

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)**

AT DAR ES SALAAM.

COMMERCIAL CASE NO. 157 OF 2018

LIGHT AND HURRY ENTERPRISES LIMITED PLAINTIFF

VERSUS

NMB BANK PUBLIC LIMITED COMPANY DEFENDANT

Date of Last Order: 24/3/2020.

Date of Judgement: 24/4/2020.

JUDGEMENT

The plaintiff, LIGHT AND HURRY ENTERPRISES LIMITED by a plaint instituted the instant suit against the above named defendant praying for judgment and decree in the following orders, namely:-

- a. An order for payment Tanzania Shillings One Hundred Fifty Eight Million Six hundred Thousand and two Hundred (TZS. 158,600,200) being compensation for the actual loss incurred due to the defendant's breach of the duty of confidentiality;
- b. General damages at an amount to be determined by the court but not less than Tanzania Shillings Three Hundred Million (TZS. 300,000,000/=);
- c. Interest on the decretal amount at the court rate of 21% from the date of filing this suit to the date of judgment;
- d. Costs of this suit;
- e. Any other relief(s) that this Honorable Court may deem fit, just and proper to grant.

Upon being served with the plaint, the defendant filed a written statement of defence disputing every allegations of the plaintiff and raised a defence that at all material time she accessed the account of the plaintiff she was complying with lawful orders of the court which were not challenged by the plaintiff. In the alternative, the defendant put the plaintiff into strict proof of his allegations.

The facts of this case as depicted from the pleadings are not complicated. The plaintiff is a customer of the defendant holding a Tanzania Shillings current account number 60302300225 at Makambako branch for more than twenty years. On 4th September,2018 one of the directors of the plaintiff by the name of Harrison Bimbiga visited one of the defendant's branch in Dares Salaam called NMB House with intention to make transfer of Tshs.50,000,000.00 to Barclays Bank for purchase of bonds valued at Tshs.100,000,000.00. The facts go that the said director was astonished to be told there is a garnishee order nisi issued on 28th August 2018 by Manyara Resident Magistrate Court and later endorsed by Njombe Resident Magistrate Court of Tshs.32,000,000.00

In the circumstances, the said director requested for bank statement and upon granted he discovered that the defendant had allowed several an unauthorized balance inquiries on the plaintiff account on 10th April, 2018 at Kasulu, 24th August, 2018, and 30th August 2018 and that all those transactions were dully charged. Consequently, the plaintiff's account was debited with Tshs.32,000,000.00 hence hindered buying the bonds from Barclays Bank. This triggered this suit the plaintiff praying the orders as contained in the plaint. And on the other hand, the facts goes that the defendant denied breach of confidentiality and raised a defence of complying with lawful orders from the court at all material she accessed the account and called this court to dismiss

this suit. It is against the above background that let the institution of this suit, hence this judgement.

At all material time the plaintiff has been enjoying the legal service of Mr. Lucky Mgimba, learned advocate from Dar es Salaam based legal clinic of Godwin Attorneys. On the other hand, defendant has been enjoying the legal services of Mr. John James, learned advocate from Dare es Salaam based legal clinic of Law Associates Advocates.

Before hearing started, the following issues were framed and agreed by the parties, to be guideline in the determination of this suit namely:-

1. Whether the Defendant breached the duty to protect the plaintiff's information relating to her account.
2. If 1st issue is answered in the affirmative, whether there was any harm or injury that the plaintiff suffered.
3. To what reliefs parties are entitled to

The plaintiff had one witness. The first witness was **Harrison Philemon Bimbiga**-christened as PW1 for the purpose of this proceeding. PW1 through his witness statement which was adopted by this court as his testimony in chief told the court that he is the director and shareholders of the Plaintiff's company incorporate on 6th April, 1989 with registration No. 16479 and its registered offices are at Makambako, Njombe and Dar es Salaam. PW1 went on to tell the court that in course of doing business, plaintiff opened several Bank accounts with various Banks in Tanzania and one of them being Account No. 60302300225 held at NBM Bank PLC Makambako Branch for its business transactions. It was further testimony of PW1 that the plaintiff had been doing its business transactions with defendants for almost 20 years with good faith.

However, on 4th September, 2018 this belief turned otherwise when PW1 discovered that on 10th April 2018 suspicious actions had taken place in their account without their knowledge and as such raised their eye brows. PW1 went on to testify that on 4th September, 2018, he visited NMB House Branch in Dar es Salaam to do a business transaction and also requested for a Bank statement but upon his perusal, he discovered that on 10th April, 2018 there was a balance inquiry done in their account at Kasulu branch in Kigoma and were charged Tshs. 1,271.19 as a balance inquiry fee and Tshs. 228.08 as VAT.

