

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

**COMMERCIAL CASE NO. 141 OF 2016**

**NATIONAL BANK OF COMMERCE LIMITED ..... PLAINTIFF**

**VERSUS**

**LAMIWI INVESTMENT LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**LAMECK MADUHU MASANJA ..... 2<sup>ND</sup> DEFENDANT**

**MICHAEL MASANJA MADUHU ..... 3<sup>RD</sup> DEFENDANT**

**WINFRIDA LAMECK MADUHU ..... 4<sup>TH</sup> DEFENDANT**

**GETRUDA LAMECK MADUHU ..... 5<sup>TH</sup> DEFENDANT**

**ZABRON LAMECK MADUHU ..... 6<sup>TH</sup> DEFENDANT**

**KELVIN LAMECK MADUHU ..... 7<sup>TH</sup> DEFENDANT**

**IRENE GABRIEL BAKARI**

**LUGENDO..... 8<sup>TH</sup> DEFENDANT**

**Date of Last of Order: 13/03/2020.**

**Date of Judgement: 24/04/2020.**

**JUDGEMENT.**

**MAGOIGA, J.**

The plaintiff, NATIONAL BANK OF COMMERCE LIMITED by a plaint under summary procedure instituted the instant suit against the above named defendants jointly and severally praying for judgement and decree in the following orders, namely:-

- (a) Payment of Tshs.903,699,787.72 (Tanzanian Shillings Nine Hundred Three Million, Six Hundred Ninty-Nine Thousand, Seven Hundred Eighty Sevenscents Seventy Two only) as pleaded in paragraph 4 of this plaint.
- (b) Payment of commercial interest at the rate of 24% per annum for the sum in (a) hereinabove from the date was due to the date of judgement.
- (c) Interest on the decretal sum at the court's rate from the date of judgement until payment of the loan in full. And/or
- (d) Declaration that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 7<sup>th</sup>, and 8<sup>th</sup> defendants are in breach of the credit facility agreement as contained under the Overdraft Facility Letter dated 23<sup>rd</sup> April 2013 and thus the plaintiff is entitled to realize the mortgage on certificate of title No. 186217/2, plot no. 74, Block "45B" Kijitonyama area, Dar es Salaam and other securities executed in favour of the plaintiff for full payment of the overdraft facility extended to the 1<sup>st</sup> defendant.
- (e) Appointment of Mr. Seni Malimi advocate as Receiver and Manager of all the assets of the 1<sup>st</sup> defendant charged under the debenture.

(f) Costs of this suit.

(g) Any other order(s) and relief(s) may this honourable court deem fit and just to grant.

Upon being served, the 1<sup>st</sup> to 7<sup>th</sup> defendants attempts to obtain leave to defend this summary suit was rejected and subsequently a summary judgement in favour of the plaintiff was entered against the 1<sup>st</sup> to 7<sup>th</sup> defendants for payment of principal sum of Tshs. 903,699,787.72, declared that were in breach of the Credit Facility Agreement dated 23<sup>rd</sup> April, 2013 and costs of the suit as prayed in the plaint save for interest of 24% which the plaintiff was to bring evidence to prove it.

In regard to the 8<sup>th</sup> defendant, she successfully sought and was granted leave to defend. In her defence filed on 21<sup>st</sup> August 2017, the 8<sup>th</sup> defendant disputed and distanced herself from the overdraft facility of Tshs.750,000,000.00 but admitted to have guaranteed a loan of Tshs.140,000,000.00 and denied almost every allegations of the plaintiff and raised an issue of forgery of the mortgage deed created on 28<sup>th</sup> May 2013. In the event she prayed that this suit be dismissed with costs and an order for payment of general damages to her was pressed.

In reply the written statement of defence, the plaintiff denied allegations of forgery and reiterated her earlier averments.

