

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

COMMERCIAL CASE NO. 147 OF 2019

HABIB AFRICA BANK LTD.....PLAINTIFF

Versus

ZAMZAM OIL CO.LTD.....1ST DEFENDANT

SHIRAZ PYRALI WALJI..2ND DEFENDANT

**KANIZ RAZAHUSSEIN
FAZAL.....3RD DEFENDANT**

TAHERA FAZAL.....THIRD PARTY

MOHAMMED JERAJ.....THIRD PARTY

RAZAL FAZAL.....THIRD PARTY

Last order: 13th April, 2021
Judgment: 25th June, 2021

DEFAULT JUDGMENT

NANGELA, J:.

This is a default judgment. It arises from a suit filed in this court by the Plaintiff on 11th December, 2019. In that suit, the Plaintiff prays for Judgment and Decree against the 1st

Defendant, 2nd Defendant and the 3rd
Defendant jointly and severally as follows:

(1) Payment of **TZS 233,549,245.53** (Two Hundred Thirty-three Million Five Hundred Forty-Nine Thousand Two Hundred Forty-Five Cents Fifty-Three) being an amount due and owing to the plaintiff from the 1st Defendant account of Credit Facilities granted to the 1st Defendant, which continues to accrue.

(2) Payment of the interest at the amount due Tshs.233,549,245.53 at 20% from the date it was due to the date of judgment.

(3) Payment of interest of the decretal sum in (1), (2) at the Court rate from the date of judgment until payment of the loan full.

(4) Declaration that the 1st, 2nd and 3rd Defendants are in the breach of the credit agreement as constituted under the Facility letter and thus the Plaintiff is entitled to realize the securities pledged and as stated in paragraph 10 (1), (ii), and (iv) of this plaint and over any other securities executed in favour of the Plaintiff

for full payment of the Facility extended to
the 1st Defendant.

(5) Costs of this suit.

(6) Any other order and relief may this
Honourable court deem fit and just to
grant.

For the sake of clarity, I will briefly
narrate the facts constituting this case. The
Plaintiff is incorporated under the Companies
Act Cap 212 [R.E 2002] and licensed under the
Bank and Financial Institution Act, 2006 to
carry out the business of banking.

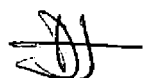
It is alleged that, sometimes on the 27th
April 2017 and 19th May 2017, the 2nd and 3rd
Defendants, being directors of the 1st
Defendant, approached the Plaintiff Bank for a
Credit Facility amounting to **TZS**
1,000,000,000/= (*Tanzanian Shillings One*
Billion).



The said Credit Facility was applied in favour of the 1st Defendant, for the purposes of financing its working capital, cash flow and operating requirements.

On 19th May 2017, the Plaintiff Bank approved and granted the application in favour of the 1st Defendant. Consequently, the 1st Defendant was allowed to overdraw its account above its approved limit to a tune of **TZS 1,000,000,000/=** (Tanzanian Shillings One Billion).

It is alleged that, as per the parties' arrangements, the said overdraft facility was to be repaid within a period of twelve months and, was to be charged at prime lending rate (PLR) of 15% per annum. A penalty of 5% per annum was to be imposed in case of any outstanding balance and if the account was to



be found operating over the limit or had expired.

It has been further alleged that, as a safety net to the Credit Facility, the 1st Defendant pledged the following, as continuing securities, guaranteeing the full payment of the Credit Facility and its obligations and liabilities associated or incidental thereto:

1. Personal Repayment Guarantee of its Directors (i.e., the 2nd and 3rd Defendants, who, acting in favour of the 1st Defendant, executed such irrevocable and unconditional Personal Guarantee and Indemnity guaranteeing full repayment of the Credit Facility),
2. Debenture on stocks and Assets and receivables of the Company;
3. Lien over fixed term deposits and allied account of the total amount of



US\$ 426,000.00, maintained by the

Plaintiff as follows:

