

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 88 OF 2019

EXIM BANK TANZANIA LIMITED PLAINTIFF

VERSUS

ASHA TAJMOHAMED FADHILI DEFENDANT

Date of filing closing submissions: 07/05/2021

Date of Judgment: 17/05/2021

JUDGMENT

I. ARUFANI, J.

The plaintiff filed the suit at hand in this court against the defendant claiming for payment of Tshs. 339,729,930.24 being the outstanding balance due and payable by the defendant arising from the facilities offered to the defendant plus interest thereon as at 30th June, 2019. The plaintiff is also claiming for interest of 27% per annum on the stated amount from 1st July, 2019 to the date of judgment or at any time as the suit may be settled, interest at court rate from the date of judgment to the date of final satisfaction of the decree, general damages, costs and any other reliefs that the court may deem fit to grant.

The background of the matter as discernible from the pleadings filed in this court by both sides is to the effect that, the plaintiff is a limited liability company registered in Tanzania under the Companies Act and licensed under the Banking and Financial Institutions Act to trade as a banker. On the other side the defendant is a natural person and a business woman doing business at Dar es Salaam, Tanzania. On 11th July, 2012 the defendant applied from the plaintiff for an overdraft facility of Tshs. 70,000,000/= and the said offer was accepted by the plaintiff on 18th July, 2012. The defendant was required to repay the loan and the interest of 21% per annum calculated monthly within a period of twelve months and penal interest at the rate of 27% on expiration of the stated period of time.

On 4th October, 2013 the said facility was renewed to the tune of Tshs. 70,000,000/= whereby Tshs. 50,000,000/= became an overdraft and Tshs. 20,000,000/= was a term loan and both were payable within a period of twelve months and agreed would have attracted the same rate of interests. As a security for the facility the defendant executed a legal mortgage over plot No. 265, Block "B" Sinza, Dar es Salaam with Certificate of Title No. 26049. She also issued a personal guarantee, executed the

credit facility agreement and demand promissory note for the same purpose.

The plaintiff averred in the plaint that, the defendant utilized the facilities but failed to pay the outstanding amount due which is a breach of the terms and conditions of the loan agreement. The plaintiff averred to have made several demands to the defendant for payment of the outstanding amount but the defendant failed or refused to heed to their demand and decided to file the suit at hand in this court claiming for the above stated reliefs.

The defendant agreed to have borrowed from the plaintiff the stated sum of Tshs. 70,000,000/= for business activities but disputed the claim of the plaintiff of Tshs. 339,729,930,24 and denied to be indebted to the stated amount of money to the plaintiff. She also agreed to have mortgaged the land property situated on Plot No. 265, Block "B" Sinza area within Kinondoni District in Dar es Salaam Region for the said facility. The defendant stated that, she discharged her duty of repaying the loan save for two installments which caused the plaintiff to threatened to sale the mortgaged property to redeem the installments which she had failed to pay.

The defendant averred further that, the plaintiff is the one breached the contract. She stated that, when she was still discharging her obligation of paying the loan, the plaintiff served her with a fourteen days notice intimating to sale the mortgaged house. She stated that is contrary to the loan agreement which states clearly that, before the plaintiff exercised its right to redeem the facility extended to her the default notice of sixty days would have been served to her. She prayed the suit to be dismissed with costs and prayed to be granted any other order the court may deem fit and just to grant.

On 7th December, 2020, when the matter came for Final Pre Trial Conference before my learned brother, Hon. Magoiga, J the counsel for the parties framed and agreed the issues for determination in the matter to be as follows:-

- 1. Whether the defendant is indebted to the plaintiff.*
- 2. If the answer to issue number one is in the affirmative, to what extent.*
- 3. To what reliefs the parties are entitled.*

During hearing of the matter the plaintiff was represented by Mr. Gabriel S. Mnyele and the defendant was represented by Mr. Augustine

Mathern Kusalika, both learned advocates. While Mr. Jacob Samweli Sanga testified for the plaintiff as PW1, on the other hand the defendant, Asha Tajmohamed Fadhili testified in person as DW1. PW1's written statement dated 30th March, 2021 and filed in this court on the same date was adopted by the court as his evidence in chief.