The brief facts of this suit are imperative for better understanding the gist of this suit. The facts are that on 23<sup>rd</sup> April 2013 at the request of the 1<sup>st</sup> defendant, the plaintiff extended to the 1<sup>st</sup> defendant credit facility initially being overdraft at the tune of Tshs. 750,000,000.00 for purpose of supplementing working capital and other operational expenses related to the business of the 1<sup>st</sup> defendant. The said overdraft facility was to attract an interest of 2% per annum below the Base Rate charged and a penalty interest of 5% per annum on the excess if the account is found to be operating over the limit or it has expired which was set to expire within a period of one year.

The facts go that as a security for such overdraft, the 8<sup>th</sup> defendant created a legal mortgage in favour of the plaintiff over her landed property located on plot No. 74 Block '45B' Kijitonyama area, Kinondoni Municipal, Dar es Salaam registered with certificate of title No. 186217/2 guaranteeing full repayment of the loan and obligations and liabilities associated and incidental thereto being a continuing security. Further securities by 1<sup>st</sup> defendant were debenture deed charged to all assets both fixed and

floating for full payment of the overdraft facility. Another arrangement was that the 2<sup>nd</sup> to 7<sup>th</sup> defendants entered into contract of guarantee jointly and severally with the plaintiff as securities and co-principal debtors guaranteeing full repayment of the said overdraft facilities.

The facts went on that the 1<sup>st</sup> defendant took and utilized the said overdraft which was to be repaid to the plaintiff within a period of one year. Unfortunately, the defendants jointly and severally, have failed, neglected and ignored to repay the said credit facility which stood at Tshs.903,699,787.72 as of 30<sup>th</sup> September, 2016.

Owing to the above situation, the plaintiff issued the 8<sup>th</sup> defendant with a notice of default, Land Form No.54A dated 11<sup>th</sup> April, 2016 but which was not heeded as such leading to the institution of this suit, hence this judgement.

The plaintiff at all material time has been enjoying the legal service of Ms. Queen Allen, learned advocate from Dar es Salaam based legal clinic of K&M (Advocates). On the other adversary part, the 8<sup>th</sup> defendant as per the record enjoyed several legal services of advocates but when this suit was called for hearing, she was enjoying the legal services of Mr. Geoffrey

Saidi, learned advocate from Dar es Salaam based legal clinic of G.N. Said  
(Advocates)

Before hearing started the following issues were proposed by the parties and eventually adopted and recorded by the court for the determination of this suit, namely:-

1. Did the 8<sup>th</sup> defendant execute any legal mortgage over the property No. 74 Block '45B' Kijitonyama area as security for an overdraft facility of Tshs. 750,000,000.00 to the 1<sup>st</sup> defendant?
2. Alternatively whether the mortgage over the landed property on plot No. 74 Block '45B' Kijitonyama area on the basis of which the plaintiff extended overdraft facility of Tshs.750,000,000.00 to the 1<sup>st</sup> defendant was fraudulently procured?
3. What reliefs are parties entitled to?

The plaintiff in proof of her claims called two witnesses and tendered 7 exhibits and the defendant in disprove of the plaintiff's claims testified herself and tendered 5 exhibits. Some exhibits were prayed to be used by both parties interchangeably, in particular written communications.

The first witness for plaintiff was Mr. FREDRICK MTEI –christened as PW1 for purposes of these proceedings. PW1 through his witness statement which was adopted in this proceeding as his testimony in chief told the court that he works with the plaintiff at the capacity of Corporate Recovery Manager:Legal portfolio. PW1 told the court that the plaintiff is a body corporate dully established under the Companies Act, 2002, [Cap 212 R.E.2002] of the Laws of Tanzania and licensed under the Banking and Financial Institution Act, No 5 of 2006 to carry out banking business. PW1 went on to tell the Court that his duties are to follow-ups, supervise and coordinate loan recoveries and was responsible and involved with the defendants in that capacity of Recovery Manager.

