IN THE HIGH COURT OF THE UNITED REPUBLIC

OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR-ES-SALAAM

COMMERCIAL CASE NO.4 OF 2020

DUNCAN BRUCE MACDONALD .....PLAINTIFF

VERSUS

AMINI NDERINGO KIMARO..... DEFENDANT

Last Order: 23rd March 2021
Date of Judgment: 29th April 2021

JUDGMENT

NANGELA, J.:

The Plaintiff is a Canadian citizen and businessman, who, currently resides and works for gain in Turkey. Through the services of Breakthrough Attorneys, the Plaintiff is suing the Defendant, a citizen of Tanzania, and a business partner with the Plaintiff, claiming from the Defendant a sum of **United State Dollars (U$) 100,000.00/-**, an amount standing as an un-discharged loan which the Plaintiff advanced to the Defendant.

For clarity, I will briefly summarize the facts of this case. It all started on 3rd April 2017 when the Plaintiff and the Defendant signed a loan agreement whereby the Plaintiff advanced a total of (**US $**) **100,000.00** to the Defendant, with a commitment that the latter will repay the amount to the Plaintiff within a period of three months from the date of signing the loan agreement. The Loan Agreement was signed on the **4th of April 2017**.

Besides, it was the parties agreement that, should the Defendant fail to repay the principal amount of the loan for more than three days after the date due for payment, or should he fail to pay any other sum payable for more than five days after the due date thereof, the Defendant shall be in default of the due performance or observance of any other term or condition of the Agreement, and, the lender, shall be entitled to take legal action against the borrower for the same.

When the loan became payable on 3rd July 2017, the Defendant was unable to repay the monies advanced to him in accordance with the terms of the agreement

signed by the two parties. It has been averred that, although the Plaintiff took efforts to remind the Defendant about the need to repay the loan, the latter either ignored, neglected or refused to pay.

It is the Plaintiff's averments that, efforts taken, in particular, included sending e-mails to remind the Defendant, as well as reminder letters. However, instead of repaying the loan, it is the Plaintff's averment that, the Defendant has been asking for more time to pay, and to date, therefore, the Defendant has not repaid the monies advanced to him by the Plaintiff.

Seeing that the Plaintiff is robbed of an opportunity to invest his monies loaned to the Defendant in other business ventures, the Plaintiff has brought up this case. He alleges that the Defendant is in breach of contract, the particulars of which are as follows:

(1) Failure to pay the Plaintiff within a period of three months from the date of signing the contract.

(2) Requesting for extension of time within which to pay the Plaintiff, despite being aware that the loan became repayable more than a year ago.

Besides, the Plaintiff claims to have suffered considerable losses, the particulars of such losses being that, the Defendant's failure to repay the loan as agreed, has made the Plaintiff unable to re-invest his monies in other business ventures that could have generated income to him.

In view of the above claims, the Plaintiff seeks for judgement and decree against the Defendant as follows:

(1) A declaration that the Defendant is in breach of the loan agreement.
(2) An Order against the Defendant for the payment of USD (US$) 100,000.00 to the Plaintiff, this being the amount advanced to the Defendant under the loan agreement.
(3) Interest at the commercial rate of 20% from the date of the loan repayment became due to the date of judgement.
(4) Payment of general damages of an amount to be determined by the Court.
(5) Interest on the principal amount at the Court rate of 7% per annum from the date of judgement till payment in full.
(6) Costs of this suit.
(7) Such other reliefs as this honourable court may deem proper and fit to grant.

On 17th February 2020, the Defendant, through the services of Summis Attorneys, a Dar-es-Salaan base Law Firm, filed his Written Statement of Defence (WSD).

He also raised a preliminary objection arguing that this Court lacks jurisdiction to entertain the suit.

However, when the matter came up for the hearing of the preliminary objection on 3rd of April 2020, the Defendant told this Court that his earlier advocates (Summis Attorneys) has withdrawn their services and, hence, he needed time to engage another advocate. Since the right to legal represention is such a fundamental right in dispensation of justice, I granted the Defendant time to engage another advocate.

The hearing of the preliminary objection was therefore set to be on the 6th of May 2020. Unfortunately, that could not take place until 10th August 2020 when the Defendant got the representation of Mr Sosthenes Mbedule, learned Advocate.

Upon appearance before this Court, Mr Mbedule made a prayer to withdrew from the Court the ealier preliminary objection filed in this Court. I granted the prayer with no costs and made an order allowing the main suit to proceed to the next stages. The matter went

through the 1st and Final Pre-trial conferences as well as mediation which was marked fruitless.

