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

COMMERCIAL CASE NO.108 OF 2018

INTERNATIONAL COMMERCIAL BANK (T) LTD...PLAINTIFF

VERSUS

YUSUF MULLA.....1ST DEFENDANT
SHAHIDI MULLA.....2ND DEFENDANT

JUDGEMENT

27/03/2020 & 08/05/2020

NANGELA, J:,

This is a suit for recovery of money. The plaintiff, a limited liability company engaged in the business of providing banking services in accordance with the laws of the United Republic of Tanzania, is suing the defendants, seeking for the following orders and reliefs:

1. *Judgement in favour of the Plaintiff against the Defendants for US$ 1,910,193.67*
2. *Interest on the aforesaid sum at the agreed rate of 8% per annum plus default interest of 2.50% per annum, thus a total of 10.50% per annum from 9th July 2018 until judgement or sooner payment.*

3. *Interest at the Court rate post judgement.*
4. *Defendant be ordered to pay the Costs of the suit; and*
5. *Such further Orders and Reliefs this Hon. Court deems just, equitable and convenient to grant.*

The brief facts of the case are as set out herein. On 25th June 2014, the Plaintiff availed a term loan facility amounting to **US$ 800,000.00** to one Nawab Abdulrahman Mulla (referred hereinafter as the Principal Debtor). The credit facility was payable within four years' time. Upon the borrower's request, the amount advanced as loan received a top-up of **US$ 200,000.00. The total loan disbursed**, therefore, was **US$ 1000,000.00**. The additional facility was payable in forty eight months. A deed of variation was signed by the parties to that effect.

The loan term facility and the Obligations of the Principal debtor were secured by personal guarantee of the 1st and 2nd Defendants dated 15th July 2014. The deed of variation of both defendants' personal guarantee dated 10th September 2014, was duly executed by all defendants in favour of the plaintiff. The unfortunate story on the part of the Plaintiff's side, however, is that, the Principal Debtor did not repay the loan as agreed.

The Plaintiff then moved to file a suit against the Principal Debtor. This was **Commercial Case No.106 of 2017**. The Plaintiff obtained a judgement and decree for **US$ 999,550.00** plus interests accruing at a rate of 9.5% per annum, from 14th June 2017 until 28th August 2017; interest at the court rate of 7% per annum, from 29th August 2017 until payment in full and legal fees amounting to TZS 32,648,266/=. The Court orders, which this Court has taken judicial notice of, were annexed to the plaint.

On or about 13th July 2018, and 18th June 2018, respectively, the Plaintiff served the defendants with 14 days demand notices, followed by a 7 days demand notice served on the Defendants on 11th July 2018. These were demanding for the full payment of the outstanding loan from the Principal debtor, amounting to **US$ 1,910,193.67.** The Plaintiff asserts that, the defendants are liable to pay on the basis of their obligation as guarantors under the respective guarantee.

On 27th August 2018, the defendants filed their joint statement of defence and refuted the Plaintiff's claims. They averred that, since the Plaintiff's Commercial Case No.106 was filed and adjudicated in the absence of the Defendants, as parties to the

case, then the Defendants are no longer under any obligation to discharge. Besides, they raised two objections against the suit, in particular, that, the suit was *res-judicata,* Commercial Case No.106 of 2017 and, secondly, that, the case was incompetent and bad in law for Misjoinder of a necessary party.

On 19th November 2018, this Court, B.K.Phillip, J, dismissed the preliminary objections, and, associating herself with the decision of this Court, **Magresson Joseph Dalotta v NBC and 2 Ors, Commercial case No.134 of 2002** (Kalegeya, J (as he then was) (Unreported), she made a finding that, although the borrower and guarantor bind themselves to meet the same liability to the lender (creditor), the bases of their liability differs. Noting that their causes of action are also different, she dismissed the objections with costs.