PW1 went on to tell the court that on 23<sup>rd</sup> April 2013 at the request of 1<sup>st</sup> defendant, the plaintiff extended credit facility being overdraft facility at the sum of Tshs. 750,000,000.00 for purposes supplementing working capital requirement and other operational expenses related to the business of the 1<sup>st</sup> defendant. In prove of this, PW1 tendered the copy of the Multi Option Commercial Terms addressed to Limiwi Investment Co Limited dated 23<sup>rd</sup> April 2013 in evidence which was admitted and marked exhibit P1.

According to PW1, the said overdraft facility was to be charged interest of 2% per annum below the Base Rate which was 20%, hence  $20-2= 18\%$ , and a penalty interest rate of 5% per annum of the excess if the account is found operating over the limit or it has expired which was set to expire within a period of one year.

PW1 went on to tell the court that as security to the said loan, the 8<sup>th</sup> defendant created a legal mortgage in favour of the plaintiff over a landed property located on plot No. 74 Block '45B' Kijitonyama area with Certificate of Title No.186217/2 guaranteeing full repayment of the loan and obligations and liabilities associated and incidental thereto being a continuing security. In proof of this, PW1 tendered in evidence a copy of certificate of title and legal mortgage deed signed by Irene Bakari Lugendo to NBC with certificate of title No. 186217/2 in the name of Irene Gabriel Bakari Lugendo which were collectively admitted and marked as exhibit P2.

PW1 further testimonies were that pursuant to law regulating mortgages, the 8<sup>th</sup> defendant signed an affidavit in lieu of the consent by spouse to create a mortgage in favour of the plaintiff on 23<sup>rd</sup> May 2013. In proof of that, PW1 tendered in court an affidavit of Irene Gabriel Bakari Lugendo which was admitted in evidence and marked as exhibit P4.



PW1 went on to testify that further securities of the said overdraft executed by the 1<sup>st</sup> defendant in favour of the plaintiff were debenture deed charging all its assets both fixed and floating for full repayment of the overdraft advanced to it by the plaintiff. In addition to the above securities stated above, PW1 told the court that the 2<sup>nd</sup> to 7<sup>th</sup> defendants on 24<sup>th</sup> May 2013 entered into contract of guarantee jointly and severally with the plaintiff as securities and co-principal debtors guaranteeing full repayment of the said overdraft facilities.

PW1 told the court that the 1<sup>st</sup> defendant took and utilized the said overdraft which was to be repaid in full to the plaintiff by the defendants within a period of one year. According to PW1, the defendants contrary to the agreed terms of the overdraft have jointly and severally failed, neglected and/or ignored to repay the said credit facility, and as such, as of 30<sup>th</sup> September 2016 an outstanding sum of Tshs. 903,699,787.72 was due and owing to the plaintiff. In proof of this PW1 tendered a bank statement of account No.015103 010246 in the name of LIMIWI INVESTMENT CO. LIMITED which was admitted in evidence and marked as exhibit P6.

PW1 went on to tell the court that following the default by the 1<sup>st</sup> defendant and other defendants based on mortgage and contract of guarantee the plaintiff issued to the 8<sup>th</sup> defendant a notice of default being Land Form No. 54A requiring the 8<sup>th</sup> defendant to rectify the default. The said default notice was admitted in evidence and marked as exhibit P3.

Following this state of affairs, PW1 told the court that they started recovery measures against all defendants and the 8<sup>th</sup> defendant wrote a letter dated 25<sup>th</sup> May 2016 demanding her certificate of title in respect of plot No. 74 Block '45B' Kijitonyama area be released on reason that she did not sign/consent to the third part mortgage of the sum of Tshs.750,000,000.00 that was extended to the 1<sup>st</sup> defendant, but she consented to guarantee only Tshs.140,000,000.00. In proof of this, PW1 tendered in court two letters one from the 8<sup>th</sup> defendant and another one from NBC collectively in evidence and marked exhibit P5.

