

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM
COMMERCIAL CASE NO. 116 OF 2017

COMMERCIAL BANK OF

AFRICA (TANZANIA) LIMITED.....PLAINTIFF

VERSUS

ISSA MOHAMED HAMDANI.....1ST DEFENDANT

SOUD MOHAMED SOUD.....2ND DEFENDANT

JUDGEMENT

B.K. PHILLIP, J

This case arises from credit facilities granted to Mohamed Trans Limited by the plaintiff. It is alleged in the plaint that the plaintiff herein granted to Mohamed Trans Limited (herein after to be referred to as " MTL") credit facilities by the letters dated 24th November 2010, 3rd July 2013 and 27th June 2014. The credit facility in respect of a facility letter dated 24th November 2010 was Tshs. 2,277,184,000/= which was later restructured to a term loan of Tshs. 2,469,000,000/=, the credit facility in respect of a facility letter dated 3rd July 2013 was Tshs. 2,513,019,827/= repayable in sixty (60) monthly installments. The credit facilities dated 24th November 2010 and 3rd July 2013 were restructured by the last credit facility letter dated 27th June 2014 by capitalizing the past due amounts and the plaintiff made available to MTL new insurance premium financing of USD 63,000

and Tshs 223,924,000/=. Furthermore, the plaintiff alleged that according to the credit facility letter dated 27th June 2014, the credit facilities made available to MTL were secured by its Directors'/Share holders' personal guarantees issued by the defendants herein who are directors/shareholders of MTL and a mortgage deed over a property situated on Plot No. 8 Block "R", CT No 5395 in Shinyanga Municipality, belonging to Issa Mohamed Hamdani (1st defendant). The defendants signed personal guarantees and indemnity in favour of the plaintiff. It is the Plaintiff's case that the MTL failed to repay the loan granted to him through the aforesaid credit facility letters as agreed and as at 28th March 2017, the outstanding amount was Tshs 3,290,368,476.82 and USD 167,596/= being principal sums and accrued interests. The plaintiff further alleged that he issued demand notice to the defendants herein for the repayment of the loan in their capacity as guarantors as well as notice of default, but the defendants failed to heed to the same. In this case the plaintiff prays for judgment and decree as follows;

- i. Payment of the sum of Tanzania Shillings Three Billion Two Hundred and Ninety, Three Hundred Sixty Eight Thousand, Four Hundred Seventy Six and Eighty Two Cents only (TZS. 3,290,368,476.82) and United States Dollars United States Dollars One Hundred Sixty Seven Thousand Five Hundred and Ninety Six (USD 167,596.00) being the outstanding amount as of March 28, 2017.
- ii. Interest on the sum of TZS 3,290,368,476.82 at the rate of 19% per annum and on the sum of USD 167,596.00 at the rate of

3.02% per annum from March 28, 2017 to the date of judgment plus penal interest at the contractual rate of 10% per annum.

- iii. Interest on the decretal amount at the court's rate of 7% from the date of judgment up to the date of payment.

In the event of failure by the 1st defendant to pay the amount at (i) (ii) and (iii) above,

- iv. Appointment of Mr. Gaspar Nyika advocate as a Receiver Manager with powers to sell the mortgaged property located on Plot No. 8, Block R, in Shinyanga Municipality vide C.T. No. 5395 owned by Issa Mohamed Hamdani.
- v. An order for sale of the property located on Plot No. 8, Block R, in Shinyanga Municipality vide C.T. No. 5395 owned by Issa Mohamed Hamdani.
- vi. Costs of the suit.
- vii. Any other relief which this honourable Court may deem just to grant in favour of the plaintiff.

In their written statement of defence the defendants alleged that the guarantee is a secondary liability which is only invoked upon the principal debtor's failure to repay the loan. Furthermore, the defendants alleged that MTL is under administration pursuant to the order of this court, thus the administrator appointed by the Court will pay all the creditors of MTL including the plaintiff and that the plaintiff herein was involved in the whole process of administration of MTL, thus MTL has not failed to repay its loans in question. Moreover, the defendants alleged that the

guarantees mentioned by the plaintiff in respect of the defendants herein are improper and irregular. Also, the defendants contended that the mortgage deed cannot be enforced since there is no event of default.

At the Final Pre Trial Conference, the following issues were framed for determination by the Court.