On 4th March, 2021, having extended the life span of this case, the hearing was to commence. However, On the material date, Ms Ernestilla Bahati, the learned counsel for the Plaintiff, made an oral application to this Court, applying for judgment by admission against the Defendant.

She submitted that, upon her careful perusal of the Plaint, she finds that the Defendant has admitted to the claims by the Plaintiff. Since the Defendant's advocate was enganged in another matter before the same court, this Court ordered that he be made to appear on 24th March 2021.

On 24th March 2021, the parties appeared before me. Ms Bahati raised the same prayer and made submissions in support of it, relying on paragraph 7 of the WSD, Order XII rule 4 of the Civil Procedure Code, Cap.33 R.E 2019, and some of decisions of this Court. She prayed that this Court be pleased to make a finding that, the Defendant was fully admitting the claim and has

no defence worth to consider given such admission. She urged this Court, therefore, to grant Judgement to the Plaintiff on the basis of Defendant's own admission.

For his part, Mr. Mbedule, learned advocate for the Defedant, urged the Court to reject the prayer by Ms Bahati. Mr Mbedule was of the view that, paragraph 4 of the Plaint has explained the circumstances underwhich the loan was advanced to the Plaintiff. He argued that, even if the loan is not directly disputed, the issue is that, the loan was not for business purposes but was personal loan.

Besides, he argued that, the Court should take into consideration the fact that the parties to the case are business partiners who are running a company together and, that, it is only through a full hearing of the case, the Defendant would be in a position to tell the Court what were the purposes of the monies advanced to him by the Plainitiff.

Furthermore, Mr Mbidule contended that, the provisions of Order XII rule 4 and Order VIII are not relevant for considearation at this stage of the case, as

the correspondences attached to the pleadings attracts a full hearing of the parties.

In a brief rejoinder, Ms Bahati brushed aside the submissions by Mr Mbedule as having no bearing to the case. She argued that, the business relationship which the parties enjoys has nothing to do with the claims raised by the Plaintiff aganist the Defendant as the fact remains that the Defendant is not denying the correctness of such claims. She insisted, therefore, that, this Court should proceed under Order XII rule 4 of the CPC, Cap.33 R.E 2019.

I have taken time to consider the rival submissions and the prayer upon which they are based, the pleadings and the law from which support for the prayer by Ms Bahati is premised.

Order XII rule 4 of the Civil Procedure Code, Cap. 33 R.E 2019 provides for a possibility where the Court may, on its own motion or upon an application by the Plaintiff, grant a judgment on admission. It reads as follows:

> "Any party may, **at any stage of a suit**, where admissions of fact have been made either on the pleading, or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just." (Emphasis added).

Essentially, Order XII rule 4 of the CPC, Cap.33 R.E. 2019 is in parimateria with Order XII rule 6 of the Indian Civil Procedure Code, 1908. The Indian Supreme Court had the opportunity to discuss that Order in the case of **Uttam Singh Duggal & Co Ltd. v. Union of India, reported as (2000) 7 SCC 120**, thereby laying to rest the object and scope of that law.

In particular, the Indian Supreme Court was of the view that:

> "... "where a claim is admitted, the court has jurisdiction to enter a judgment for the plaintiff and to pass a decree on admitted claim. The object of the Rule is to enable the party to obtain a speedy judgment at least to the extent of relief to which according to the admission of the defendants, the plaintiff is entitled". We should not unduly narrow down the meaning of this Rule, as the object is to enable a party to obtain speedy judgment.

> Where other party has made a plain admission entitling the former to succeed, it should apply and also wherever there is a clear admission of facts in the face of which, it is impossible for the party making such admission to succeed."

In line with the above legal position, it is also a legal requirement that admission of the kind envisaged in Order XII rule 4 of the Civil Procedure Code, Cap.33 R.E. 2019, be clear and unambiguous if one is to obtain a judgment by admission. This was also a fact emphasized in the Indian case of **Vijaya Myne v. Satya Bhusan Kaura, reported as 142 (2007) DLT 483 (DB)**, whereby, a Division Bench of the Supreme Court held that:

> The admissions can be in the pleadings or otherwise, namely in documents, correspondence etc. These can be oral or in writing. The admissions can even be constructive admissions and need not be specific or expressive which can be inferred from the vague and evasive denial in the written statement while answering specific pleas raised by the plaintiff. The admissions can even be inferred from the facts and circumstances of the case. No doubt, for this purpose, the Court has to scrutinize the pleadings in their detail and has to come to the conclusion that the admissions are unequivocal, unqualified and

> unambiguous. In the process, the Court is also required to ignore vague, evasive and unspecific denials as well as inconsistent pleas taken in the written statement and replies. Even a contrary stand taken while arguing the matter would be required to be ignored."