Under cross examination by Mr. Saidi, PW1 told the court that at his capacity he was involved in the recovery process of this dispute. PW1 told the court that 2<sup>nd</sup> to 7<sup>th</sup> defendants are directors and shareholders of the 1<sup>st</sup> defendant and as such guarantors of the said overdraft facility. PW1 told the court that 1<sup>st</sup> defendant was dealing with several businesses such

as food staffs and other shops in Mwanza. PW1 pressed with questions told the court that the 8<sup>th</sup> defendant created legal mortgage in favour of the plaintiff-Bank. According to PW1, the legal mortgage created was for Tshs. 1,264,000,000.00 and gave explanation that in his witness statement he said the guarantee was for Tshs.750,000,000.00 and that failure to state that amount was not out of ill-motive. PW1 admitted that there has been dispute over the guarantee but Irene has never produced any guarantee of Tshs.140,000,000.00 she alleges. PW1 went on answering questions that when she complained they checked the record but the guarantee was for Tshs. 750 million. On the debenture, PW1 told the court they can follow up their said assets and realize the loan money. PW1 said they recalled the overdraft after two years after realizing same was not properly managed and negligent can be imputed to NBC.

PW1 when asked about board resolution of the 1<sup>st</sup> defendant, he said it was there and when referred as to the amount started thereon, PW1 admitted it had no amount stated thereon.

Under re-examination, PW1 told the court that the amount guaranteed was Tshs.750,000,000.00 but his property for 8<sup>th</sup> guarantor had a value of

Tshs.1,264,000,000.00. PW1 told the court that the money advanced has never been paid.

The next witness for plaintiff was Mr. MESHACK SHASHI-christened as PW2 for purposes of these proceedings. PW2 through his witness statement that was adopted in these proceedings to be his testimony in chief told the court that he is the investigator of the plaintiff and that his duties are to conduct investigations relating to fraud in the bank. PW1 told the court that on 4<sup>th</sup> January 2016 Forensic Investigation Unit received a non-trading report from Honorary Kwayu- Business Support Manager from Whole Credit Directorate, who reported a case of suspected mortgage fraud in relation to Lameck Maduhu (2<sup>nd</sup> defendant) trading as LIMIWI Investment Co. Limited who is customer of the bank. PW2 went to tell the court the said investigations were initiated after the 1<sup>st</sup> defendant approached the bank requesting for additional funding of Tshs.750,000,000.00 to make a total of overdraft to Tshs. 1,500,000,000.00. and the complaints of the 8<sup>th</sup> defendant that she guaranteed only Tshs.140,000,000.00 and not Tshs.750,000,000.00 which was substituted fraudulently and replaced by Tshs.750,000,000.00. PW2 said the scope of the investigation was to establish the truth or lies of the allegations.

According to PW2, after conducting the said investigations by interrogating the 8<sup>th</sup> defendant, Lameck Maduhu (2<sup>nd</sup> defendant), Happiness Mugunda- Corporate Credit Manager for plaintiff and Mr. Nicholus Paul- head: Risk Control unit and eventually there was no truth of the same for the record was clear that the 8<sup>th</sup> defendant guaranteed the overdraft facility to the tune of Tshs.750,000,000.00. PW1 told the court that the 8<sup>th</sup> defendant insisted that what she guaranteed was Tshs. 140,000,000.00 and the page that was showing the amount had been fraudulently replaced by another page that shows that the amount is Tshs.750,000,000.00 and that even the signature on that page differs with her other signatures on the document. PW2 told the court that upon interrogating the 2<sup>nd</sup> defendant insisted that no forgery was ever done but the allegations are leveled because the 2<sup>nd</sup> defendant and the 8<sup>th</sup> defendant are at loggerheads.

According to PW2, after all his investigation and examining the documents he realized that no forgery was committed and the signatures are the same and resembles one another. PW2 further told the court that the 8<sup>th</sup> defendant told him that she has referred the matter to police and promised to share the police findings but she has not done to the date he is testifying. PW2 concluded that the mortgage was for Tshs.750,000,000.00

and not Tshs.140,000,000.00 as alleged. In proof his story PW2 tendered in evidence investigation report dated 28<sup>th</sup> November, 2017 which was admitted and marked as exhibit P7.