On 16th October 2019, this Court conducted a final pre-trial conference (FPTC) and the following were issues agreed upon and recorded by the Court:

1. *What, if any, is the liability of the defendants to the Plaintiff.*
2. *To what relief are the parties entitled to.*

During the FPTC, all parties were directed to file their witness statements as per the requirements of the Rule 49 (2) of the High Court (Commercial Division) Procedure Rules, GN. 250 of 2012 (as amended by GN. 107 of 2019). The case was then fixed for hearing. The hearing was made possible on 12th March 2020 and ended on 16th March 2020.

When this case came up for its hearing on this 12th day of March 2020, the Plaintiff was represented by Mr. Zacharia Daudi, learned advocate, while the Defendants were served by Mr. Mohamed Mkali, learned advocate. The Plaintiff's advocate sought for this Court's order to have the Witness statements filed by the Defendant struck out for having breached Rule Rule 55 of the High Court (Commercial Division) Procedure Rules, GN. 250 of 2012 (as amended by GN. 107 of 2019).

In a ruling dated 12th March 2020, this Court struck out the Defendants' witness statements. The Court ruled that the Defendants will have no ability to call for witnesses, or provide proof or tender documents they had mentioned or attached to their Written Statement of Defence. However, it was ruled that, at the end of the day, the Court will consider the Written Statement of

Defence, and, the defendant's counsel will be given the opportunity to cross-examine the Plaintiff's witness.

At the hearing of the case, the Plaintiff called one witness, Mr. Bernard Kilomongasa, who testified as **PW1. PW 1's** statement filed in this Court in line with the requirements of Rule 50 (1) ad (2) of GN.250 (as amended) was adopted and admitted as constituting his testimony in chief.

In his testimony in chief, PW1 stated that on 25th June 2014, a loan facility amounting to US$ 800,000.00 was advanced to Mr. Nawab Abdulrahiman Mulla, as a principal borrower who accepted its terms and conditions on 1st July 2014. He stated that such loan was further varied on 9th September 2014, and an additional facility amounting US$ 200,000.00 was disbursed to the principal debtor making a total of US$ 1,000,000.00.

PW1 stated that the loan facility was guaranteed by personal guarantors namely Yusuf Mulla and Shahid Mulla. **PW1** tendered and sought to be admitted in Court as evidence the following documents:

(i) A Term Loan Facility Agreement for a loan amounting to US$ 800,000.00- (which

was admitted into evidence and marked as **Exh.P.2**);

(ii) Personal guarantees of Mr. Yusuf Mulla- and Shahid Mulla (which were admitted into evidence and marked as **Exh.P.3 & P4** respectively);

(iii) Term Loan Facility Agreement dated 9th September 2014 for US$ 200,000.00 and two Deeds of variation in respect of Mr. Yusuf Mulla and Shahid Mulla dated 10th September 2014. All these were admitted as **Exh.P.5**, **Exh.P.6** and **Exh.P7** respectively.

PW 1 further stated that upon default the Plaintiff wrote and sent demand letters to the Defendants as guarantors. **PW 1** sought to be admitted into evidence the demand notices sent to the defendants. The demand notices sent to Mr. Yusuf Mulla Shahid Mulla, together with Tanzania postal receipts No.19891 dated 18th June 2018, were admitted as **Exh.P.8; Exh.P. 9, Exh.P.10, & Exh.P 11** respectively.

In his statement in chief **PW1** testified that, the principal borrower defaulted payment. He sought to be admitted as evidence two Loan Statements in respect of Mr Nawab Mulla for **US$ 200,000.00** and **US$ 800,000.00**. These statements were received, and, without any objection, admitted into evidence as **Exh. P.12** & **Exh.P 13** respectively.

Upon being cross-examined by Mr. Mkali, **PW1** was admitted to have mentioned Commercial case No.106 of 2017 in his Witness statement and that the parties were the International Commercial Ban (Tanzania) (as the Plaintiff) and Nawab Abdulrahaman Mulla (as the Defendant). **PW1** admitted that the matter in dispute was the failure to honour the term loan facility agreement for US$ 1,000,000.00.