According to PW1, he was shocked because he has never been to Kasulu neither his fellow shareholder. PW1 went on to tell the court that he called his co-director and explained to her and she replied for not performing any transaction as well. In proof of the above state of affairs, PW1 tendered in evidence bank statement in respect of account NO. 6032300225 which was admitted and marked as exhibit P1.

PW1 told the court that by 4th day of September, 2018 plaintiff's account No. 60302300225 NMB had TZS 54,264,120/=, BOA Bank Account had Tshs. 38,000,000/= which together made the total of Tshs. 87,799,800/=. Further testimony of PW1 was that on 4th day of September, 2018 plaintiff decided to purchase a Treasury bond from Barclays Bank for 10 years in value of Tshs. 100,000,000/= at a costs of Tshs. 87,799,800/= at coupon rate of 11.44%. According to PW1, he went to NMB house and requested a TISS form to transfer 50,000,000/= to Barclays Bank but was informed by the defendant bank officer that their account has insufficient funds. PW1 when he asked of whereabouts of the money he was informed that branch manager of Makambako has restricted the amount of Tshs. 32,000,000/= against the plaintiff account as a result of a Garnishee Order issued on 28th August 2018 by Manyara Resident Magistrate Court. PW1 tendered in court the decree of

Resident Magistrate Court of Manyara at Babati which was admitted in evidence and marked as exhibit P2.

Further testimony of the PW1 was that he immediately notified his fellow director on the incident and according to PW1, the other director went direct to Makambako Branch and she was availed with a copy of the Garnishee Order dated 28th August 2018. It was the testimony PW1 that the said Garnishee amount was close to actual balance present in the account of the plaintiff as of 24th - 27th August, 2018. PW1 tendered Garnishee order Nisi which was admitted in evidence and marked as exhibit P3

It was further testimony PW1 that all the unknown inquires coincidentally matched with the dates on the Court documents, for example, balance inquiry done in Kasulu was 10th April, 2018, it was the same date application for execution was heard at the Resident Magistrate Court at Manyara, also balance inquiry done on 30th August 2018 in Mkambako branch was the date defendant received the Court documents.

According to PW1 after perusal of the court documents plaintiff discovered that one advocate Sanka was the one who told the court that they have made a fellow up and found that the plaintiff account had Tshs. 32 Million and thus pray for Garnishee Order to be issued on the same amount while the amount was less than decreed amount of Tshs. 46,050,000/= which was to be executed. PW1 went on to tell the court that on 5th September 2018 he went to NMB House and transferred Tshs. 24,000,000/= and Tshs. 37, 45,860/= from BOA and they managed to get 61,459,860 coupon rate of 11.44% instead of Tshs. 100,000,000/=. PW1 told the court that failure to purchase a TZS.100,000,000.00 bonds the company was denied to get TZS.126,600,200.00 and TZS.32,000,000.00 which would have been reimbursed in 10 years by the

Bank of Tanzania and therefore suffered a loss of TShs.158,600,200. PW1 tendered in court a bank statement of plaintiff account with BOA account No.01562240007 which as admitted in evidence and marked as exhibit P6.

PW1 further told the court that the plaintiff wrote a letter to the Defendant demanding an explanation for all what happened, demand an apology and required them to recover the damages for the missed opportunity the plaintiff would have got if they had successfully purchased a Treasury Bond of Tshs. 100,000,000/=. The defendant replied to plaintiff's demand notice, among others, asked the defendant to be patient as the bank is working of his concerns. PW1 tendered two demands notices which were admitted in evidence and marked as exhibit P4 and P5. Basically, it was upon that evidence PW1 prayed that their claims be allowed in this suit with costs as prayed in the plaint.

PW1 when asked by the court for clarification on the number of people who are authorized signatories of the disputed account, PW1 told the court that they are two, one is Lyne Ismail Kaduma and himself.

This marked the end of evidence of the plaintiff and counsel for plaintiff closed their case.