Under cross examination by Mr. Said, PW2 told the court that he is the investigator of all fraud issues in the plaintiff's bank. The dispute was referred to him in January 2016 but was not referred to police by the bank. When pressed with questions, PW2 admitted that he is aware the 8<sup>th</sup> defendant referred the issue to police. Upon 8<sup>th</sup> defendant reported the matter to police, PW2 was required to take the legal mortgage documents for examination but he doesn't know what the results of those investigations were. The contention of Irene (8<sup>th</sup> defendant) was that the signature at page 4 of the legal mortgage is not her. PW2 pressed with questions admitted that he is not a forensic expert and that if he gets a police report he is at liberty to change his stance on the allegations.

Under re-examination by Ms. Allen, PW2 told the court that it was Irene who reported the matter to police and PCCB.

This marked the end of the plaintiff's case.

On the other hand, the only witness for 8<sup>th</sup> defendant was Ms. IRENE GABRIEL BAKARI LUGEMBE- to be referred as DW1. DW1 under affirmation through her witness statement which was adopted as her testimony in chief told the court that sometimes in April or May 2013 she approached the plaintiff for the sake of obtaining loan, but she was told that having a house alone is not enough to secure a loan unless one has a business with convincing financial records. DW1 went on to tell the court that upon that advice, she went outside the bank but was later called by the officer of the bank by the name '**Emmanuel Ntobi**' who told her that he can connect her to a company that qualifies for loan and that company is LIMIWI INVESTMENT CO. LIMITED.

DW1 told the court that she was introduced to the officers of the 1<sup>st</sup> defendant (Isack Nyanda and Lameck Maduhu) in the office of the bank and upon negotiations, DW1 entered into agreement with the officers of the 1<sup>st</sup> defendant for offering her title as security to serve as collateral for an overdraft loan of Tshs.140,000,000.00 in condition that they should give her Tshs.70,000,000.00 as consideration. According to DW1, the whole process was facilitated by the officers of the plaintiff who are '**Emmanuel Ntobi and Harrison Temu.**' DW1 questioned the odd

and illogical of third party acknowledgement and undertaking which was signed by the owners and executive of Limiwi who gave nothing tangible to the plaintiff in order to secure their promises, instead of DW1 who is alleged to have mortgaged her property as security. DW1 tendered an agreement for offering her title deed as security to the plaintiff loan dated 23/05/2013 which was admitted in evidence and marked as exhibit D2.

DW1 went on to tell the court that she possesses no enough English to understand the terms of the purported mortgage. DW2 told the court that she was informed by her lawyer, one Edwin Shibuda that the act of the plaintiff not asking the 8<sup>th</sup> defendant to get independent legal advice before executing the mortgage is not a bank standard, custom and practice. Further information, DW1 got from the lawyer was that the act of signing documents for mortgage of Tshs.140,000,000.00 and the plaintiff giving a loan of Tshs.750,000,000.00 without her consent and for failure to do periodic and routine appraisal of the property value is not a bank standard, custom and practice of the verification.

DW1 in strong words denied to have put her signature in the mortgage deed created on 28<sup>th</sup> May 2013 in relation to overdraft of Tshs.750,000,000.00 as alleged and called the said mortgage deed as a



forged one. DW1 told the court that upon learning that the mortgage deed was forged, she reported the matter to police for investigation. DW1 told the court that she has been resisting the forged legal mortgage deed since 2015 and there is a clear misrepresentation of what was guaranteed done by 1<sup>st</sup> defendant in collusion with the plaintiff officers, namely Emmanuel Ntobi ad Harrison Temu. It was the testimony of DW1 that she has never intended to secure Tshs.750,000,000.00 in relation to the mortgage in dispute. DW1 tendered in court a letter dated 17/08/2017 from Intel Attorneys to police which was received in evidence and admitted as exhibit D1 and letter from OCD Central police to Shibuda of Intel dated 29/11/2017 of forgery and obtaining money by false pretense done by Isack Maduhu and Lameck Maduhu of LIMIWI INVESTMENT CO. LIMITED as exhibit D3.