- i) Whether the 1st defendant Mortgaged Plot No 8 Block "R", CT No.5395, Shinyanga in favour of the plaintiff.
- ii) Whether the defendants are liable to pay the outstanding amount in respect of the credit facilities offered by the plaintiff and to what extent.
- iii) To what reliefs are the parties entitled to.

At the beginning of the hearing of this case the learned Advocates Miriam Bachuba and Michael Ngalo appeared for the plaintiff and the defendants respectively. However, during the hearing of the defence case Mr. Ngalo withdrew from representing the defendants and the learned advocate Frank Chundu took over the case from Mr. Ngalo.

In proving his case the plaintiff brought in court one witness, namely Samweli Mangesho who testified as PW1 whereas both defendants filed their witness statement but failed to appear in court for cross examination. Following the prayer for admission of the witness statements of the 1st and 2nd defendants under the provisions of Rule 56 (2) of High Court (Commercial Division) Procedure rules, 2012 as amended, made by Mr. Chundu, the witness statements of the 1st and 2nd defendants were

admitted pursuant to the provisions of Rule 56(3) of the High Court (Commercial Division) Procedure Rules, 2012.

Now, let me proceed with the determination of the issues. Starting with first issue , that is, *Whether the 1st defendant Mortgaged Plot No 8 Block "R", CT No.5395 in favour of the plaintiff*, in his testimony in chief PW1 reiterated the facts alleged by the plaintiff in this case which I have already summarized at the beginning of this case. I think there is no need of repeating them here. However, most importantly as far as this issue is concerned, PW1 testified that on 4th September 2013, in compliance with the terms of the facility agreement dated 27th June 2014, the 1st defendant executed a mortgage deed over Plot No. 8, Block "R", CT No. 5395 Shinyanga Municipality, in favour of the plaintiff. PW 1 tendered in court the Mortgage deed (Exhibit P5) together with the facility letters for the loan granted to MTL (Exhibit P1,P2,P3 and P4) and the Bank statement of MTL's account (Exhibit P 8).

On the other hand, the testimony in chief of DW1 (1st defendant-Issa Mohamed Hamdani) who is the owner of the mortgaged property at issue is to the effect that, the property at issue was not properly mortgaged. DW2 (2nd defendant–Soud Mohamed Soud) has not said anything concerning the mortgage in respect of the property on Plot No 8 Block "R", CT No.5395, Shinyanga.

Having analyzed the evidence adduced by the parties herein, I am inclined to agree with the views expressed by the plaintiff's advocate in his closing submissions, that this issue has to be answered in affirmative, since DW 1 in his testimony in chief has conceded that the property at issue was

mortgaged, but contended that it was not properly mortgaged without pointing out any fault/defect in the Mortgage deed in respect of the property at issue.

I have taken into consideration the submissions made by the defendants' on this issue, that is, the mortgaged deed at issue is not in respect to the credit facility the subject of these proceedings. With due respect to the defendant's advocate, his argument stated herein above is not supported by any evidence or the defendants' testimonies. It has to be noted that submissions of an advocate is not part of evidence, [**See the case of The Registrar Trustee of the Archdiocese of Dar Es Salaam Vs the Chairman Bunju Village Government and 11 others, Civil Appeal No. 147 of 2006, (CAT)** (unreported)]. It was imperative for the defendants to testify on the opinion held by the defendants' advocate.

I have perused the mortgage deed in respect of the suit property (exhibit P1) and have not seen anything on which I can fault it. I have also noted that in the last credit facility letter dated 27th June 2014 (exhibit P4) which was issued for the purpose of restructuring the previous credit facilities the mortgage deed in respect of the suit property is mentioned as one of the securities for the credit facility granted to the MTL. So, the Mortgage deed in respect of the suit property is one of the securities for the claimed outstanding amount subject of the proceedings in this case.

The above being said, I hereby hold that the 1st issue has to be answered in the affirmative.

As regards the second issue, that is, *Whether the defendants are liable to pay the outstanding amount in respect of the credit facilities offered by the*

plaintiff and to what extent , PW1's testimony is to the effect that MTL failed to repay the loan as agreed and structured from time to time, and as at 28th March 2017, there was an outstanding amount to a tune of Tshs 3,290,368,476.82 and USD 167,596/=. He tendered in evidence Bank a statement (Exhibit P8). PW1 testified further that the said outstanding amount continues to accrue interests.