He also admitted that the debt being claimed from the two defendants herein is the same, though the earlier case which was ended by way of settlement by the parties, was against the principal borrower, while the current case is in respect of the guarantors. He stated that the principal debtor sued the Plaintiff objecting to the sale of his collateral and, that, the terms of their

settlement were for the principal debtor to pay the debt or else should he fail, the Plaintiff Bank would dispose his collateral.

PW1 told the Court upon being cross-examined that, the two defendants herein were not part of the earlier case and did not form part of the settlement agreement between the Plaintiff and the principal borrower, although they were made aware by way of phone calls. Upon being shown annex.7 to the Plaint, which was the Compromise of Suit dated 16th August 2017 and its Orders dated 28th August 2017, **PW1** stated that he did not refer to in his testimony in chief or tendered in court them because they were skipped.

During cross-examination, **PW1** further stated, that, the Defendants were informed of the variations made to the Facility Agreement but the bank (Plaintiff) cannot be forced to sue all parties to the facility agreement. **PW1** stated that, the Plaintiff was at liberty regarding whom to sue.

Upon being asked whether he was aware of the compromise entered between the Principal Debtor and the Plaintiff in 2017, and that the same had a limited its execution by barring further recourse to the courts of law, **PW1** denied being aware of any

limitation arising from the settlement agreement regarding Commercial Case No.106 of 2017, which was filed by the Plaintiff, and which resulted in a decree of this Court, issued on 30th August 2017. However, PW1 admitted that the Defendants were not involved in the making of the compromise between the Plaintiff and the Principal Debtor.

Unfortunately, although the Plaintiff had annexed to the Plaint the compromise dated 16th August 2017 and the Court's Order on the Compromise of Suit dated 28th August 2017, in respect of Commercial Case No.106 of 2017, and PW1 had mentioned these in his Witness Statement as P7, the compromise was not tendered into evidence. This Court, nevertheless, acting under section 59 (2) of the Evidence Act, takes judicial notice of its Order in respect of Commercial Case No.106 of 2017.

Upon closure of the Plaintiff's case, and there being no defence case owing to the ruling of this court issued on 12th March, 2020, the parties prayed to file their final submissions. Such submission were to be filed on or before 25th March 2020.

On 23rd March 2020, the Plaintiff filed its closing submissions. In its submissions, the Plaintiff submitted that the Defendants, as

guarantors, are liable to the Plaintiff for payment of US$ 1,107,624.11 as per **Exh.P12** and **P.13.** To buttress its submission, the Plaintiff placed reliance on section 80 of the Law of Contract Act, Cap.345 R.E.2002 and the decision of the Court of Appeal of Tanzania, in the case of **Exim Bank (Tanzania) Limited v Dascar Limited and Another,** Civil Appeal. No.92 of 2009, (unreported).

The Plaintiff's final submission, was further based on the case of the Court of Appeal, in the case of **CRDB Bank Ltd v Isaack B. Mwamasika and 2Ors**, Civil Appeal No.139 of 2017 (unreported), arguing that, since **Exh.P.3, P.4, P.5 and P.6** indicate that the Defendants stood as guarantors for the loan, their liability is coextensive with that of the principal debtor. To that end, reliance was placed on the decision of this Court, in **National Bank of Commerce Ltd v Universal Electronic & Hardware Ltd** [2005] TLR 257, and the Plaintiff urged this Court to make a finding that the first issue framed in this case has been responded to affirmatively.

