IN THE HIGH COURT OF TANZANIA

COMMERCIAL DIVISION

(AT MWANZA)

COMMERCIAL CASE NO 14 OF 2015

I&M BANK (T) LIMITED.....PLAINTIFF

VERSUS

EMMANUEL JUSTINE NYERERE T/A

MAFUTA DISTRIBUTORS.....1ST DEFENDANT

REVINA JOSEPH MHONGE.....2ND DEFENDANT

JUDGMENT

MRUMA, J.

The plaintiff bank I&M Bank Limited brought this action against the Defendants jointly and severally for among other orders an order to recover T.shs 546,746,529.60 being an outstanding amount, interest at commercial rate of 20% per annum on the outstanding amount from the due date to the date of judgment and further interest at undisclosed court's interest rate from the date of judgment to the date of full payment and also costs of the suit.

The facts giving rise to the plaintiff's claims are that on or about the 5th December, 2013 the 1st Defendant requested from the Plaintiff credit facilities being an Overdraft Facility of T.shs 326,000,000 and a Term Loan of T.shs 124,000,000 for the purposes of meeting his business working

capital requirements and partly to take over his then existing liabilities at the Equity Bank Tanzania Limited and Amana Bank Limited respectively.

It is the Plaintiff's case that the terms of the said Overdraft and Term loan would be charged interest rate of 20% per annum both to be debited to the Defendant's account monthly on daily product basis and that the said Overdraft facility shall be repaid within the 12 months from the date of the first draw down, and that the Term loan facility shall be repaid within 33 months from the date of the first draw down.

Furthermore it is the Plaintiff's case that 1st Defendant created legal mortgages in favour of the Plaintiff over his landed properties located on Plot No 1278,Block B Kiseke Area,Mwanza City ,Certificate of Title No.37743,LR Mwanza ; Plot No.850,Block M , Pasiansi Area, Mwanza City, Certificate of Title No 45680,LR –Mwanza and Plot No.1183 ,Block M,Pasiansi Area, Mwanza City, Certificate of Title No.45222,LR-Mwanza guaranteeing the full repayment of the said credit facilities and liabilities and incident thereto. Also that as security for loan and overdraft facility the 1st Defendant created chattel mortgage over two trucks with registration No. T. 841 CLX and T.462 CLK and two trailers with registration Nos. T. 834 CLX and T. 838 CLX guaranteeing further for the full repayment of the said credit facilities.

On the involvement of the 2nd Defendant, it is the Plaintiff's case that on 13th December 2013, the 2nd Defendant executed in favour of the Plaintiff an irrevocable and unconditional Personal Guarantee guaranteeing full repayment of the said credit facilities.

It is stated by the Plaintiff in her plaint that the 1st Defendant took and utilized the loans and that vide the facility letters, the said Over Draft Facility was to be repaid on recurring basis inclusive of the interest and further that the 1st Defendant was supposed to route the entire daily proceed through the account maintained by the Plaintiff, but that to the contrary the 1st Defendant failed, neglected or ignored to repay the said credit facilities such that as of 15th March, 2015 a total of T.shs 546,746,529.60 was due and owing to the Plaintiff from the 1st Defendant on account of the said credit facilities. That in accordance with the law regulating mortgage enforcement and recovery of loans under mortgage, the Plaintiff issued to the Defendants a Notice of Default that is Land Form No.54 A requiring the 1st and 2nd Defendants to rectify the default by paying the term loan and overdraft facility advanced to the 1st Defendant by the Plaintiff. The Plaintiff contention is that despite several demands requiring the 1st and 2nd Defendants to settle the outstanding liabilities of the Plaintiff, the Defendants have failed or neglected to repay the overdraft facility and the term loan facility advanced to the first Defendant and guaranteed by the second Defendant.

The Defendants on their part filed a joint written statement of defence contesting the Plaintiff's claims by stating that the loan agreement was uncertain and ambiguous as well as the personal guarantee, and further that the 1st Defendant never created chattel mortgage over the two trucks as alleged in the plaint and that he never signed hence the signature thereto is forged, they thus prayed for the suit to be dismissed with costs.

At the final scheduling conference the following issues were framed by the court and agreed on by the parties;

1. *Whether or not the Defendants are indebted to the Plaintiff and if yes how much is owed to the Plaintiff from the Defendants*
2. *Whether or not it was the terms and conditions of the credit facility letter that the overdraft was to be repaid on recurring basis inclusive of interest*
3. *Whether or not it was the agreed terms that the 1st Defendant had to route the entire daily sale proceeds through the account maintained by the Plaintiff*
4. *Whether or not the Defendants breached the terms of the agreement*
5. *To what reliefs are the parties entitled.*

On the date fixed for hearing of the matter, the Plaintiff was represented by **Ms. Marina Mashimba, Advocate** while the Defendants were represented by **Mr. Feran Kweka, Advocate**.