The above legal position means, therefore, that, a court can grant judgment on admission but the admission must be categorical in nature . It should be a "*conscious and deliberate act of the party making it, showing an intention to be bound by it*".

In **Himani Alloys Ltd. v. Tata Steel Ltd., reported as (2011) 15 SCC 273,** the Indian Supreme Court deliberating on Order XII rule 6 of the Indian Civil Procedure Code (which is in parimateria to our Order XII rule 4) emphasized that:

> "... the enabling provision of Order XII Rule 6 of the [Indian] CPC, being an enabling provision, it is neither mandatory nor preemptory but discretionary. In that regard, the court, on examination of the facts and circumstances, has to exercise its judicial discretion, keeping in mind that a judgment on admission is a judgment without trail which permanently denies any remedy to the defendants, by way of an appeal on merits. Therefore unless

> the admission is clear, unambiguous and unconditional, the discretion of the Court should not be exercised to deny the valuable right of a defendant to contest the claim. In short the discretion should be used only when there is clear admission which can be acted upon...."

In this instant case, the learned counsel for the Plaintiff has relied on what the Defendant pleaded in Paragraph 7 of the Written Satatement of Defence. That paragraph reads as follows:

> "The contents of paragraph 8 of the Plaint are partly noted to the extent that it is true **the Defendant exchanged emails and letter correspondencies with the Plaintiff with regards to the payment of the loan, however, the Defendant honestly requested for more time to redeem the same due to circumstances which were beyond his control.** The Plaintiff has ill-intents if you refer to his e-mail dated 30th October , 2019 which he stated that he shall file the case requiring order to sell the Defendant's assets to repay his loan, and again he wanted to pay-off the Defendant by buying his shares from project companies which both Plaintiff and Defendant are shareholders." (Emphsis added)

Looking at the above paragraph extracted from the WSD, and further reading paragraph 6, and 8 of the

WSD, it is cear to me, that, the Defendant does not deny being indebted to the Plaintiff.

In paragraph 7, for instance, what is offered is, in my view, a blunted assertion which is to the effect that he was denied more time to repay the loan. He does acknowledge in paragraph 6 of the WSD that, "**the loan amount has not been paid as of 03rd July 2019.**" Likewise, in paragraph 8 of the WSD, the Defendant is clear that "**the loan is due**".

The above assertions by the Defedant, clearly amounts to admissions that the Defendant is indebted to the Plaintiff and, hence, confirms the Plaintiff's assertion that the Defendant borrowed the amount claimed by the Plaintiff and has not repaid it. It also confirms the fact that the Plaintiff and the Defendant had an agreement uponwhich the latter borrowed monies from the Plaintiff.

As stated in the case of **Beda Mgaya t/a BFCA Technical and Supplies v The A.G. and Another, Civil Case No.112 of 2019, HC (DSM Registry) (Unreported), Amir Sundeerji v J.W. Ladwa (1977) Ltd, Misc. Civil Appl. No.820 of 2016 HC DSM**

(Unreported), and, as also stated in the Indian cases of **Uttam Singh** (supra), **Vijaya Myne** (supra) and **Himani Alloys** (supra), the law has given this Court discretionary powers to enter judgement on admitted facts without waiting for determination of other questions.

In view of the above, and having examined the WSD and its contents as partly captured in paragraph 6,7 and 8 thereof, I am fully convinced that the Defendant has not denied the material allegation made against him. With such a finding, therefore, exercise of this Court's discretion under Order XII rule 4 of the Civil Procedure Code, Cap.33 R.E 2019 is warranted.

In the upshot, thererefore, judgment on admission should be entered in favour of the Plaintiff. This Court proceeds to do so and makes the following orders, that:

(1) The Defendant is hereby declared to have breached of the loan agreement between him and the Plaintiff.
(2) The Defendant is hereby Ordered to pay the Plainitff USD (US$) 100,000.00, this being the amount advanced to the Defendant under the loan agreement.
(3) That, the Defendant is to pay interest at the commercial rate of 14% from the

date when the repayment of the said loan became due to the date of judgement.

(4) The Defendant is also to pay Interest on the principal amount at the Court rate of 7% per annum from the date of judgement till payment in full.

(5) The Defendant is also to pay Costs of this suit.

It is so Ordered

DATED at DAR-ES-SALAAM, this 29th April 2021

THE HIGH COURT OF TANZANIA COMMERCIAL DIVISION

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HON. DEO JOHN NANGELA
JUDGE,