As regards the suit against the principal debtor (the Commercial Case No.106 of 2017) and its subsequent Compromise

of the Parties, the Plaintiff argued that the same did not discharge the Defendants from their liability as guarantors. To that effect, the Plaintiff placed reliance on the Indian case of **Bank of India v Orient Wollen Textile Mill Pvt I (2002)BC 24,** 2004 (1) BomCR 233 and the ruling of this Court, (B.K.Phillip, J.,) dated 19th November 2018, in respect of **International Commercial Bank (Tanzania) Ltd v Yusuf Mulla and Another** (this Commercial Case No.108 of 2018) (Unreported). Reliance was also placed on **sections 85, 86** and **87** of the Law of Contract Act, Cap.345 R.E.2002.

The Plaintiff further drew the attention of this Court to Paragraphs 4, 4.1 to 4.7 of **Exh.P3 and P4** where it is stated that the Plaintiff may resort to any other means of payment and that the liability of the guarantors remains. The Plaintiff, therefore, submitted that the Plaintiff is entitled to judgement and decree against the Defendants jointly and severally.

On 26th March 2020, the Defendants filed their final submissions. In it, they submitted that, since the Plaintiff had entered into a Deed of Compromise of the Suit with the principal debtor in Commercial case No.106/2017 **International**

Commercial Bank (Tanzania) Ltd v Yusuf Mulla and Another, the matter having been conclusively determined, the Defendants were exonerated from their liability therefrom.

The defendants submitted, further, that, the former suit did, conclusively, determine the matter and the plaintiff was to pay the decretal sum from the proceeds of mortgaged property which was valued at **TZS 2, 462,000,000/=**. They argued that, the parties to the Deed of Compromise of the Suit, having concluded the matter by qualifying it to the effect that they should execute the Deed without any recourse to further court processes, the Plaintiff cannot now claim the same adjudicated sum from the defendants.

Let us now discuss the merits. As stated, earlier, this Court raised two issues to guide it in the course of determining this case. However, acting under Order XIV rule 5 of the CPC I have found it necessary to add a new **issue**, namely: *whether the compromise signed between the Plaintiff and the Principal Debtor without involving the Defendants had the effect of discharging the Defendants;* and, rephrase the first issue to come after this new issue.

Consequently, having added the above issue, the issues to be addressed, in the course of determining this case, are as follows:

1. *whether the Deed of Compromise of the Suit signed between the Plaintiff and the Principal Debtor without involving the Defendants had the effect of discharging the Defendants.*
2. *If the above issue is answered in the negative, what, if any, is the liability of the defendants to the Plaintiff; and,*
3. *to what relief are the parties entitled to.*

As it might be noted herein, the defendants are being sued as guarantors. Their liability stems from their contractual relationship with the creditor (the Plaintiff) under the contract of guarantee in which they stand as sureties for the principal debtor.

The concept of guarantee is governed by the Law of Contract Act, Cap. 345 [R.E.2002]. Section 78 of this Act, defines what the contract of guarantee is all about and the parties thereto. The section provides as follows:

> 'A "contract of guarantee" is a contract to perform the promise, or discharge the liability of a third person in the case of his default and the person who gives the guarantee is called the "surety"; the person in respect of

whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor"; and the guarantee may be oral or written.'

As may be observed in the above provision, the contract of guarantee puts a surety under an obligation to honour the promise of the principal debtor by paying the principal debtor's present or future debt, provided to him by a creditor in case of default by the principal debtor. In the case at hand, there is no dispute that both defendants signed deeds of personal guarantee which were admitted into evidence as **Exh.P.3 & P.4.**

Moreover, it is also undisputed that, owing to an additional facility advanced to the Principal debtor, on 10th September, 2014, the defendants signed deeds of variation of their personal guarantees and the same were tendered and admitted into evidence as **Exh.P.6 and P.7**.

What seems to be a source of controversy, however, is the Defendants' argument that, because the Plaintiff entered into a *Deed of Compromise of the Suit* with the principal debtor, which Deed was registered as an Order of this court, in **Commercial Case No. 106 of 2017**, and, since the Defendants were not

involved in that arrangement, then they were discharged from their obligation.