PW1 stated in his statement and told the court in his testimony that, he is a plaintiff's Senior Manager – Special Assets Management. He said one of his duties is to engage customers on recovery of non-performing loans and prepares report on debt recovery for the bank management. He stated he know the defendant as their customer since 2012 and added that, on June 2012 the defendant applied from the plaintiff for a facility in a form of an overdraft.

He stated that, the defendant's application was accepted and she was granted an over draft of Tshs. 70,000,000/= through a letter of offer dated 11th July, 2012 which was admitted in the case as exhibit P1. According to exhibit P1 the overdraft was supposed to be paid on demand or within 12 months from the date of disbursement. He stated further that, the defendant was required to pay an interest of 21% and penalty of 27% for unauthorized overdrawing.

He stated it was a condition that the loan had to be secured by a landed property and the defendant pledged a land situated on Plot No. 265, Block "B" located at Sinza area within Kinondoni District in Dar es Salaam Region with Certificate of Title number 26049. He went on stating that, the defendant executed a mortgage deed over the above mentioned landed property dated 19th July, 2012 which was admitted in the case as exhibit P2. The certificate of title to the right of occupancy of the mentioned land which is in the name of Hawa Tajmohamed Fadhili was admitted in the case as exhibit P4. He stated that, after the defendant accepted the offer she proceeded to utilize the overdraft as exhibited in her bank statement which was admitted in the case as exhibit P3.

PW1 went on stating in his statement that, on 1st August, 2013 the defendant was indebted to the tune of Tshs. 73,341,037/= and the plaintiff gave the defendant a fresh offer dated 04th October, 2013 which resulted into renewing the facility extended to her. The letter for renewing the credit facilities of the defendant was admitted in the case as exhibit P5. According to that letter, the defendant was given an overdraft of Tshs. 50,000,000/= payable on demand or within 12 months from 2nd August, 2013 and a term loan of Tshs. 20,000,000/= payable within 12 months

from the date of disbursement. He said the facilities continued to be secured with the same mortgaged land stated in exhibits P2 and P4.

PW1 told the court that, as a security for the overdraft and a term loan the defendant executed a credit facility agreement, demand promissory note together with a guarantee and indemnity all signed on 5th February, 2014 and were admitted in the case as exhibits P6, P7 and P8 respectively. PW1 stated that, after the renew of the facilities in two categories and execution of the necessary documents, on 28th February, 2014 the defendant was credited with the term loan of Tshs. 20,000,000/= aiming to reduce the liability in the overdraft and made the principal amount payable to remain Tshs. 57,991,203.89 in respect of the overdraft facility.

He stated that, thereafter the defendant never made any deposit to service the overdraft and the term loan as witnessed by exhibit P3. He went on stating that, the interest continued to accrue in the account and on 30th June, 2019 the amount had accumulated to the tune of Tshs. 339,729,930.24. PW1 stated that, on 3rd October, 2014 the defendant issued a statutory default notice to the defendant which was admitted in the case as exhibit P9.

He stated that, to frustrate recovery of the facilities the defendant initiated litigations at Kinondoni Land and Housing Tribunal and at Kisumu Resident Magistrate's Court and stated to date the outstanding principal amount plus the interest has never been recovered. In fine he prayed the court to grant the reliefs the plaintiff is claiming against the defendant. When PW1 was cross examined by the counsel for the defendant he said that, after serving the defendant with a default notice they conducted several meetings with the defendant to see how the debt should have been paid but it has never been paid to date. He said justification for claim of the stated outstanding amount is the bank statement admitted in the case as exhibit P3.

The defendant simply prayed her statement to be adopted by the court as her evidence in chief in the case. After the statement being adopted and when she was cross examined by the counsel for the plaintiff she agreed to have borrowed Tshs. 70,000,000/= from the plaintiff and agreed she is indebted to the plaintiff to the tune of Tshs. 339,729,930.24 as indicated in exhibit P3. She agreed to have pledged the plot mentioned above as a mortgage for the loan given to her. She however said that, she has been in several meetings with the plaintiff discussing on how the debt

should have been paid and they agreed she should have paid Tshs. 100,000,000/= as a full settlement of the outstanding debt.