(a) For US\$ 162,500.00

maintained in the Fixed

Deposit Account No.03-

2453-091 in the name of

Shiraz Pyar Ali Walji &

Mazahir Taki;

(b) For US\$ 73,548.91

maintained in the

Savings Account No.03-

2453-051 in the name of

Shiraz Pyar Ali Walji &

Mazahir Taki;

(c) For US\$ 155,000.00

maintained in the Fixed

Term Deposit Account

No.03-2887-091 in the

name of Zamzam Oil

Company Ltd;

(d) For US\$ 20,107.44

maintained in the

Savings Account No.03-

2542-051 in the name of

Shiraz Pyar Ali Walji &
Shital;

(e) For US\$ 14,843.65
maintained in the
Savings Account No.03-
0035-051 in the name of
Shiraz Pyar Ali Walji;

4. Chattel Mortgage over the following

Motor Vehicles: - Mercedes Benz
Tanker with Reg. No. T288 AXM, a
Suzuki Carry, with Reg. No. T347 CLM,
a Toyota-Station Wagon, passenger
Vehicle, with Reg. No. T605 CBN, a
Mitsubishi Canter with Reg. No. T 991
AZK, a FAW Tanker with Reg. No.
T856 DBU, and a FAW Cargo Truck,
with Reg. No. T382 CHQ, all in the
joint name of the Plaintiff and the 1st
Defendant.

It has been stated by the Plaintiff that,
although the 1st Defendant took and utilized the
Credit Facility, the 1st Defendant failed,
neglected and/or ignored to repay it in full.

It was the Plaintiff's assertions that, when the credit facility became due and payable, as of 27th April, 2018, a total of **TZS 1,410,000,000.00 (One Billion, Four Hundred Ten Million)** was due and owing to the Plaintiff.

To remedy the default situation, the Plaintiff exercised its rights of recovery and prematurely encashed the security and sold all Motor Vehicles, except one a Toyota-Station Wagon passenger Vehicle, with Reg. No. T605 CBN.

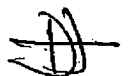
Even so, the sale could not satisfy the whole amount owed. As of 12th November 2019, a total of **TZS 233,549,245.53** (say, *Tanzanian Shillings Two Hundred Thirty Three Million Five Hundred Forty Nine Thousand Two*

Hundred Forty Five cents Fifty Three) were remaining due and owing to the Plaintiff.

On 3rd October, 2018 and 8th June, 2019, the Plaintiff sent demand notices to the Defendant's Directors of the 1st Defendants, followed by an e-mail which was sent on 07th August, 2019, at 16:49, to the 2nd Defendant, copied to Sibtin Mukhtar and Hasan Rizvi.

The notices and the email reminded the Defendants about the default and called upon them to immediately have it adjusted. It is alleged that, despite such efforts by the Plaintiff, the Defendants ignored, failed, neglected, and/or refused to repay the Credit Facility.

Consequently, on the 11th December, 2019, the Plaintiff's patience ran out and was



forced to file a Plaint in this Court jointly and severally suing the Defendants.

Subsequent to the filing of the suit, on 27th December 2019, this Court made an Order that a substituted service be made as the Plaintiff was not finding it easy to effect service to the Defendants. The Plaintiff effected the orders of this Court and on 14th February 2020, a substituted service by way of a publication in the Guardian News Paper was published.

In response to the Order of this Court and the published notice, the 2nd Defendant filed his Written Statement of Defence (WSD) on 3rd January 2020, together with two preliminary objections which were disposed of on 2nd October 2020 in favour of the Plaintiff.

In his **WSD** the 2nd Defendant further raised a counterclaim against the Plaintiff. In



particular, the 2nd Defendant counterclaimed from the Plaintiff a total of **USD 93,656.35**, interest thereon at a fixed deposit rate (FDR) of 4% per annum, 7% interest at the decretal amount as well as costs. The Plaintiff filed a WSD to the counterclaim as well.