In other words, the Defendants seem to argue that, the if one is to take into account the Deed of Compromise of the Suit between the Plaintiff and the Principal Debtor, then, the Plaintiff is estopped from claiming anything from the Defendants. Is that position legally correct?

As correctly stated by the Plaintiff's learned counsel, it is trite that, the liability of a guarantor is coextensive with the liability of the principal debtor and can be invoked without exhausting the remedies against the principal debtor, unless otherwise provided in the contract (of guarantee), i.e. certain exceptions could be created at the time of execution of the contract of guarantee *vis-a-vis* the obligations of the guarantor.

The co-extensive nature of a surety's liability with that of the principal debtor means that, the liability of the former is exactly the same as that of the latter. Where there is no principal, there can be no surety. In other words, a default having been made by the principal debtor, the creditor (Plaintiff) is entitled to recover

from the surety all what he could have recovered from the principal debtor unless otherwise stated in the contract.

Section 80 of the Law of Contract Act, Cap. 345 [R.E.2002] is very clear on that. See also the decision of the Court of Appeal in **Exim Bank (Tanzania) Ltd v DASCAR Limited & Another**, Civil Appeal No.92 of 2009. See further **National Bank of Commerce Ltd v Universal Electronics and Hardware Ltd & Another** [2005] T.L.R. 257 at 271.

In actual fact, when the principal debtor defaults, the creditor/bank is entitled to proceed against the guarantors/sureties, even without exhausting the remedies against the principal debtor. And, in case the guarantor refuses to comply with the demands made by the creditor/bank, such guarantor would also be treated as a *'willful defaulter'*.

However, section 85 of Law of Contract Act, Cap. 345 [R.E.2002] postulates that, any variance, made **without surety's consent**, in terms of the contract between the principal debtor and the creditor, **discharges surety** as to transactions subsequent to the variance. This means that, if the guarantors can successfully establish that there have been subsequent variations to the

contract of guarantee to which the guarantors were not privy to or had no knowledge of, the guarantors can be excused from performing their obligations under the law for all the subsequent transactions post the variance. (See **Exim Bank (Tanzania) Ltd v DASCAR Limited & Another (supra) at page 15-16).**

In this case, the Plaintiff does not dispute the existence of the Deed of Compromise of the Suit and the orders of this Court entered thereafter. What is being disputed it that the compromise of the suit did not discharge the Defendants. One this, immediate question that arises is:

> Can the Deed of Compromise of the Suit between the Plaintiff and the Principal Debtor, which was entered into in the absence or without involvement of the Defendants, be regarded as an agreement which varied the contract of guarantee? Put in another way, was the Deed amounting to a variation of the original contract?

If the above questions are answered in the affirmative, that will mean, that, the first issue will be also responded to affirmatively, and, this will kill off the rest of the issues, because, the Plaintiff's case will fall flat. However, to be able to respond to the above question and to the first issue, one has to examine *the*

nature and effect of the Deed of Compromise of the Suit in **Commercial Case No. 106 of 2017** for which an order of this Court and a decree in favour of the Plaintiff was issued.

In law, according to *Stroud's Judicial Dictionary of Words and Phrases*, 6th Edn, Vol.1, page 465, the term "**compromise**" is defined as:-

> "a mutual promise of two or more parties that are at contriversie...A compromise takes place when there is a question of doubt, and the parties agree not to try it out, but settle it between themselves by a give-and-take arrangement" (per Kay, L.J., *Huddersfield Bank v Lister* [1895] 2Ch.285)."

In RH Christie, *Business Law in Zimbabwe,* 2nd Edn, at page 108, the term "compromise" is defined as a:-

> "settlement by agreement of disputed obligations and **is a form of novation**, replacing the disputed obligations by the obligations created by the agreement of compromise." (emphasis added).

Generally, the effects of a compromise of suit, especially once it is recorded as a decree of the Court, is that it bars any proceedings based on the original cause unless there is an agreement to the contrary.