In addition to the above PW1 testified that the defendants signed personal guarantees for the repayment of the credit facilities granted to MTL, to a tune of Tshs. 3,913,206,250 /= each. (Exhibit P6 and P7).

On the other side, the defendants' testimonies in chief are to the effect that MTL, the principal debtor was placed under receivership as per the orders of this court and on 28th March 2017, the receiver held a meeting with the creditors of MTL. The plaintiff's principal officers, Mr. Patrick Malewo and Modra Crege attended the meeting. After that meeting "properties" were sold and proceeds thereof were given to the administrator for making payments to creditors.

In addition to the above the defendants have stated in their testimonies in chief, that before the restructuring of the credit facilities , MTL continued to repay the loan. They contended that the claimed amount is unrealistic and unfounded.

In his closing submission, Mr. Nyika submitted that the defendants are guarantors to the loan granted to MTL by virtue of the guarantees agreement they signed with the plaintiff (Exhibit P6 and P7). Thus, they are liable to pay the outstanding amount. He contended that in terms of

section 80 of the Law of contract Act, Cap 345, R.E. 2002, the liability of a surety/ guarantor is co-extensive with that of the principal debtor unless provided otherwise in the contract, that is the liability of a guarantor go hand in hand with that of a principal debtor. He cited the case of **Exim Bank (Tanzania) Limited V Dascar Limited and another, Civil Appeal No. 92 of 2009** (unreported) in which the Court of Appeal held that section 80 of the Law of Contract, Cap 345, stipulates that a surety's liability is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract. It is the contention of Mr. Nyika that the liability of the defendants as guarantors is not a secondary one since there is no indication in exhibit P6 and P7 that the same should be a secondary one.

As regards the extent to which the defendants are indebted to the plaintiff, Mr. Nyika submitted that according to clause 2.1 of Exhibits P6 and P7, which provides that "*In consideration of the Bank making or continuing to make available banking facilities or other accommodation for so long as it may think fit to **MOHAMED TRANS LIMITED** whose address is Post Office Box Number 492, Shinyanga (hereinafter called "the Debtor" which expression shall include were the contents its successors and assigns), the Guarantor hereby irrevocably and unconditionally Guarantees to discharge the Debtor's obligations to the Bank on demand in writing by the Bank to the Guarantor without deduction, set-off, or counterclaim, together with interest thereon from the date of such demand.*", the defendants undertook to pay a maximum of Tshs. 3,913,206,250/=, while as at 28th March 2017, the outstanding amounts were Tshs. 3,290,368,476.80 and

USD 167,596/=. Mr. Nyika was of the view that since the amount secured under the said guarantees is bigger than the outstanding amount then the defendants are liable to pay the whole of the outstanding amount.

In addition to the above Mr. Nyika, submitted that, since PW1 admitted during cross examination that the administrator of MTL paid the plaintiff Tshs. 184,000,000/= and that was after the institution of this case, that is after 28th March 2017, then the same can be deducted from the outstanding amount after the calculation of the applicable interests up to 28th March 2017.

On the other hand, in his closing submissions Mr. Chundu invited this court to answer the second issue in the negative. He submitted that PW1 testified that the principal debtor failed to repay the loan but did not say what happened to him and during cross examination he admitted that the administrator of the principal debtor paid to the plaintiff a sum of Tshs 184,000,000/=. Mr. Chundu submitted further that the said amount of Tshs. 184,000,000/= is not reflected in the Bank statement tendered in court (Exhibit P8). He contended that it is not yet known whether during the administration process of the principal debtor, there were no funds sufficient to pay the outstanding loan. He contended that the plaintiff was supposed to present a proposal to the principal debtor's administrator which could be considered under the provisions of section 262 of the companies Act, 2002 and if the plaintiff's interests were under jeopardy then the proper recourse was for the plaintiff to petition under the provision of section 265 (a) of the Companies Act,2002. The plaintiff did

not take any appropriate steps during the administration of the principal debtor, contended, Mr. Chundu.

