

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

COMMERCIAL CASE NO.144 OF 2019

**ABSA BANK
TANZANIA LIMITEDPLAINTIFF**

VERSUS

MITUL MAHENDRA SHAH.....DEFENDANT

DEFAULT JUDGEMENT

Date of Last Order: 22/ 04/2021
Date of Judgement: 18/06/2021

NANGELA, J.:

The Plaintiff, a banking institution duly incorporated and authorised to offer financial services in Tanzania, filed this case against the Defendant praying for judgement and Decree as follows:

- (a) That, the Defendant's failure to pay the Plaintiff the whole of the outstanding amount of personal loan facility amounts to breach of the personal loan agreement dated 15th January 2019.
- (b) That, the Defendant be ordered to immediately pay the Plaintiff the outstanding amount of TZS 122,555,531.41/=being the Principal amount of the outstanding personal loan agreement and credit card facility between the Plaintiff and the Defendant.
- (c) Payment of interest of 17% per annum of the decretal amount from 26th July 2019 when the account was written off to the date of judgment.
- (d) That, the Defendant be ordered to pay the Plaintiff interest on the decretal amount from the date of judgment to the date of full payment

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- (c) Payment of interest of 17% per annum of the decretal amount from 26th July 2019 when the account was written off to the date of judgment.
- (d) That, the Defendant be ordered to pay the Plaintiff interest on the decretal amount from the date of judgment to the date of full payment

thereof at the prevailing Court rate of 12%.

(e) Payment of general damages to cover the loss the Plaintiff suffered from the Defendant's failure to discharge his obligations under the agreement.

(f) The Defendant be ordered to pay costs of this suit.

(g) Any other relief(s) (sic) that the Court deems fit and just to grant.

When this case was fixed for mention on 7th January 2020, Mr Denis Maringo, learned Advocate, appeared for the Plaintiff. The Defendant was absent in Court. Mr Maringo prayed for re-service to the Defendant on the ground that he was nowhere to be traced. I granted that prayer and set another date for mention, which was the 5th of February 2020.

On that material day, the Defendant was absent and, since he was still within the statutory time within which to file his Written Statement of Defence, I did adjourn the matter to 21st February 2020.

On 21st February 2020, the Defendant appeared in person and prayed for time to file his Written Statement of Defence (WSD). This Court granted the prayer and ordered the Defendant to file his WSD on or before 9th March 2020. The case was set for mention on 6th March 2020. On 2nd March 2020, the Defendant filed its WSD.

On 2nd June 2020, the Court held the First Pre-trial Conference wherein the Defendant enjoyed the services of Mr Ereneus Swai, learned Advocate, while Ms Hamis Nkya, learned Advocate represented the Plaintiff.

Unfortunately, when the matter was placed under the mediation process, the parties could not settle it out and, hence, the mediation process was marked as a failed process. The matter was placed before the trial judge to proceed with a final pre-trial conference. However, on 24th September 2020, the Plaintiff made a prayer to amend the Plaint as the Plaintiff had changed its name and assumed a different new name.

On exceptional ground as advanced, this Court granted that prayer under Rule 24(1) of the High Court Commercial Court Procedure Rules, 2012 (as amended, 2019). The Defendant was also ordered to file an amended WSD to reflect the changes. The Court was also informed that the parties were still interested to settle their matter and a separate process to do so was on-going.

On 22nd December 2020, the parties appeared before me and the Defendant prayed for time to file his amended WSD. He also confirmed that the parties were still engaging each other for a possible settlement out of Court. This Court granted the Defendant time to file his amended WSD as prayed. He was supposed to have filed it on or before 18th January 2021. The matter was fixed for mention on 23rd March 2021.

However, when the matter was called for mention on the material date, the Defendant was absent. It also turned out that he had not even filed his amended WSD as he had earlier prayed.

Due to that failure on the part of the Defendant, the Plaintiff's learned counsel prayed to proceed under Rule 22(1) and (2) of the High

Court Commercial Court Procedure Rules, 2012 (as amended, 2019). I granted the prayer.

On 31st March 2021 the Plaintiff filed Form No. 1 as per the requirements of Rule 22(1) of GN. No. 250 of 2012 (as amended by GN. No.107 of 2019), setting out the prayers and reliefs which the Court is being asked to grant.

That particular Form No.1 was accompanied with two affidavits sworn by one Florian Pesha, one meant to substantiate or prove the claim and the other was affidavit for production of electronic evidence by the Plaintiff.