As it may be ascertained from *RH Christie*, a compromise also acts as "a form of **novation**, replacing the disputed obligations by the obligations created by the agreement of compromise." Put in our context, it means that, its general effects is that, the settlement of the banking facility issued to the principal debtor was substituted with this new form of arrangement between the Principal debtor and the Plaintiff. The doctrine of novation is not novel in our law. It is recognized under section 62 of the Law of Contract Act, Cap.345, [R.E. 2002]. See also the case of **M/s Musilanga Engineering v P.F. NyakutonyaNyangesera and Another** [1986] T.L.R.115. However, as regards the case at hand, did the act of novation discharge the sureties?

As stated in this judgement, this Court took judicial notice of **Commercial Case No. 106 of 2017,** its proceedings, orders and the decree. In principle, a compromise decree creates an estoppel by judgment. Such was a position which was upheld in a persuasive case of **Jadu Gopal Chakravarty (Dead) by his Lrs. v Pannalal Bhowmick and Ors. MANU/SC/0010/1978**. In this case, the Indian Supreme Court held that, a compromise decree is

binding upon the parties and, unless set aside, it operates as an estoppel.

As I stated earlier, no one is disputing the validity of the compromise. In the case of **Arusha Planters and Traders & Others v Rozina Jayant Narshibhai Patel,** CAT, (DSM) Civil App. No.78 of 2001 (unreported), the Court of Appeal of Tanzania was of the view that, while in India the content of a consent judgment/decree may be challenged by way of filing a separate suit, in our jurisdiction there is no provision in the CPC allowing one to challenge a consent judgement/decree by way of a separate suit.

Such a judgement can only be challenged by way of a review or an appeal with the leave of the Court. To me, this is because, if the Plaintiff files a separate suit, instead of seeking a review of the consent order, he will be confronted with the doctrine of estoppel to his detriment.

However, if the above principles are to be applied in this case, can it be argued that they will apply as between the principal debtor and the creditor (the Plaintiff) only and should not extend to the sureties? I think so, as I will explain further below.

As noted earlier, it is an agreed legal position that, when considered under the Law of Suretyship, a compromise is a form of "**Novation**". "Novation" involves the substitution of a new contract for a new one with the new one extinguishing the rights and obligations under the old contract. Section 62 of Law of Contract Act so provides. The section states that, "*If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.*"

Principally, novation may be effected by way of a contract or by operation of the law. As a general rule, the approach would be that the surety will be thereby discharged unless he had consented. This, however, is a general rule and is subject to exceptions, especially as may be ascertained from the wording of the contract of guarantee itself. So the determinant factor will be the guarantee signed by the parties.

As it may be observed from the evidence offered and submissions made by the parties, it is true that, the Defendants were not party to the Deed of Compromise signed between the Plaintiff and the Principal Debtor.

In that Deed, it was agreed that the Defendant would pay the judgment debt in full on or before 30th November 2017, failure of which the Plaintiff would be at liberty to enforce the judgment in a manner befitting, including the sale of the judgment debtor's immovable property located in Mbeya, without having undertaken court processes.

This court, Songoro, J., (as he then was) proceeded to record the Deed of Compromise as constituting its Decree. However, as I stated, the Defendants were not privy to it, and, therefore, they did not consent to it. In my view, although the compromise had the effect of novating the initial contract between the Plaintiff and the Principal Debtor, and even if such novation was not an act consented to by the defendants, the Court should not be rushed to apply the general applicable to sureties in respect of an act of novation which they did not consent to, and discharge the sureties.

The proper approach and the duty of this Court, therefore, is to examine the wording of the of guarantees signed by the Defendants and see if at all they contemplated a situation where an

innovation takes place and whether the sureties will still remain to be bound.

Doing so is essential because, in order to determine whether a surety stands discharged or continues to be liable under the surety agreement, the real test to apply is to find out the terms of the bond, examine its nature and scope.