DW1 reminded the court of the pattern of fraud conduct of the 1<sup>st</sup> to 7<sup>th</sup> defendants on 28<sup>th</sup> February 2017 before Hon. Mruma, Judge in application No. 13 of 2017 which they swear an affidavit purported to have been made by DW1 while it is not true. Lastly, DW1 told the court that she was advised by her lawyer one Shibuda that had a lawyer been involved and the officers of the plaintiff satisfied by their identification and verification

then the whole fraud could be avoided. In proof of the forgery DW1 tendered in court a letter dated 12/12/2017 for Intel Attorneys to Risal Security Solutions which was admitted as exhibit D4. And lastly DW1 tendered in court body investigation scientific examination and comparison report which was admitted as exhibit D5.

Under cross examination by Ms. Allen, DW1 told the court that she is a form four leaver and as such not well conversant with English because she was impregnated before completing the school. DW1 told the court that she knew Shibuda for more than three years. DW1 told the court that she was later given an advice by his advocates. DW1 continued to insist that she signed a mortgage deed of Tshs.140,000,000.00 and not the Tshs.750,000,000.00 which is shown at page 4 of the mortgage deed, which amount according to her was forged to indicate that the mortgage deed was for Tshs.750,000,000.00. The signatures on impugned documents, DW1 said, resembles her signature but are not her signature. DW1 said the signature at her witness statement is her. As to pictures, DW1 said, it is her picture because she gave the picture to Isack Nyanda(who is not a defendant in this case) and Lameck Maduhu, who is the second defendant. DW1 insisted again that she gave the pictures to

Lameck Maduhu and was for guaranteeing Tshs.140,000,000.00. DW1 admitted she is indebted to the bank to the tune of Tshs.140,000,000.00 in 2013 and immediately I noted the forgery I wrote the bank to complain before the institution of this case. On the Tshs.140,000,000.00, DW1 admitted I signed on my own volition.

DW1 shown exhibit D4 and asked if it is has her signature, and said it was not her signature. DW1 was specific that page 4 of the mortgage deed is the one which was forged. DW1 insisted she complained to all authorities and even the amount she guaranteed she gave Lameck Maduhu some refund but it seems they he never paid to the bank. Lastly, DW1 admitted she went to PCCB to complain on the issue because she was not assisted by police to her expectations.

Under Re-examination, DW1 told the court that she believes what was advised by her advocate. DW1 believes the bank officers she mentioned and Lameck Maduhu colluded to change the figures from Tshs.140,000,000.00 to Tshs.750,000,000.00 at her detriment. As to pictures were for the agreement of guaranteeing Tshs.140,000,000.00 but Lameck Maduhu took advantage of her. DW1 told the court that

immediately she realized that there was something wrong she started complaining and last time is when she complained to PCCB for help.

This marked end of hearing of this hotly contested suit inters parties.

At the closure of the parties' testimonies, the learned advocates for parties prayed for leave that they be allowed to file final closing submissions under Rule 66(1) of this court's Rules. I granted the prayer in accordance with the law and gave them seven days to do so. Let me record my gratitude to each one of them for their very insightful contribution on this case that has tasked my mind a great deal. I have carefully read them and I promise where necessary will be referring to them but it suffices to say I have given them the weighty they deserve.

The task of this court now is to determine the merits or otherwise of this suit. Before going into analysis of evidence, it should be noted that following PCCB taking all original documents from parties to this suit for investigations, by consensus parties agreed to use photocopies after issuing the necessary notice as required by law. It should also be noted that there are also some notorious facts not in dispute in this suit. These are; **one**, there is no dispute that the 8<sup>th</sup> defendant guaranteed and

