IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO 57 OF 2019

BETWEEN

FIRST NATIONAL BANK TANZANIA LIMITED.....PLAINTIFF

Versus

HUSSEIN AHMED SALWAR t/a

PUGU HARDWARE (2000).....1st DEFENDANT

AHMED HUSSEIN ABDUKARIM.....2nd DEFENDANT

Last Order: 9th Mar, 2020

Date of Default Judgment: 22nd Apr, 2020

DEFAULT JUDGMENT

FIKIRINI, J.

The Plaintiff, First National Bank Tanzania Limited is a limited liability company engaged in banking business while the 1st defendant is a natural person carrying and owns business in Tanzania. In this suit the plaintiff is suing the defendants, the 1st defendant as a principal debtor, and the 2nd defendant as a guarantor, for breach

of the facility agreement and recovery of Tzs. 490, 286,954.82 plus the interest, being monies due from the overdraft facility issued to the 1st defendant.

The brief background of the case as disclosed in the plaint is that on 30th March, 2017, the plaintiff entered into an agreement with the 1st defendant for an overdraft facility lasting for one (1) year, repayable on demand, of Tzs. 350,000,000/= (Tanzania Shillings Three Hundred Fifty Million only). The 2nd defendant secured the facility by a personal guarantee and as well by the legal mortgage over residential property on Plot No.83 Block 20 located at Bunju Area, Kinondoni Municipality in Dar Es salaam City which is registered in his name.

The 1st defendant defaulted in his undertakings to make repayments. He was in breach of the agreement and indebted to the plaintiff for Tzs. 490,286,954.82 plus interest and other costs. Since the Principal Debtor was in default, the 2nd defendant as a guarantor of the overdraft facility extended to the 1st defendant, became liable. On 06th June, 2018 the plaintiff issued the defendants with sixty (60) days statutory notice requiring them to remedy the default. The defendants ignored, refused and/or failed to pay the outstanding principal amount plus interest despite several meetings, repeated demands and reminders, and hence this suit.

During the hearing, the plaintiff enjoyed the legal service of two learned counsels, Mr. Joseph Kipeche and Ms. Mariam Mtalitinya. On 15th October, 2019, when the matter came for the hearing Ms. Mariam Mtalitinya, entered appearance for the plaintiff and requested for a substituted service under Order V Rule 20 (1) of the Civil Procedure Code, Cap 33 R.E 2002 (the CPC) as amended, as attempts to effect service on the defendants physically had failed.

The application was granted and the service effected by a way of publication in Mwananchi newspaper. As proof of publication in the newspaper, a copy of the publication dated 20th November 2019, was filed in Court. In the publication the defendants were ordered to file their written statement of defence within 21 (twenty one) days. The 21 (twenty one) days elapsed on 11th December, 2019. Up to 9th March 2020, no defence has been filed, nor Court appearance made by the defendants.

The plaintiff pursuant to Rule 22(1) of the High Court (Commercial Division) Procedure Rules, 2012, as amended by GN No. 107 of 2019, (the Rules), has applied for default judgment. The application has been supported by the affidavit of Mr. David Sarakikya, the Principal Officer of the Plaintiff conversant with facts of the matter deponed on.

In the affidavit deponed to prove the claim, the following documents have been annexed to wit: copy of bank facility letter dated 30th March 2017, Z-A1, copy of

mortgage deed and personal guarantee letter dated 30th March 2017 and 6th April 2017, ZA-2, copy of 60 days notice-ZA-3, bank statement ZA-4, and copy of the Mwananchi newspaper-ZA-5.

It was Plaintiff's claim that she has suffered financial losses and damages amounting to Tzs. 490,286,954.82, and is thus praying for the following orders:

(a) A declaration that the defendants have breached the terms of the Bank facility letter and the guarantee letter dated 30th March 2017 and 6th April 2017 respectively;

(b) An order for payment of Tanzanian shillings **490,286,954.82** being the principal sum on the term loan with interest accruing thereon up to 9th April 2019;

(c) an interest on (b) at the rate of 23% per annum from the date of filing this suit to the date of judgment;

(d) General damages to be assessed by the Court;

(e) An interest on the decretal amount at the rate of 7% per annum from the date of judgment till the date of final satisfaction of the decree;

(f) That the defendants be ordered to pay costs of this suit; and

(g) Any other relief (s) the Court deems fit and just to grant.

By publication in the Mwananchi newspaper, it is without a doubt that the defendants were duly served, as the Mwananchi newspaper is usually distributed and sold in many parts of Dar es Salaam, reachable by average people. Convinced that the defendants were duly served, and since they neither entered appearance nor filed written statement of defence, it is apparent they have religuished their right to defend this suit. The plaintiff therefore correctly and lawful moved the Court under Rule 22(1) of the Rules praying for default judgment.