The Plaintiff called one witness **Mwanahamis Mohamed Pazi** (PW1) to prove her case. In her witness statement filed in court on 11th February, 2019 she stated that she works at the Plaintiff's Bank as a recovery manager and thus she is conversant with the matter at hand. On the first issue of whether *or not the Defendants are indebted to the Plaintiff and if yes how much is owed to the Plaintiff from the Defendants PW1* testified that on 5th December,2013 the 1st Defendant requested from the Plaintiff

credit facilities being an overdraft facility of T.shs. 326,000,000.00 and a term loan facility of T.shs.124,000,000.00 for purposes of meeting his business working capital requirements and partly to take over his then existing liabilities at Equity Bank Tanzania Limited and Amana Bank Limited as per **Exhibit P1**. That as security for the said loans the 1st Defendant created legal mortgages in favour of the Plaintiff over his landed properties as per **Exhibit P2, Exhibit P3 and Exhibit P4** which were admitted and marked by this court accordingly. She testified further that the 1st Defendant also created a chattel mortgage as further security to the said loan facilities as evidenced by **Exhibit P5** and a further security was a personal guarantee issued in favour of the Plaintiff guaranteeing full payment of the credit facilities issued to the 1st Defendant and that the same was executed by 2nd Defendant as evidenced by **Exhibit P6.**

It is further evidence of PW1 that the loans were granted to 1st Defendant after signing the offer letter in December, 2013 and that the documents were perfected in February, 2014 because the two loans were bought from Equity Bank and Amana Bank and the securities were released to the Plaintiff in January 2014. PW1 stated further in her witness statement that, as of 15th March,2015 the 1st Defendant was indebted to the Plaintiff to the tune of T.shs 546,746,529.60 and that as of 9th February 2019 the outstanding amount owing to the Plaintiff from the 1stDefendant account reached T.shs 1,032,920,538 as evidenced by **Exhibit P7 collectively.**

On the part of the defence on the first issue, through the testimony of DW1 Emmanuel Justin Nyerere ,firstly he admitted to have applied for the

loan facilities which were granted as applied and that part of the loan was used to offset his liabilities at Equity Bank and Amana Bank. DW1 also admitted to have pledged his landed properties as securities for the loans advanced to him and that indeed the overdraft facility was valid for 12 months and term loan was to be repaid in 33 months and that the purpose of the collaterals was to enable the Bank to recover its money. He also conceded that to date he has not repaid the loan as agreed.

When he was re-examined by Mr.Kweka his counsel DW1 stated that currently he is indebted to the Defendant to the tune of T.shs 380,000,000.

On her part DW2 Revina Joseph Mhonge briefly stated that the 1st Defendant is her husband and that indeed she signed Exhibit P1 which is an offer letter. When she was cross examined if she signed Exhibit P6 which is guarantee and indemnity she conceded that she actually signed it but she contended that she was just asked to sign without reading it and that she was told that it is personal guarantee. The witness said that she is aware that the 1st Defendant is still indebted to the Plaintiff.

When she was answering a re-examination question DW2 did not dispute to have signed the guarantee, indemnity forms and the spouse consent form but she insisted that she signed the documents without reading them.

From the evidence and testimonies on record it is not disputed that the Defendants are indebted to the Plaintiff. What the 1st Defendant seems to challenge is the amount claimed by the Plaintiff against him. In law whoever desires court to give judgment in his favour alleging existence of

certain facts, he has the duty to prove that those facts do actually exist [See Section 110 of the Evidence Act]. In the case at hand the Defendants have admitted that they are indebted to the Plaintiff. The plaintiff has adduced evidence to the effect that by 15th March 2015 a total of T.shs 546, 746, 529.60 was due and owing to the Plaintiff. No evidence has been lead to contradict these facts. Thus, this court finds that since the Defendants have failed to prove what they are alleging or disapprove the Plaintiff's claims, then the Plaintiff's claimed outstanding amount stands to be correct amount on the balance of probability as required in civil cases . I therefore hold and find that the Plaintiff is owed T.shs 546,746,529.60 from the Defendants as prayed in the plaint.