She went on stating that, she failed to repay the loan because of the hardship she encountered in her business. She said she agreed with the plaintiff that, she would have found a purchaser of the mortgaged land so that she can sale it and pay the loan but she has not secured a purchaser todate. She agreed she was served with exhibit P9 on 10th November, 2014 and said she instituted a suit before the Kinondoni District Land and Housing Tribunal and in the Resident Magistrate's Court of Dar es Salaam at Kisutu for the purpose of seeing if she might have get a person to purchase the mortgaged land to get the money of paying the facilities without success. She also conceded the plaintiff has a right to sale the mortgaged property to get back the facilities.

When she was re-examined by her learned counsel she said she was not involved when exhibit P3 was prepared and she don't know how the amount stated thereon was arrived. She said from when she signed exhibit P9 todate about seven years have passed. She said they conducted several meetings to try to see how she should have repaid the loan but they didn't reach an agreement. At the end the counsels for the parties prayed to file

in the court their final submissions and were allowed to do so. I will be referring to their submissions in the course of determining the issues framed for determination in this matter.

After giving due consideration to the evidence adduced in this matter by the parties together with what is stated in the pleadings filed in the court by the parties, the court has found in relation to the first issue that, there is no dispute that the plaintiff gave to the defendant an overdraft facility of Tshs. 50,000,000/= and loan term of Tshs. 20,000,000/= for the purpose of doing business. The court has also found there is no dispute that the said loan was supposed to be repaid within twelve months and attracted an interest of 21% and in case of a default an interest of 27% was supposed to be charged. That is well supported by the letter of renewal of credit facilities, the credit facility agreement and the promissory note admitted in the case as exhibits P5, P6 and P7 collectively which shows the credit facilities advanced to the defendant was renewed and the defendant accepted the offer of renewing the credit facilities and promised to repay the same.

The court has also found that, despite the fact that the defendant is not disputing she was given the above stated credit facilities and the loan

term totaling Tshs. 70,000,000/= with an interest of 21% but she has not stated anywhere being in her written statement of defence or in her evidential statement that she has fully repaid the credit facilities given to her by the plaintiff. To the contrary the court has found the defendant averred at paragraph 4 of her written statement of defence that she defaulted to pay two installments of the credit facility advanced to her and that caused the plaintiff to threaten to sale the property she pledged as a security for the facility.

Sequel to that, the court has also found that, when the defendant was cross examined by the counsel for the plaintiff she admitted she is indebted to the plaintiff to the tune of the debt the plaintiff is claiming from her. The above stated evidence shows that, as the defendant is not disputing is indebted to the plaintiff and her dispute is on the actual amount the plaintiff is claiming from her then the first issue is supposed to be answered in affirmative that the plaintiff is indebted to the plaintiff.

Coming to the second issue which is asking to what extent the defendant is indebted to the plaintiff the court has found that, it is averred in the plaint and PW1 stated in his evidential statement that the plaintiff is indebted to the tune of Tshs. 339,729,930.24. To substantiate the claimed

outstanding sum of money PW1 tendered to the court the bank statement of the defendant which was used to give the overdraft and the loan term to the defendant which was admitted in the case as exhibit P3. That statement shows up to 30th June, 2019 the debt of the defendant to the plaintiff had accrued to the tune of Tshs. 339,729,930.24.

The defendant disputed the stated claimed sum of money by stating that, she does not know how the stated sum of money was arrived and she was not involved in the calculation of the claimed sum of money. The court has found that, despite the fact that the defendant is disputing the claimed sum of money but she has not told the court how much money she has paid to the plaintiff to service the credit facilities given to her and how much debt has not been paid so as to show her debt is not the one featuring in exhibit P3.

The court has been of the view that, as this is a commercial case which as defined under Rule 3 of the High Court (Commercial Division) Procedure Rules, 2012 as amended by GN No. 107 of 2019 is a civil case then its standard of proof as provided under section 3(2) (b) of the Evidence Act, Cap 6 R.E 2019 is on preponderance of probability. That means the court is required to see which party has stronger evidence than

the other, notwithstanding the slight the edge may be. That position of the law takes me to the position stated in the plaintiff's final submission that, as provided under section 110 and 111 of the Evidence Act the defendant was required to prove her allegation that the outstanding amount due is not the one appearing in exhibit P3 by showing what is the actual debt is due to date.