In addition to the above, Mr. Chundu contended that this court should take a judicial notice of its decision in Misc. Commercial Cause No. 121/2015, in which it ordered the principal debtor to be under administration. Mr. Chundu contended that under the circumstances, this case has been filed prematurely and/or filed to gain double advantage and/or payment because in this case the plaintiff claims for the principal sum without accounting for what has been paid by the principal debtor and what was paid by the administrator. Moreover, it was the contention of Mr. Chundu that there is no proof of service of notice of default to the principal debtor, (MTL). The alleged notice of seven days was served to the 2nd defendant who is not the mortgagor, contended Mr. Chundu. Relying on the case of **Moshi Electrical Light Co. Ltd and 2 others V Equity Bank (T) Ltd and 2 others, Land case No 55 of 2015** (unreported), Mr. Chundu contended that the notice alleged to have been served to the 2nd defendant is void in terms of section 127 (1) and (2) (c) of the Land Act, Cap 113 R.E 2019. Relying on the decision of this court in the case of **Adam Rashid Chohora V Knight Support (T) Limited, Commercial Case No.88 of 2013**, (unreported), in which this court declined to grant interests at the Bank rate and said that the plaintiff pleaded interests but did not lead any evidence to show that he was entitled to such kind of interests, Mr. Chundu submitted that the plaintiff's claims for payment of interests have not being proved.

Having analyzed the evidence adduced and the closing submissions made by the learned advocates, I am inclined to agree with Mr. Nyika that this issue has to be answered in the affirmative that is, the defendants are liable to pay the outstanding amount on the credit facilities granted to MTL by the plaintiff. There is no dispute that the defendants were guarantors to the credit facilities offered to the MTL. The liability of the guarantors as stipulated in the guarantee agreements signed by the defendants (Exhibits P5 and P6), does not exonerate them from their responsibility in case the principal debtor goes bankrupt or is placed under administration. Clause 2.1 and 3.1 of the guarantee agreements (Exhibits P5 and P6) are relevant in the determination of this issue. For easy of understanding, let me reproduce Clause 3.1 of the guarantee agreement hereunder. Clause 2.1 has already been reproduced earlier in this judgment

*"3.1 This Guarantee is a continuing security and shall secure the ultimate balance from time to time owing to the Bank by the Debtor in any manner whatsoever notwithstanding the **[death bankruptcy insanity or liquidation, administration]** or other incapacity or any change in the constitution of the Debtor or in the name or style hereof [or the retirement or death of any partner or the introduction of any further partners of the Debtor or the Guarantor] or any settlement of account or other matter whatsoever until three months after receipt by the Bank of notice in writing to determine the same signed by the Guarantor [or in case of death disability or insanity of the Guarantor by his person representatives or persons legally entitled to represent to him] provided always that such notice shall*

not affect the liability of the Guarantor or his estate for moneys obligations or liabilities present or future actual or contingent due owing or incurred prior to the expiration of such three month period."

(emphasis is added)

From the foregoing, in my considered view, the fact that the MTL has been under administration does not either relieve the defendants of their responsibilities or remove the plaintiff's rights to claim the outstanding amount from the defendants in their capacity as guarantors in the credit facility granted to MTL. The case of **Exim Bank (Tanzania) Limited** (supra) cited by Mr. Nyika, in which the Court of Appeal said that "*in terms of section 80 and 92 of the contract Act, once a principal debtor defaults in the payment of the loan, the surety steps into or is placed into equal footing with that of the principal debtor. So, unless the principal debtor sooner discharges the liability, the guarantor is liable as the principal debtor to the creditor and to the same extent under the terms of the overdraft facility*", is very relevant in the circumstances of this case, since the evidence tendered by PW1 (Exhibit P8) shows that the principal debtor (MTL) is in default on the repayment of the credit facilities granted to him. It is also worth noting here that the defendants are the directors of the principal debtor and in their testimonies they have not proved before this court that the outstanding amount claimed in this case was cleared in anyway. Thus, with due respect to Mr. Chundu, his contention that it is not clear whether or not the principal debtor failed to pay the outstanding is unfounded. In my considered view, since the plaintiff tendered in evidence the Bank statement (exhibit P8) showing that there are outstanding

amounts, the defendants had a burden of proving wrong the plaintiff by showing that the outstanding amounts were cleared.

Coming to the second wing of this issue, the extent of the defendants' liability, again I am inclined to agree with Mr. Nyika that each defendant is liable to the extent of the amount he guaranteed to pay that is, Tshs. 3,913,206,250/= as per clause 2.2 of the guarantee agreements (Exhibits P5 and P6) which provides as follows;

"2.2 The total amount recoverable under this guarantee shall the sum of TZS. 3,913,206,250.00 (Tanzania Shillings Three Billion Nine Hundred Thirteen Million Two Hundred Six Thousand Two Hundred Fifty Only) and commission thereon and all costs, charges and expenses referred to herein."