created a legal mortgage in favour of the plaintiff on 23<sup>rd</sup> April, 2013 in respect of her landed property situate at plot No. 74 Block '45B' Kijitonyama area in the city of Dar es Salaam. **Two**, it is equally not in dispute that the this court entered a summary judgement against the 1<sup>st</sup> to 7<sup>th</sup> defendants on 14/08/2017 jointly and severally for Tshs.903,699,787.72 and were equally condemned to pay costs of this suit on the basis that the 1<sup>st</sup> defendant guaranteed the overdraft facility by signing a **debenture deed charging its fixed and floating for full payment of the overdraft facility advanced** in favour of the plaintiff and that the 2<sup>nd</sup> to 7<sup>th</sup> defendants signed **contract of guarantee of Tshs.975,000,000.00 (Tanzania Shillings Nine Hundred Seventy Five million only)** signed on 24<sup>th</sup> May, 2013 in favour of the plaintiff on the overdraft facility.

The above undisputed facts will assist this court in determining this suit in a very fairly and just manner.

The first issue is in this suit was couched that did the 8<sup>th</sup> defendant executed any legal mortgage over her property on plot No.74 Block '45B' Kijitonyama area as security for an overdraft facility of Tshs.750,000,000.00 extended to the 1<sup>st</sup> defendant? And the second issue was thus couched that, in the alternative, whether the mortgage over the

landed property on plot No. 74 Block '45B' Kijitonyama area on the basis of which the plaintiff extended overdraft facility of Tshs.750,000,000.00 to the 1<sup>st</sup> defendant was fraudulently procured. I find it that the two issues can be disposed off as one issue because the dispute here is the amount and not the execution of legal mortgage in so far as the testimonies of PW1 and PW2 DW1 are concern. In other words it can be conclusively be observed that this overdraft facility to the 1<sup>st</sup> defendant was secured by three securities, **one**, being debenture created by the 1<sup>st</sup> defendant to cover the whole amount due, **two**, contract of guarantee signed by the 2<sup>nd</sup> to 7<sup>th</sup> defendants to cover the whole amount due and **three**, legal mortgage created by the 8<sup>th</sup> defendant to cover the whole amount due. Also it can be observed that the plaintiff so far has a judgement and decree against the 1<sup>st</sup> to 7<sup>th</sup> defendants in respect of realizing the whole amount due. In the course of this judgement, I will consider the effect of the phrase 'jointly and severally' in the light of this suit between parties.

Now back to the issue at hand, the plaintiff in proof of her case has tendered exhibits P1- multi option facility commercial terms, exhibit P2- mortgage created by DW1 in favour of plaintiff, and exhibit P4- an affidavit in lieu of consent by spouse to create a mortgage and exhibit P7- which is

forensic report on allegations for forged signature of the guarantor to show that what the amount of guarantee in all these documents is Tshs.750,000,000.00 and not Tshs.140,000,000.00 as alleged and utterly failed to prove. Even the final closing submissions of the learned counsel for plaintiff was based on the above exhibits to say that the amount guaranteed is Tshs.750,000,000.00.

On the other hand, the 8<sup>th</sup> defendant tendered exhibit P2-letter to police to give results of investigations reported for their action, exhibit D2-a contract signed on 27<sup>th</sup> May 2013 between 8<sup>th</sup> defendant and 2<sup>nd</sup> defendant in favour of the plaintiff to guarantee Tshs.140,000,000.00 to LIMIWI INVESTMENT Co.Ltd dated 27<sup>th</sup> May 2013, exhibit P3 showing that he reported the matter to police immediately he knew of the fraud by Lameck Maduhu, exhibit D4- letter requesting for examination of signature and initials and exhibit D5- body impressions scientific examination and comparison report by RISALA SECURITY SOLUTIONS by Richard Luhende, a gazetted and independent document examiner and finger print impressions who confirmed that the disputed signature are of two authorship.