While being guided by the stated position of the law the court has found that, as stated in the statement of PW1 and as appearing in exhibit P3 it is crystal clear that, from 28th February, 2014 when the term loan facility of Tshs. 20,000,000/= was credited in the bank account of the defendant and left the principal amount payable in respect of the overdraft facility to be Tshs. 57,991,203.89 there is no any other amount of money credited in the bank account of the defendant to repay the overdraft facility advanced to her. As stated by PW1 in his statement the interest of the outstanding overdraft and the term loan continue to accrue and on 30th June, 2019 it had accumulated to the tune of Tshs. 339,729,930.24 as indicated in exhibit P3.

The court has found that, the defendant stated she failed to repay the credit facilities because of the hardship she encountered in her

business. The court has found this cannot be a ground of exonerating her from liability of paying the credit facilities advanced to her plus the agreed interest which is not disputing she promised to repay. The court has arrived to the above finding after seeing there is no evidence adduced to show hardship in the business of the defendant would have been a ground for not paying the loan.

The above finding of this court is being bolstered by the decision made by this court in the case of **Stanbic Bank (T) Ltd V. NAM Enterprises Ltd & Four Others**, Commercial Case No. 99 of 2015 where the court quoted with approval the persuasive Kenyan case of the **National Bank of Kenya Ltd V. Pipe Plastic Samkolit Ltd and Another**, [2002]2 EA 503 where it was stated that, parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved, something which has not been pleaded in the case at hand. The court stated at page 18 of the case of **Stanbic Bank (T) Ltd** (supra) that, experiencing hardship in the business has nothing to do with the defendant promises to pay monthly installments and the entire loan.

The court has also considered the defendant's argument that she defaulted to repay only two installments but found as stated in the case of

AbdallahYussuf Omar V. Peoples Bank of Zanzibar & Another,

[2004] TLR 399 at page 400 failure to pay any installment which is due that amount to breach of the agreement. Although the defendant stated in the cross examination and it is also stated in her final submission that there was several meetings conducted by the plaintiff and the defendant to see how the debt should have been settled but as stated by PW1 there is no agreement which was reached by the parties. Therefore the parties were bound by what they agreed in exhibits P5 and P6.

The court has also considered the testimony of the defendant that she was not issued with a default notice and the argument made in her final submission that the one issued to her on 10th November, 2014 had expired but failed to see any basis in the said argument. The court has arrived to the above finding after seeing the defendant and her counsel did not inform the court the stated condition is provided under which terms and condition of the loan agreement entered by the parties. Further to that the court has failed to see how the stated failure of issuing the second default notice to the defendant would have been a ground of finding the debt has not accumulated to the amount alleged by the plaintiff.

The above stated analysis make the court to find the plaintiff has managed to discharge its duty of proving the credit facilities alleged is outstanding against the defendant as required by sections 110 and 111 of the Evidence Act to the standard required by the law. In the premises the court has found the answer to the second issue is supposed to be that, up to 30th June, 2019 the defendant was indebted to the plaintiff to the tune of Tshs. 339,729,930.24.

The above finding makes the court to move to the third issue which is in respect of the reliefs the parties are entitled. The court has found as it has already been found up to 30th June, 2019 the defendant was indebted to the tune of Tshs. 339,729.930.24 then the plaintiff is entitled to be paid the stated sum of money. The court has also found that, as there is no dispute that the parties agreed in case of a default the penal interest of 27% per annum would have been charged the court is granting the prayer of the stated interest on the claimed amount from the 1st July, 2019 to the date of this judgment. The plaintiff is also granted interest on the stated amount at the court rate of 7% from the date of judgment to the date of final satisfaction of the decree. Further to that the plaintiff is granted a

general damages at the tune of Tshs. 2,000,000/= and the costs of the case to follow the event. It is so ordered.

Dated at Dar es Salaam this 17th day of May, 2021.



I. ARUFANI

JUDGE

17/05/2021

Court:

Judgment delivered today 17th day of May, 2021 in the presence of Mr. Gabriel S. Mnyele, advocate for the plaintiff who is also holding brief of Mr. Augustine Mr. Kusalika, advocate for the defendant. Right of appeal to the Court of Appeal is fully explained.



I. ARUFANI

JUDGE

17/05/2021