I have looked at all these affidavits. The affidavit of proof of the claim by the Plaintiff makes reference to the Annexure filed in this Court to prove the claim. It also sets out the facts regarding the claim, noting that, the whole

amount of **TZS 122,555,531.41** advanced to the Defendant by the Plaintiff on 15th January 2019 has never been repaid.

The right to apply for a default judgement is provided for under Rule 22(1) of the *High Court (Commercial Division) Procedure Rules, 2012 (as amended, 2019)*. The said rule 22(1) provides as follows:

“(1) Where any party required to file written statement of defence fails to do so within the specified period or where such period has been extended in accordance with sub-rule (2) of rule 20, within the period of such extension, the Court may, upon proof of service and on application by the plaintiff in Form No.1 set out in the Schedule to these Rules accompanied by an affidavit in proof of the claim, enter judgment in favour of the plaintiff.”

As it has been demonstrated herein above, the Plaintiff did file Form No.1 in this Court owing to the failure by the Defendant to file the Amended Written Statement of Defence as ordered by this Court. The Defendant was given ample time to do so but failed to utilise that opportunity. It is also clear that the Plaintiff has filed affidavits to prove the claims as required under the law.

In the affidavit, it has been asserted that the whole amount equal to **TZS 122,555,531.41** advanced to the Defendant as personal loan on 15th January 2019 advanced has never been repaid.

In **Alaf v Joyce Mbuyeku (*the Administratrix of the Estate of the late Esmail Mbuyeku*)**. Commercial Case No.146 Of 2019

(unreported), this Court, (citing the cases of **A-one Products Machinery Ltd v Hong Kong Hua Yun Industries Ltd, Commercial Case No.105 of 2017, (unreported)**, and **Nitro Explosives (T) Ltd v Tanzanite One Mining Ltd, Comm. Case No.118 of 2018 (unreported)**), held that, the grant of a default judgement is made possible upon proof of the following:

- (a) That, there was proof of service to the Defendant but failed to file written statement of defence.
- (b) That, the Plaintiff had made an application to the Court in the prescribed **Form No.1** to the 1st Schedule to the Rules.
- (c) That, the **Form No.1** is accompanied by an affidavit in proof of the claim.

It was further emphasized by this Court that,:

“the affidavit in proof must be self-explanatory proving every claim in the plaint and the exhibits must as well be authenticated and that the three ingredients must co-exist for the judgement in favour of the plaintiff to be given.”

As I stated herein above, the Plaintiff did file an affidavit as required by the law and, having looked at it, I am satisfied that the Plaintiff in this case has satisfied the above requirements.

In the circumstances and taking into account the available evidence on record as per the annexures to the affidavit which accompany Form No.1, I am fully convinced that the Plaintiff has proved its case to the required standards and, hence, is entitled to a default judgement, as well as some of the prayers sought in Form-No.1.

It follows, therefore, that, in terms of Rule 22(1) of the *High Court (Commercial Division) Procedure Rules, 2012 (as amended, 2019)*; this Court do hereby enters default judgement and decree in favour of the Plaintiff as follows:

- (a) That, the Defendant's failure to pay the Plaintiff the whole of the outstanding amount of personal loan facility amounts to breach of the personal loan agreement dated 15th January 2019.
- (b) That, the Defendant is hereby ordered to immediately pay the Plaintiff the outstanding amount of **TZS 122,555,531.41/=** being the Principal amount of the outstanding personal loan agreement and credit card facility between the Plaintiff and the Defendant.
- (c) That, the Defendant is hereby ordered to pay interest of 17% per annum of the decretal amount from 26th July 2019

when the account was written off to the date of judgment.

(d) That, the Defendant is hereby ordered to pay the Plaintiff interest on the decretal amount from the date of judgment to the date of full payment thereof at the prevailing Court rate of 7%.

(e) The Defendant be ordered to pay costs of this suit.

Further orders:

That, in terms of Rule 22 (2) (a) and (b) High Court (Commercial Division) Procedure Rules, 2012 (as amended, 2019), the Court makes further orders that the decree emanating from this suit shall not be executed unless the decree holder has, within a period of ten (10) days from the date of this default judgement, publish a copy of it (the decree) in at least two (2) widely circulated newspapers in the country

and after a period of twenty one days
(21), from the date of expiry of the said
ten (10) days, has elapsed.

It is so ordered



A handwritten signature in blue ink, appearing to read "Deo John Nangela". The signature is written over a horizontal dotted line.

**DEO JOHN NANGELA
JUDGE,
High Court of the United Republic of
Tanzania (Commercial Division)**