I have carefully considered this point with a very keen legal mind and the point in dispute over the disputed signature and amount, and I am of the considered opinion that the 8<sup>th</sup> defendant has been able to prove that the signature on exhibit P2 was tampered with and as such some figures were indeed added to make the amount be Tshs.750,000,000.00. This was collaborated by the content of exhibit D2 which was the agreement to guarantee only Tshs.140,000,000.00. This contract was signed a day before the creation of exhibit P2 which was created a day after. Another reasons am believing the story of 8<sup>th</sup> defendant was that she was a weaker party and the bank had duty to make sure that she gets independent advice in regards to the transactions as part of the good standard, custom and banking practice to avoid unnecessary fraud to occur. The 8<sup>th</sup> defendant in her written statement defence mentioned the two officers of the bank as '**Emmanuel Ntobi and Harrison Temu**' who were behind this transaction but both in reply to written statement of defence the plaintiff did not specifically denied these two people to be her employees but the denial to paragraph 19 was evasive which amounts to admission.

Further, the bank apart from tendering exhibit P2, but exhibit D2 tendered by the 8<sup>th</sup> defendant which I consider in this proceedings and in the



circumstances as deed of guarantee between the 8<sup>th</sup> defendant and LIMIWU COMPANY was tendered showing the amount of money guaranteed was Tshs.140,000,000.00 and not the Tshs.750,000,000.00 which is seriously disputed. Another reason I am made to believe the 8<sup>th</sup> defendant is the conduct of the 8<sup>th</sup> defendant in this matter, she has been vigilant in following this matter ever since she knew of the fraud and in my considered opinion therefore was enough for lay person of DW1 and the steps she took in this matter to be enough to raise eye brows to the transaction.

Having examined exhibit P2 it shows the mortgage created was to secure Tshs.1,264,000,000.00 but exhibit P2 shows a different amount of Tshs.750,000,000.00. No explanation was given to this discrepancy and variance of the figures.

In the totality of the above reasons, I am far from being convinced with the closing submissions by the learned advocate for plaintiff that fraud was not proved in this case. Having found and hold that there was fraud in the mortgage created and given the facts that the defendant admits liability of Tshs.140,000,000.00 this court hereby find the first and second issue that were determined jointly as one that the amount the 8<sup>th</sup> defendant

guaranteed and created the mortgage was of Tshs.140,000,000.00 and not that of Tshs.750,000,000.00.

The last issue is what reliefs parties are entitled to. Based on what I have discussed above, without much ado I hereby enter judgement of Tshs. 140.000.000.00 for plaintiff against the 8<sup>th</sup> defendant plus interests as agreed in the exhibit P1. To make myself clear the liability of the 8<sup>th</sup> defendant shall be limited to the Tshs.140,000,000.00 and same shall attract interests as agreed in the multi Option Facility Commercial Terms. Therefore, the '**jointly and severally**' liability of the 8<sup>th</sup> defendant in this suit should be limited to Tshs.140,000,000.00 and no more.

This court when entered summary judgement it ordered the plaintiff to prove the prayer of interest of 24% as prayed in the plaint against the 1<sup>st</sup> to 7<sup>th</sup> defendants. I have considered this prayer and given the contents of exhibit P1, this limb of objection has to succeed and the said limb of prayer is hereby equally now granted against the 1<sup>st</sup> to 7<sup>th</sup> defendants.

The prayer for interests at court's rate is hereby granted at the rate of 7% to be paid jointly and severally by all defendants. Given there is admission that no money has been paid back to the bank, I hereby declared that all

defendants are in breach of credit facility agreement to the extent explained above and the plaintiff is entitled if not paid the whole amount within one month to six months from the date of this judgement to exercise all his legal rights to the extent of liability explained above to all securities executed in favour of the plaintiff by all defendants.


In realizing the payment of the money as decided above, Mr.Seni Malimi advocate is hereby appointed as Receiver and Manager of all fixed assets of the 1<sup>st</sup> defendant charged under the debenture, in case no payments is done within a month from the date of this judgement.

The plaintiff shall have cost of this suit.

It is so ordered

Dated at Dar es Salaam this 24<sup>th</sup> day of April, 2020.



  
**S.M.MAGOIGA**  
**JUDGE**  
**24/04/2020**