The defendant through MARY JOHN MARUNGI-christened as DW1 for purpose of this proceeding and led by Mr. James, learned advocate entered defence. Through her witness statement that was adopted by this court as her testimony in chief, DW1 told the court that she is Branch Manager of NMB Bank, at NMB House Branch, Dar es salaam. DW1 testified that the defendant is a company registered under the laws of Tanzania and its main activity is banking. DW1 further testimony was that the plaintiff is customer of the defendant bank operating an account with three signatories. DW1 went on to tell the court that the primary duty of NMB Bank is to protect the client's money deposited from

any fraud and theft. DW1 went on to testify that once customer balance given to the customer, the bank has no control of such information also for an organization like that of plaintiff account balance information can be accessed and communicated to anybody, say accountants or cashiers. DW1 went further to tell the court that the allegations that the information as to account balance of the plaintiff was shared to stranger is not true. DW1 gave an example that on 24th August 2018 one of the plaintiff's signatories one, Harrison Bimbiga requested for Bank statement which was availed to him. DW1 tendered in evidence a copy of statement Register of 2018 from NMB House Branch which was admitted and marked as exhibit D1.

It was the testimony of DW1 that on 10th April 2018 the plaintiff account was viewed by the Bank official upon receipt of the order of the court which was served upon the Bank and the Bank had to view the account in order to comply with the lawful order of the court. DWI requested that the garnishee order tendered by the plaintiff and marked as P1 to form part of their defence. It was further testimony of DW1 that after the defendant received garnishee nisi, on 30th August 2018 quickly informed plaintiff through the letter dated 03rd September 2018 from NMB to plaintiff, which was admitted in evidence and marked as exhibit D2. Another letter was from NMB head quarters to Resident Magistrate of Babati dated 3rd September 2018 which was tendered and admitted in evidence as exhibit D3. It was further a testimony of DW1 that on 30th August 2018 the Bank was served with Garnishee order absolute and drawn order again from the court. Normally, according to DW1, the Bank had to view the account whenever receives Garnishee Order in compliance with the court's order. DW1 tendered a letter dated 19th September 2018 from NMB to plaintiff informing the plaintiff that they have received a garnishee order absolute in respect of their account and it was received on the same date by

one Kaduma who is a co-director. The said letter dated 19th September 2018 and drawn order were admitted in evidence and marked as exhibit D4 and D5 respectively. According to DW1, plaintiff did not suffer any loss as the Bank was complying with the lawful orders and in debiting the plaintiff's account as the money was debited to liquidate the debt that was due from the plaintiff.

In cross examination DW1 told the court that 10th April 2018 NMB accessed the account of plaintiff due to garnishee order and inquiry was made at Kasulu Kigoma. On 30th August 2018 they viewed the account upon receipt of the garnishee order absolute of the court which was served upon the Bank and the Bank had to view the account in order to comply with the lawful order of the court. DW1 asked question how can the bank access the plaintiff account from Kasulu, DW1 explained that viewing can be done in any NMB branch and it's true that NMB charged plaintiff because the charging system is automatic. DW1 pressed with questions told the court that exhibits D2 and D5 were addressed to plaintiff but no proof of service that they reached the plaintiff.

Under re-examination, DW1 told the court that 10th April 2018 NMB received garnishee order from Babati in respect of an account of plaintiff if it has money and upon served with garnishee any NMB Branch can be able to access an account. DW1 further told the court that on 30th August 2019 they were served with garnishee order absolute and viewed plaintiff account at Makambako. DW1 went on to tell the court whenever they receive an order from the court, Prevention and Combating of Corruption Bureau, Financial Intelligence Unit and TRA the Bank can view the account of the client and usually NMB has to notify the client through letter but in case of PCCB and FIU they don't write letter to client. DW1 prayed for dismissal of the suit with costs.

This marked the end of defence case and Mr .John James learned advocate prayed to close the case for defendant.

In the foregoing, the learned counsel for both parties prayed to file final closing submissions under Rule 66(1) of Commercial Court Rules. I granted the prayer and directed that the same be filed within seven days to pave way for composing this judgment.

I must at the outset commend the learned counsel for both parties for their thoughtful input on this matter. I have read their respective submissions and the cited authorities which have greatly assisted this court in great measure towards the preparation of this judgment.

The task of this court now is to determine the merits or otherwise of the suit. However from the parties' pleadings, witness statement filed and exhibits there are some of the facts not in dispute in this suit. These are; **one**, there is no dispute that, that plaintiff is a customer of the defendant who holds a Tanzania Shillings current account number 60302300225 NMB Makambako branch; **two**, there is no dispute that the defendant on several occasions as alleged viewed the plaintiff's account at Kasulu, Makambako and Dar es Salaam; **three**, there is no dispute that the Manyara Resident magistrate court issued Garnishee order in respect of plaintiff account and an amount of TZS.32,000,000.00 was debited in compliance with court's orders. **Four**, it is undisputed fact that plaintiff was a judgment debtor in Civil case No 21 of 2015 at Manyara Resident Magistrate court. The above undisputed facts alongside with issues framed will guide this court in determination of this suit.