If, for instance, it will be found that, there is nothing in the consent decree or the compromise which shows that the compromise is at variance with the terms of the surety bond, then, notwithstanding the fact that the sureties were not, at the time when the compromise was entered into between the parties, privy to, or did not consent to it, the surety will still continue to be liable and cannot stand discharged.

In the present case, the guarantees signed by the Defendants (**Exh.P3 & P.4**) show, in clause 3, 3.1 and 4.1 to 4.7 of each, and reads as follows:

> "3. **Continuing Security**
>
> 3.1 This Guarantee is and shall remain a continuing security for the Debtor's obligations to the Bank at any time and shall not be satisfied or otherwise affected by any repayment or recovery from time to time of the whole

or part of any amount which may then be due and owing from the Debtor to the Bank.

4.**Arrangement with the Debtor and Others**

The Bank may in its absolute discretion as it thinks fit, **and without the consent of the Guarantor, and without releasing or reducing or otherwise affecting whatsoever the liability of the Guarantor under this Guarantee** or the validity of the security hereby created do any of the following:

4.1 **enter into**, renew, vary or determine **any agreement** or **other arrangement with the Debtor** or any other person; and without prejudice to the generality of the foregoing, grant to the Debtor any new or increased facility and increase any rate of interest of charge;

4.2.....

4.3.....

4.5.....

4.6.....

4.7 and the security hereby created shall not be discharged **nor shall the liability of the Guarantor under clause 2 be affected by anything which would not have discharged, released, reduced or otherwise affected the liability of the Guarantor** if the Guarantors had been a Principal Debtor of the Bank instead of Guarantor." (**Emphasis added**).

From a legal standpoint, when a Court seeks to give effect to a contract, the intention of the parties to such contract is

customarily gleaned and determined by looking at the language used by the parties, and give effect to the ordinary meaning of their words and to the grammatical sense in which they have expressed themselves.

Unless the contrary view appears from the context, i.e., that, both parties intended their language to bear a different meaning, Courts do not easily deviate from the above principle. If the language is clear, then, the Court is obliged to proceed and give effect to it, and, in so doing, it is presumed that the parties knew the meaning of the words used.

In the case at hand, the above cited clauses of the guarantees signed by the Defendants, are very clear and straight forward, that, the mere signing of a compromise, did not absolve the sureties from their liability. In fact, by virtue of clause 4, and its sub-clauses, the sureties undertook to be bound, even where the Plaintiff concludes a compromise with the Principal Debtor.

The Clauses referred to herein above, are also so expressive that, unless it is proved that the whole amount guaranteed had been fully paid and the principal debtor discharged, the Defendants

cannot be allowed to through spanners into the wheel of recovery of the debt from their pockets as guarantors.

I also hasten to add, that, by virtue of Clause 3 of the guarantees signed by the Defendants, the guarantees are continuing guarantees. They are not specific guarantees. In essence, a continuing guaranty is an agreement by the guarantor to be liable for the obligations of someone else (the principal debtor) to the creditor (lender), even if there are several different obligations that are made, renewed or repaid over time.

In view of that fact, it means that, the Defendants guarantees signed, (Exh.P3 and P.4), have not been terminated and remain in force for as long as there is no evidence that the principal debtor is discharged from being liable to the plaintiff.

In follows, therefore, that, the defendants remain bound by the terms of the guarantee notwithstanding the fact that the compromise had the effect of novating. As clause 4 and 4.1 of the Guarantees show, the act of 'novation' or otherwise of the principal debt cannot and did not disturb the defendant's liability.

Specifically, each of the guarantees signed provide, in clauses 4 and 4.1, that, the Creditor may **enter into, renew, vary**

or determine any agreement or **other arrangement with the Debtor** (which to me will amount to an act of 'novation'), but all such acts will change nothing. Moreover, there is no evidence that the guarantees have not been terminated, hence, leaving the liability of the defendants still intact.

