanding in her loan account has prompted her to seek redress in this court, because in reality she is not indebted.

The Defendant denied the allegations made by the Plaintiff in her plaint and in rebuttable, she alleges it is actually the Plaintiff who is

indebted to the Defendant and hence the Defendant has set up a Counter Claim.

I will now turn to consider the framed issues both in the suit and in the Counter Claim by applying the evidence adduce for and against and the exhibits tendered by the parties.

The first issue in the suit is ***whether or not the Plaintiff was denied direct access to the cash withdrawal of the loaned money.*** From the testimonies of PW1 and DW1 it cannot be disputed that indeed the Plaintiff entered into overdraft facility loan agreement with the Defendant. The first loan advanced to the Plaintiff was T.shs 1,500,000,000/=. The loan was intended to facilitate the Plaintiff's cotton business. It was a prerequisite that before the loan is disbursed the Plaintiff should operate a fixed Deposit Account of T.shs 200,000,000/= the condition which the Plaintiff fulfilled. In the loan facility agreement it was mutually agreed that the Defendant Collateral Manager would take control of the cotton business and further that no cash could be disbursed directed to the Plaintiff unless and until the said collateral manager authorizes the bank to do so. That was one of the terms of the loan agreement and it was not challenged by the Plaintiff.

When PW1 was cross examined by Ms. Marina on whether the Plaintiff maintained an account with the Defendant's Bank PW1 stated that it is true the Plaintiff maintained bank accounts with the Defendant and that indeed there were conditions to be met before money could be

released to the Plaintiff which condition they fulfilled and that in order to pay money from those accounts he was supposed to issue cheques.

From the evidence on record the first issue is answered in the negative. That is to say the Plaintiff was not denied direct access to the cash withdrawal but it was a mutual agreed arrangement between the parties to meet certain conditions before money could be accessed. In Terms of clause 5.2 of Exhibit P2, disbursement of cash from the overdraft facility was conditional precedent to availability of cotton stock collected by the Plaintiff. That having been mutually agreed by the parties, the Plaintiff cannot be heard turning around and saying that she was denied access to proceeds of sale of cotton.

The second issue was precedent upon the first issue being answered in the affirmative and it was to the effect that if the answer to the first issue was in the affirmative ***what consequences the plaintiff would have suffered***. Since the first issue has been answered in the negative it follows that the second issue dies a natural death and one can say that the Plaintiff didn't suffer any consequence at the instance of the Defendant.

The third issue is about disbursement of the loaned money for mobilization of working resources and the question was ***Whether or not the Defendant's bank delayed to release mobilization funds and if they did delay what were the consequences on the part of the Plaintiff.***

Let me start by saying that principle of the law of evidence that whoever desires any court to give judgment as to the legal right or liability dependent on the existence of facts which he asserts must prove that those facts do exist. In the instance case the plaintiff alleged that she accessed to lesser amount than T.shs 1.5 Billion loan advanced in the first facility and T.shs 2 Billion approved in the second facility and that even the little amount she accessed was not released timely to enable her to meet cotton growers' selling seasons the fact which led her to fail to collect the amount of cotton she planned to purchase. The Plaintiff's sole witness complained that stringent control of the Defendant in the sense that any proceed of sale had to be paid directly to the Defendant for recovery of the loan advanced to the Plaintiff turned the Plaintiff an agent and marketer of the Defendant in the cotton business. As a result, the Defendant disbursed less that T.shs 1.5 billion agreed in the loan agreement document (Exhibit P2). Similar situation prevailed in respect of the second facility of T.shs 2 Billion. No evidence was led to prove that less amount than the amount planned was disbursed to the Plaintiff for any activity she wanted to carry out. The Plaintiff did not give any evidence towards establishing any amount requested which was not honoured by the Defendant in any particular period of the cotton season business. In the circumstances this court is unable to find the Defendant guilty of delay in disbursing or releasing mobilization funds or any other fund. Accordingly the third issue is answered in the negative.

The fourth issue is about T.shs 314. 7 Billion which was granted by the Government and the issue here is whether or not the money was granted as a relief for the Plaintiff's Capital or was intended to off-set the Plaintiff's restructured loans. This issue will not detain me much. The answer to that issue is not far fetched exhibit P6 speaks it all. On 10th December 2009 the Defendant's Bank wrote to the Plaintiff to inform her that the Government had deposited into her Account No. **01J1084362400** the sum of T.shs 314,171,545.28 as rescue compensatory package to cotton loan borrowers suffered loss during financial crisis period. The Bank went on to inform her that the whole fund has been paid to the Bank to offset the outstanding re-structured loan on the same Account. The Plaintiff acknowledged by signing the letter (Exhibit P6) and the bank statement showing the transaction involved. The letter which the Plaintiff signed informed him that the outstanding balance remaining was T.shs 362,682, 278.26. There is no evidence to counter these facts. I therefore find that T.shs 314,7 Million given by the Government was a Rescue Compensation Package to the Plaintiff as a cotton loan borrower who had suffered loss during financial crisis and that it was proper for the Defendant's bank to use to set off part of the Plaintiff's re-structured loan and this answers the fourth issue in the negative.

Having resolved all issues framed in the suit in the negative it follows that the relief the parties are entitled is the dismissal of the Plaintiff's case

with costs. Accordingly the Plaintiff's case is dismissed with costs to the Defendant.