Since PW1 admitted that the administrator paid the plaintiff a sum of Tshs. 184,000,000/= for repayment of the outstanding debt on account of MTL, then, that amount has to be deducted from the claimed amount.

I have taken into consideration the concern raised by Mr. Chundu on the fact that the sum of Tshs. 184,000,000/= that was paid to the plaintiff by the administrator is not reflected in exhibit P8 (Bank statement). I have noted that exhibit P8's records ends up in 31st March 2017, while according to the testimony in chief of the 2nd defendant, the creditors' meeting was held on 28th March 2017 and thereafter properties were sold and proceeds thereof were given to the Administrator for making payments to creditor. The 2nd defendant's testimony in chief, does not mention the properties which were sold and the proceeds obtained thereof. Since the

properties were sold after 28th of March 2017 as per the testimony of DW2, under normal circumstances, the proceeds were distributed to creditors from April 2017 onwards and this explains why the amount of Tshs. 184,000,000/= is not reflected in exhibit P8 which ends up in 31st March 2017.

The above being said, the next and last issue is the reliefs the parties are entitled to. Having analyzed the evidence adduced by the parties herein, I am satisfied that the plaintiff has proved that the outstanding amount in respect of the credit facilities granted to MTL as at 28th March 2017 was Tshs. 3,290,368,476.80 and USD 167,596/=. However, as I have mentioned herein above a sum of Tshs. 184,000,000/= which was admitted to have been paid to the plaintiff by the administrator of MTL should be deducted and since the defendants who are the directors of MTL have not adduced any evidence to prove that more money was paid by the administrator apart from the said Tshs. 184,000,000/=, then the plaintiff is entitled to the payment of Tshs. 3,106,368,476.8 and USD 167,596/=. Since the defendants' liabilities is to a tune of Tshs. 3,913,206,250/= as stipulated in the guarantee agreements which is quite above the total amount the plaintiff is entitled to be paid, then the amount to be paid by the defendants to the plaintiff is within the amount stipulated in the guarantee agreements.

As regards interests, first I wish to point out that the case of **Adam Rashid Chohora** (Supra) that has been cited by Mr. Chundu is irrelevant in the circumstances of this case since, the amount claimed here arises from a credit facility agreements (Exhibits P1,P2,P3 and P4) which

stipulates clearly that it attracts interests and the plaintiff pleaded for the payment of interests while in the case of **Adam Rashid Chohora** (Supra) the claimed amounts did not arise from a credit facility. Also, the case of **Moshi Electrical Light Co. Ltd and 2 others**, (supra), is distinguishable from the case in hand because in that case the plaintiff was challenging a sale of the mortgaged property that was done by the mortgagee in exercising his right of sale the mortgaged property without resorting to the court processes. Thus, it was mandatory for the mortgagor to be served with the sixty (60) days notice of default as provided under section 127 of the Land Act, Cap 113, R.E. 2002. The circumstances and facts in this case are different. In this case the plaintiff is seeking for a court order for the sale of the mortgaged property as an alternative remedy in event this court grants the prayers for the claimed amount and the 1st defendant fails to pay the decretal sum.

From the foregoing, I hereby enter judgment against the defendants jointly and severally as follows;

- i) The defendants shall jointly and severally pay the plaintiff a sum of Tshs. 3,106,368,476.8 and USD 167,596/= being the outstanding amount from the credit facilities granted to Mohamed Trans Limited.
- ii) The defendants shall jointly and severally pay the plaintiff interests on the decretal sum in item (i) herein above at the rate of 19% per annum for the Tanzanian Shillings and 3.02% for the US Dollars from the date of filing this case to the date of judgment.

- iii) The defendants shall jointly and severally pay the plaintiff interests on the decretal sum in item (i) herein above at the court rate of 7% from the date of judgment to the date of payment in full.
- iv) That in case of default in payment of the decretal sums in item (i) ,(ii). (iii) herein above, then the plaintiff shall be entitled to auction the property on Plot No 8 Block "R", CT No.5395, Shinyanga, to realize the decretal sums.
- v) The defendants shall jointly and severally pay the plaintiff the costs of this case.

Dated at Dar es Salaam this 27th day of May 2020.




B.K. PHILLIP
JUDGE