In the event, I am satisfied that, there is nothing in the compromise that shows it is having the effects of varying the terms of the guarantees signed by the Defendants to the extent of discharging them from liability. Moreover, the Defendants have not even complained that they were prejudiced by it, and, in what manner.

Gupta, S.N., *Law Relating to Guarantees,* 8th Edn, (2017) states, on page 454, that:

> "Filing of a suit by the creditor against the principal-debtor and obtaining a decree for the full amount, would not, by any stretch of imagination, amount to 'composition' resulting in the discharge of the liability of the surety. It would not make the slightest difference if the decree is a consent decree ...."

In view of the above, it follows, therefore, that, unless a contrary evidence is submitted to show that the debt had been fully discharged, the Defendants cannot be said to have been discharged

from their liability as guarantors by a mere fact that there was a suit against the principal debtor (the Commercial Case No.106 of 2017) and its subsequent Compromise of the Parties which was obtained without the Defendants' consent.

Further, I am also satisfied that, even if the compromise amounted to novation, it is not necessarily that a surety or guarantor should be released from liability where the agreement between the creditor and principal debtor is novated. It will only depend on the circumstances of each case, and at least not in this case.

Where a Suretyship or Guarantee Agreement contains special clauses which excludes certain rights which otherwise a surety would have and notwithstanding certain acts being done by the creditor that would otherwise release him, doctrines such as compromise, set off and novation, cease to have any application.

In view of the above analysis and reasons as contained herein, I find that, the first issue is answered in the negative. To that effect, the second issue also has been responded to affirmatively due to the fact that, in law, the liability of a guarantor depends on that of the principal debtor. In order to sustain a claim

against a guarantor, a creditor is required to show that the principal debtor is obligated to it and has defaulted in repaying the debt or that the guarantor has accepted liability for the debt. The Plaintiff has established such a fact with concrete evidence.

Principally, the rationale behind the idea of a guarantee is that, the guarantor undertakes to answer to a creditor in the event that the principal debtor fails to pay the debt. There has been no evidence that the principal debtor paid in part or in full. Sice a creditor who has a guarantee at his disposal has an election to proceed against the principal debtor or guarantor, there is no doubt that the Plaintiff herein, being a creditor, is entitled to that.

That being said and held, and, Plaintiff, having been able to discharge its burden of proof within the required standards, judgement is, therefore, entered in favour of the Plaintiff. The Defendants, are severally found to be liable to pay the Plaintiff the full amount of debt due to the Plaintiff.

The last issue is about reliefs sought by the parties. Generally, this follows the consequences of the findings made by this Court. In principle, a party who wins the case is entitled to the reliefs sought. However, it is trite law that a court cannot award

more than is claimed. In this case, the Plaintiff prays for, and, this Court does hereby grant, the following orders and reliefs against the Defendants, jointly and severally:

(i) That, as per prayers' paragraph (a), the Defendants jointly and severally to pay the Plaintiff a sum of **US$ 1,910,193.67**.

(ii) That, the above to carry **interest equal to 10.50% per annum,** from the date of filing this suit (1st August 2018) until judgement, as per paragraph (b) of the Plaintiff's prayer.

(iii) Interest in the decretal sum at the Court rate of 7% per annum from the date hereof until full satisfaction.

(iv) That, the Costs of the suit be borne by the Defendants.

It is so Ordered.

THE HIGH COURT OF TANZANIA COMMERCIAL DIVISION

.....

DEO JOHN NANGELA
JUDGE,

High Court of Tanzania (Commercial Division)
08 / 05 /2020

Judgement delivered on this 08th day of May 2020, in the presence of the Advocate for the Plaintiff, and the Advocate for the Defendant.

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DEPUTY REGISTRAR,
High Court of Tanzania (Commercial Division)
08/ 05 /2020