I now turn to the Counter Claim. As stated hereinbefore four issues were framed in respect of the counter claim. The first issue is ***whether or not in 2008/2009 the Defendant in the counter-Claim (Who is the Plaintiff in the suit) declared not to involve any more in cotton business.*** This issue is not seriously disputed by the Plaintiff in the Counter Claim (who is the Defendant in the suit). Actually it was proved through a letter (Exhibit P5) addressed to the Plaintiff's Bank. In that letter the Defendant in the counter claim requested the Plaintiff to immediately remove her collateral agent Vision Control and Superintendence Limited due to unfavourable cotton business. Accordingly I answer the first issue in the counter claim in the affirmative.

The second issue in Counter-Claim is ***whether or not it was correct for the Plaintiff in the counter -Claim (i.e. Defendant in the suit) to use the Plaintiff's compensation package to off-set part of the Defendant in the Counter-Claim (Plaintiff in the suit) outstanding restructured loan***". In a way this issue has been answered when answering issue No. 4 in the suit. The Defendant in the Counter-Claim didn't challenge the use of her money to reduce his own outstanding loan. There is evidence from DW1 to the effect that it was the Plaintiff's Bank which took initiatives with the Government to get the rescue packaging. This testimony is corroborated by Exhibit P1 which is a letter informing the Defendant of the deposit by the government of T.shs 314,

171, 545.28 and its payment to the bank towards offsetting of her restructured loan. The defendant acknowledged by signing the latter. she doesn't challenge this evidence. The letter clearly show that it was the money was a financial rescue packaging for cotton loan borrowers and the defendant herein was among the cotton loan borrowers. Accordingly I find that it was correct for the Plaintiff herein to use the funds to offset the Defendant's cotton loan.

The next issue is whether after the said offset the Defendant herein (the Plaintiff in the suit) has any outstanding in his account against the Plaintiff herein (the defendant in the suit). From the evidence on record the Defendant admits that there is outstanding amount against the Plaintiff. Starting with her letter to the Plaintiff dated 15th February 2008 (Exhibit P1), the Defendant stated at paragraph 5 that:-

"However, we are currently working on the issue of the remaining balance of our overdraft facility and we will be regularly servicing our loan facility through our merchandize business and sister company"

This was followed by the signing of the Financial Crisis Rescue letter for Cotton Borrowers (Exhibit P1) which she signed after the offset was done. In that letter it was stated under paragraph 2 that:

"You are further informed that the whole fund has been paid to the bank to offset the outstanding restructured loan (A/C 0160084362400) resulted from the cotton business. The

current loan balance in the term loan account is therefore T.shs 362,682,278.26)drastic reduced by the above mentioned government assistance”

That letter (Exhibit P5) was signed by the Plaintiff through William Masubi Chimaguli (PW1) who signed as the Managing Director of the Defendant’s company Mass Trading Company Ltd and Enock Mshimo who signed as Director. By signing exhibit P5, the two directors were acknowledging the contents therein including the fact that there was an outstanding balance of T.shs 362, 682,278.26 and they were also validating the Plaintiff’s act of offsetting part of the outstanding loan. The Plaintiff cannot be heard turning around and say that after the set off there is no outstanding balance against the company. The presence of outstanding balance is also admitted in PW1’s witness statement in paragraph 11 where it is stated that:-

“.....such less disbursement and the said business control led to unrecovered overdraft loan facility to the tune of T.shs 482 Million for 2007/2008 and T.shs 400 Million in 2008/2009”

There is also evidence from DW1 to the effect that by March 2015 the outstanding balance against the Defendant was T.shs 911,183, 394.29 being the principal sum plus accrued interest. This evidence was not challenged. The defendant geared the most part of her evidence towards showing that the Plaintiff contributed to her failure to discharge her obligations under the facility letters. In law every fact alleged and which is supported by evidence must be specifically denied with evidence to

counter it. In the case at hand DWI stated in paragraph 13 of his witness statement that the Plaintiff (in the main suit) who is the Defendant here in defaulted in repaying the loan in the agreed manner and by 30th March 2015 the outstanding loan stood at T.shs 911,183,394. 29. That statement is the evidence in chief of the Plaintiff and it is made on oath. It ought to have been challenged through cross-examination or by bringing other evidence to the contrary. This was not done. When a fact is deposed by one party and it is not controverted by the other then it is presumed to be admitted. In civil cases where the standard of proof is on the balance of probability any unchallenged evidence tilt the case towards a party who produced it. In the present case I find that the Plaintiff in the Counter- Claim has been able to prove her case on the balance of probability.

Accordingly and in summary and as stated hereinabove, it is hereby ordered that:-

1. The Plaintiff's claim (in the suit) is dismissed with costs to the Defendant;
2. On the other hand judgment is hereby entered for the Plaintiff in the Counter –Claim against the defendant therein as follows:-
 - i. The Defendant in the Counter-Claim shall pay to the Plaintiff therein T.shs 933, 898, 224.84 being the outstanding loan and accrued interest as at 30th June 2015;

- ii. The decretal sum shall attract interest at the rate of 16% per annum from 30th July 2015 to the date of Judgment;
- iii. Further interest at court's rate of 7% per annum shall be chargeable from the date of judgment to the date of payment of the decretal sum in full and;
- iv. The Plaintiff in the Counter- Claim shall have costs against the Defendant in the counter-claim and costs in respect of the main suit where she is the Defendant.




A.R. Mruma,

Judge.

Dated at Mwanza this 8th day of June 2018.