

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

**COMMERCIAL CASE NO. 52 OF 2020**

**I & M BANK (T) LIMITED ..... PLAINTIFF**

**VERSUS**

**GENERAL MOTORS COMPANY (TANZANIA)**

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

**ASIF ALI .....2<sup>ND</sup> DEFENDANT**

**AISHA ASIF ALI .....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**B.K. PHILLIP, J**

In this case the plaintiff prays for judgment and decree against the defendants jointly and severally for as follows:-

- i. A declaration that the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> defendants are in breach of credit facility agreement and contract of guarantee respectively by their failure to discharge their duties and obligations in accordance with the agreements.
- ii. That defendants jointly and severally be ordered to immediately pay to the plaintiff the outstanding amount of Tzs. 296,780,000 (say Tanzanian shillings Two Hundred Ninety six Million Seven Hundred Thousand only) being the principal amount of the outstanding loan and interest as at 11<sup>th</sup> March, 2020.
- iii. Payment of the default rate of interest (12% per month) charged from the date of breach of the terms and conditions of the credit

facility agreement that is 11<sup>th</sup> March 2020 to the date of judgment thereof.

- iv. Payment of interest (12% per month) on the decretal amount from the date of judgment to the date of full payment thereof.
- v. Payment of general damages to cover the loss the plaintiff suffered for the defendant's failure to discharge their obligations under the said contracts.
- vi. The defendants pay the plaintiff costs of this suit.
- vii. Any other relief(s) that the honourable court may deem fit to grant.

It is alleged in the plaint that, on 1<sup>st</sup> July 2016 the 1<sup>st</sup> defendant was granted by the plaintiff an overdraft facility to a tune of Tshs. 250,000,000/= .The 2<sup>nd</sup> and 3<sup>rd</sup> defendants were guarantors to the aforesaid overdraft facility. The same was secured by the following securities;

- i. Legal mortgage over property on Plot No. 465 Block "44" vide CT No. 186249/67 Kijitonyama Area, Kinondoni Municipality, Dar es Salaam in the name of Aisha Asif Ali.
- ii. Debenture charge over all assets of the 1<sup>st</sup> defendant's company.
- iii. Joint and severally guarantees issued by the directors of the 1<sup>st</sup> defendant's company (Asif Ali and Aisha Asif Ali).
- iv. Promissory note payable on demand to the plaintiff.

The plaintiff further alleged that on 18<sup>th</sup> December 2018, 1<sup>st</sup> defendant's request that the overdraft facility granted into him be converted into a term loan was approved.

It is the plaintiff's case that after utilizing the credit facility, the 1<sup>st</sup> defendant defaulted to repay the same as agreed. The plaintiff served the

defendants with demand notices requesting each one of them to discharge his/her obligation in the loan agreement and individual guarantee but in vain.

Moreover, the plaint reveals that the plaintiff sold the mortgaged property located on plot no. 465 Block "44" CT No. 186249/67 Kijitonyama Area, Kinondoni Municipality Dar es Salaam which was in the name of the 3<sup>rd</sup> defendant, but it realized a sum of Tshs. 110,000,000 only leaving an outstanding amount to a tune of Tshs. 296,780,000/=.

Upon being served with summons to file written statement of defence to defend the suit, the defendants did not file any defence. Consequently, the plaintiff's Advocate, the learned advocate, Hamisa Nkya filed an application for default judgment pursuant to rule 22(1) of the High Court(Commercial Division) Procedure Rules, GN No. 250 of 2012 as amended by GN 107 of 2019.

The application for default judgment is supported by an affidavit sworn by one Clement Kagoye, the plaintiff's principal officer. In his affidavit Mr. Kagoye narrated the background of this case which I have narrated at the beginning of this judgment. He also attached the following documents;-

- i. An application for overdraft facility made by the 1<sup>st</sup> defendant dated 1/7/2016.
- ii. Third party mortgage in respect of a property located on plot no. 465, Block 44 together with spouses consent for mortgage signed by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.
- iii. General debenture issued by the 1<sup>st</sup> defendant in favour of the plaintiff.
- iv. Certificate of registration of a charge.

- v. Promisory note issued by the 1<sup>st</sup> defendant for payment of a sum of Tshs. 250,000,000/=.
- vi. Joint and several directors' personal guarantee and indemnity issued by individual guarantor the 2<sup>nd</sup> and 3<sup>rd</sup> defendants for repayment of the overdraft facility.
- vii. Personal guarantee and indemnity issued jointly and severally by the directors of the 1<sup>st</sup> defendant for repayment of the overdraft facility of Tshs. 250,000,000/=
- viii. Credit facility letter dully signed in which the overdraft facility a tune 250,000,000/= that was issued to the 1<sup>st</sup> defendant was converted into a term loan.
- ix. Demand letters addressed to the 3<sup>rd</sup> defendant.
- x. 1<sup>st</sup> defendant's bank statement.

I have noted that the plaintiff's case is hinged on sale of the mortgaged property located on plot No. 465 Block "44" CT No. 186249/67 Kijitonyama Area Kinondoni Municipality, Dar es salaam which the plaintiff alleged that it was sold for recovery of the outstanding amount but realized a sum of Tshs. 110,000,000/= only, leaving an outstanding amount to tune of Tshs. 296,780,000/= which is the principal sum claimed by the plaintiff in this case. However, I have also noted that the plaintiff has not brought in court any evidence to prove that the said mortgaged property realized the alleged sum of Tshs. 110,000,000/= only. Not only that, the Plaintiff, has not disclosed the date on which the said mortgaged property on Plot No. 465 Block "44" CT No. 186249/67 Kijitonyama Area Kinondoni Municipality, Dar es salaam was sold. This leaves a lot to be desired as I believe under normal circumstances the plaintiff is in possession of the proper legal documents for the sale of the aforesaid mortgaged property

which indicates the amount realized at the auction as well as the date on which that property was auctioned. Now, the question is; why has the plaintiff opted not to produce the relevant documents for the sale of the aforesaid mortgaged property so as to prove that the same realized a sum of Tshs 110,000,000/=only?. Definitely, I cannot know the reason behind this, but one major message that can be gathered here is that the trend of events alleged by the plaintiff in this case creates genuine and reasonable doubts on the plaintiff's allegations that the mortgaged property realized a sum of Tshs 110,000,000/= only. Consequently, under the circumstances, in the absence a document showing that the mortgaged property realized a sum of Tshs. 110,000,000/= only, it is evident that the plaintiff has failed to prove its claims against the defendants to the standard required by the law. It has to be noted that in order to establish the correct outstanding amount there must be proof of the amount realized out of the sale of the mortgaged property aforesaid.

In the upshot, the plaintiff's case is hereby dismissed. I give no order as to costs.

Dated at Dar es Salaam this 18<sup>th</sup> day of May 2021.



  
**B.K. PHILLIP**

**JUDGE**