Rule 22(1) clearly provides that;

> *"Where a party required to file written statement of defence fails to do so within the specified period or where such period has been extended in accordance with sub rule 2 of Rule 20 within a period of such extension, the court may upon proof of service and* ***on application by the Plaintiff in form No.1 set out the schedule to these Rules accompanied by an affidavit in proof of claim, enter judgment in favour of the Plaintiff."***
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> (Emphasis is mine)

In this instant suit the main question to be legally determined is **whether the plaintiff has successfully proved her case, by way of an affidavit in proof of the claim.**

Granting of default judgment is not an automatic or mandatory requirement such that only proof of service is enough. In the past that would have been sufficient, but after the amendment the requirement has changed. Currently, in light of Rule 22 (1) of the Rules, the plaintiff must comply with three legal requirements which are: **One,** proof of service to the defendant who in the present suit failed to file a written statement of defence and enter appearance, the fact not disputed, **two,** the plaintiff is required as a must to make an application in the prescribed Form No.1 as provided in the First Schedule to the Rules, the requirement complied with and **three,** Form No. 1 must be accompanied by an affidavit in proof of the claim, which has equally been fulfilled.

Further to fulfilling the three main requirements, the plaintiff is equally expected to satisfy the Court by proving the claims in the plaint. A legal requirement is that the one who alleges must prove; therefore it is upon the plaintiff, who desires the Court to enter default judgment in her favour, to fulfill that obligation. This is according to section 110, 111 and 112 of the Tanzanian Evidence Act, Cap 6 R.E 2002 (the Evidence Act). In the present suit likewise, the plaintiff is anticipated to fully comply in the sense that,the affidavit in proof of the claim deponed and filed, must prove each and every claim outlined in the plaint, albeit on the balance of probabilities, despite the fact the deposition will not encounter challenges from the

defendants. This includes the authenticity, relevance and admissibility, of documents or annextures accompanying the affidavit deponed.

In the case of **Juliana Dani Kimaro v Attorney General, Civil Case No. 179 of 2014** was held that:

> *"It is the duty of the plaintiff to prove that the said property belongs to him, since the plaintiff failed to prove that, the original document is in the possession of the defendant then secondary evidence are not admissible."*

What this Court is tasked with is to scrutinize if the affidavit deponed including the documents annexed support each and every claim in the plaint. The "Best Evidence" rule requires proof by production of original or primary evidence. The presumption is that if secondary evidence is produced where better evidence and/or original might be given, this would operate adversely to the producing party's case. Meaning only out of necessity and impossibility of producing the primary evidence the Court can admit secondary evidence. This is evidence which has been reproduced from an original document. In order for that to take place compliance to section 67 of the Evidence Act, is a must. In the case of **Edward Mwakamela v R [1987] T. L. R. 121**, when faced with the issue, the Court had this to say:

"For secondary evidence to be admissible it must first satisfy provision of S 67 of the Tanzania Evidence Act, on admissibility of secondary evidence"

All the documents annexed to the affidavit though are relevant to the fact but their authenticity is questionable. The documents were uncertified photocopies. In the affidavit deponed there was no single paragraph stating the whereabouts of the originals and no reason was given as to their uncertification. This also touches on admission of electronic documents. That besides being relevant as defined by the Evidence Act, but in order to prove that the document is what it purports to be, an affidavit of the originator is necessary. In our case there was none. An affidavit of a person, who printed or generated annexture ZA-4, was a must. The fact annexture ZA-4 had the plaintiff's official stamp, was not sufficient to prove the authenticity of the document and allow it admissibility.

Compliance to these requirements is compulsory whether in default judgments or in any other reliefs sought whereby a party desires the Court to enter judgment in her favour. Documents are not simply admitted because they have been referred in the affidavit but because they have as well complied to the rules in place. In the case of **Farah Mohamed v Fatuma Abdallah [1992] T.L.R 205,** the Court rejected admission of an exhibit as it did not meet the requirements of section 65 of the Evidence Act.

The omission to annex original copies has in actual fact impacted the plaintiff's case and consequently rendered it not proved. The affidavit deponed also lacked detailed information, the same being a substitute to the oral evidence. Restating what is contained in the plaint is in my view not sufficient.

In light of the above I find the plaintiff has failed to prove his claim to warrant this Court to enter a default judgment prayed in her favour. The suit is dismissed with no order to costs. It is so ordered.

P. S. FIKIRINI

JUDGE

22rd APRIL, 2020