On the second issue which was *whether or not it was the terms and conditions of the credit facility letters that the overdraft was to be repaid on recurring basis inclusive of interest.* PW1 stated in her witness statement that the 1st Defendant was availed credit facilities vide facility letter and that it was the term and condition that the said overdraft facility was to be repaid on the recurring basis inclusive of interest. I have looked on the evidence on record, Exhibit P1 shades a light on what indeed was agreed by the parties it is reflected in the offer letter at page 2 clause 4 that the overdraft was to be valid for 12months and the term loan was to repaid over 33 monthly principal payments of T.shs 3,757,576, again clause 3 of the offer letter on interest provide the following I wish to quote it;

"'Interest on the Overdraft and Term loan Facility will be charged at our TZS Bank's Prime Lending rate Plus 1%effective 20% per annum.

Both on daily product basis and will be debited to your account at the end of every month. We reserve the right to vary the interest rate as and when required by giving 7 days' notice. Interest shall accrue day to day and will be calculated on the basis of the actual number of days elapsed and a 365 –day year will be debited to your account with us monthly in arrears "....

Therefore it is clear that parties agreed on repayment recurring basis inclusive of interest, and this answers the second issue in the affirmative

The third issue is *whether or not it was the agreed terms that the Defendant had to route the entire daily sale proceeds through the account maintained by the Plaintiff.* PW1 in her witness statement filed herein court she stated that one among the terms and conditions of the credit facilities was that the 1st Defendant was supposed to route the entire daily sale proceeds through the account maintained by the Plaintiff but did not do so. I have gone through the testimonies and evidence on record, I did not see anything on this issue as far as agreement to route the entire sale proceeds through the account maintained by the Plaintiff. Exhibit P1 which in essence consists the terms of the agreement as far as the two loan facilities are concerned is silent on the issue. I therefore answer the issue in the negative that is to say there was no such agreed term to have the daily proceeds of the 1st Defendant routed in the account maintained by the Plaintiff.

As far as the fourth issue is concerned *which is whether or not the Defendant breached the terms of the agreement* , I wish to take recourse to my findings on issue number one which has established that indeed the Defendants are indebted to the Plaintiff after they failed to honour the terms and conditions of the agreement a fact DW1 the key witness for the defence did not dispute, failure to repay the loans as per the terms envisaged under Exhibit P1 led to breach of the agreement so to speak. Hence I hold that the Defendant breached the terms of the agreement.

The last issue is about reliefs. I have found as a matter of fact that the Plaintiff has proved her case on the balance of probability. I find that the amount claimed in the plaint has been proved to be the outstanding since there was no counter outstanding amount after the 1st Defendant agreed to being indebted but not to the claimed amount.

Before I enter judgment, I find it important to state why the 2nd Defendant was sued jointly and severally with the 1st Defendant. The reason is not farfetched. As stated by PW1 , the involvement of the 2nd Defendant is as far as guaranteeing the loan as per Exhibit P6 is concerned. That is to say as the guarantor of the first Defendant she unconditionally guaranteed to discharge the Debtor's obligation (1st Defendant) to the Bank on demand and since she did not heed to the demand as per the demand notice **Exhibit P9** she is also liable to the Plaintiff's claims. In her testimony before this court **DW2** did not dispute to have signed guarantee and indemnity deed but that she was just told to sign without knowing what

she was actually signing, which I find not to be a defence to escape her liability.

Having said the above, accordingly I enter judgment for the Plaintiff and against the Defendants and order that the 1st and 2nd Defendants jointly and severally shall pay to the Plaintiff T.shs 546,746,529.60 being amount outstanding and due to the Plaintiff as of 15th march 2015 .

The Plaintiff is also claiming commercial interest at the rate of 20% per annum for the outstanding amount from the date was due to the date of judgment. In awarding commercial interest the court always look at several factors depending on the circumstances of each case as well as the agreement of the parties in the given mater, in this case the parties themselves covenanted to the interest to be chargeable on both loan facilities , looking at Exhibit P1 clause 3 on interest parties agreed to an interest of 20% per annum, hence a prayer in the plaint of the mentioned commercial interest is justified, I therefore order that the 1st and 2nd Defendants jointly and severally shall pay to the Plaintiff a commercial interest rate of 20% per annum on the outstanding from the date of filing the suit to the date of judgment.

As regards the court's rate interest prayed for by the Plaintiff, I award court's interest at the rate of 3% per annum from the date of this judgment till payment in full. Accordingly the 1st and 2nd Defendants shall jointly and severally pay to the Plaintiff interest at court's rate of 3% per annum from the date of this judgment to the date of full payment of the decretal sum.

Finally, it is the general rule of practice and law that costs normally follows the event in the suit, I find myself inclined to award costs of the suit to the Plaintiff, I therefore award the Plaintiff costs of her suit.

A.R. Mruma,

Judge.

Dated at Mwanza this 15th Day of February, 2019