Therefore guided by the pleadings and evidence tendered by both parties and the closing written submission, it is imperative now I test the framed issues against the evidence on record.

The first issue for determination is whether defendant breached the duty to protect the plaintiff's information relating to his account? The plaintiff has

through PW1 tendered exhibit P1 which is a Bank statement in proof of this issue. The said exhibit shows that defendant at different times and places viewed the plaintiff's account without authorization and all these inquiries coincidentally matched with the dates on the court orders. For example, balance inquiry done in Kasulu was the same date application for execution was heard, balance inquiry done on 30th August 2018 in Makambako branch was the date defendant received the garnishee order, these coincidences suggest that defendant disclosed plaintiff account to third parties.

On the other hand, the defendant completely denied any such act and called plaintiff in strict proof of his allegations. DW1 testified that plaintiff is not entitled to be paid what is claiming because there was no any breach of contract as they were complying to court orders whenever they accessed the plaintiff's account. DW1 tendered exhibit P1 and D3 and D4 which were Garnishee order nisi, drawn order and Garnishee absolute from Manyara resident court at Babati respectively. DW1 told the court that there are government institutions which when the bank receives their orders they have to comply to avoid further ado. One of such institution is the court, DW1 insisted.

I have dispassionately listened and considered the rival testimony and submissions of the parties on this issue and I have given each side equal weight it deserved. Much as I agree with Mr. Mghimba submissions that it is an implied term of the contract between bank and customer that banker will not divulge to third party information relating to its customers account affairs without the consent of the customer unless the banker is compelled to do so by the order of the court or for other lawful cause. That being the case, however, that duty of confidentiality is not absolute duty. It has its limits and there are situations that the bank will disclose the information and still will be lawful. A good example of that exception is when the bank receives court's orders. In

this case, I am satisfied with the evidence of DW1 that they accessed the plaintiff's account when complying with the court orders. This was not challenged at all by the plaintiff. On that note therefore the evidence of PW1 and the submissions of Mr. Mghimba did not pass the test of proof that the defendant breached the duty of confidentiality as alleged.

The contents of exhibits P3, and D4, (which are garnishee nisi and drawn order respectively from Manyara Resident Court at Babati) negates any malice to the access of the account by the defendant who do not deny to do so. The defendant through DW1 has offered an explanation that the plaintiff failed to rebut. These documents clearly show that there was an order of the court and the bank before performing any act concerning the account of the plaintiff they have to view the account and give feedback to court and the bank did as we can see Exhibit D3. It should be noted also that there is no dispute that the garnishee order was from the court or the plaintiff is not a judgment debtor or that the amount which was attached was not the property of the plaintiff and the plaintiff has not taken any legal step that those document were forged and not only that but also that the plaintiff has failed to raise any other reasonable explanation as to which resulted in breach of duty to confidentiality.

Another reason I find the plaintiff has failed to prove her case is that the disputed account is operated by more than one person, and the other person was not called to testify for no explained reason. It is trite law even without citing any case law that failure to call material witness to testify then an adverse inference is to be drawn against plaintiff. The testimony of PW1 that he talked to his co-director who denied to access the account was hearsay evidence that is inadmissible in court. The plaintiff if wanted to prove that all transactions were done by the defendant alone was duty bound to call all signatories and all authorized signatories to the account to testify to that effect.

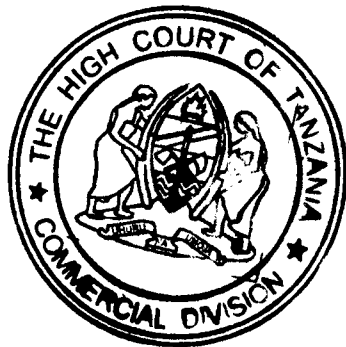
That said and considered the first issue in this suit is to be answered in the negative for reasons stated above.

Having answered issue number one in the negative, automatically extinguishes issue No 2, which mainly depended on it being answered in the affirmative. The plaintiff wanted to be paid damages on the injury incurred but unfortunately on their party they have failed to prove that defendant breach the duty to confidentiality and this suffices to dispose this suit.

The last issue is what reliefs parties are entitled to. The defendant prayed that the instant suit be dismissed with cost. On the other hand, the plaintiff prayed several reliefs which stand to fail in this suit for the reasons stated above. In the end of it all, this suit is hereby dismissed in its entirety with costs for want of merits.

It is so ordered

Dated at Dar-es-salaam this 24th day of April, 2020




S. M. MAGOIGA
JUDGE
24/4/2020