Furthermore, the 2nd Defendant prayed and was granted by the Court, an order to issue a 3rd Party Notice which was served upon **Tahera Fazal, Mohamed Jeraj and Razal Fazal** (as 3rd parties).

On the other hand, while the 2nd Defendant took efforts to file a Written Statement of Defence, the 1st and 3rd Defendants did not file their defence to the claims contained in the Plaint.

As such, on 3rd June 2020, this Court granted a prayer to proceed against them *ex-*

parte and, with that prayer the Plaintiff filed Form No.1 seeking for a Default Judgment against the 1st and 3rd Defendants. The filing was made under Rule 22 of the High Court (Commercial Division) Procedure Rules, 2012 GN No. 250 (as amended by GN 107 of 2019).

On 17th December 2020, Mr Romani Lamwai raised a point that, if the Court was to grant the prayers for default Judgment which were made on 10th June 2020, the likelihood given the nature of their defence was that; the case against his client would be redundant.

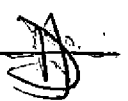
Mr Lamwai sought for guidance as to whether the Court should determine the application for default judgment or proceed to the first pre-trial conference. On their part, the Plaintiff prayed that the Court proceed to issue a default judgment.



On 9th March 2021, before this Court proceeded to compose the Default Judgment, and in the course of the general litigation of the suit in respect of the rest of parties to it, the parties appeared before me.

Mr Seni Malimi, who appeared for the Plaintiff, requested the Court to put the process on hold for a while as he sought to liaise with the 2nd Defendant and reflect on his earlier position. I granted the prayer and adjourned the matter till 12th March 2013. However, on that material date the matter could not proceed until 13th April 2021.

On 13th April 2021, Mr Malimi appeared before me representing the Plaintiff, while the 2nd Defendant enjoyed the services of Mr Abel Elisa Msuya, and Ms Gloria, learned Advocates. The 3rd Parties were absent and unrepresented.



When Mr Malimi rose to address the Court, he submitted that, although the matter before the Court was scheduled to proceed for a first pretrial conference in respect of the case against the 2nd Defendant and the 3rd Parties, the Plaintiff was no longer interested to pursue the matter against the 2nd Defendant.

He thereby prayed to withdrawal the case against the 2nd Defendant with a leave to re-file it. He submitted that, the withdrawal was necessitated by the fact that, the earlier application for default judgment is against the 1st and 3rd Defendants jointly and severally, which, if granted it will have a bearing on the case against the 2nd Defendant as well.

For his part, Mr Msuya did not object to the prayer by Mr Malimi. However he as well prayed to withdrawal from the Court the



Counterclaim which he raised against the Plaintiff under Order 21 rule 1(2)(b) of the Civil Procedure Code, Cap.33 of RE 2019. He also noted that the withdrawal will as well affect the 3rd parties in the like manner.

Following those prayers, this Court made an order to the effect that the case against the 2nd Defendant and the notices issued to the 3rd Parties, as well as the counterclaim filed by the 2nd Defendant, were withdrawn from the Court with no orders as to costs; with leave to re-file should any of the parties feel that there is a necessity to do so. The matter was to proceed against the 1st and 3rd Defendant.

It is from the above long background that this default judgment is now being issued against the 1st and 3rd Defendants who did not



file their written statement of defence as required by the law.

As I indicated herein above, the Plaintiff had filed in this Court, Form No.1, seeking for a default judgment against the 1st and 3rd Defendant, under Rule 22(1) of this Court's rules of procedure.

The Form No.1 is as well accompanied by an affidavit Syed Mukhatar Sibtain together with various annexure that form part of the affidavit as evidence pointing towards the 1st and 3rd Defendants' involvement and obligation towards the Plaintiff's claims.

In the affidavit, Mr Sibtain stated that sometimes on the 19th May 2017 the 1st Defendant applied for and received from the Plaintiff, an overdraft facility to a maximum of **TZS 1,000,000,000.00.**

The deponent attached **annexure P.1** to the affidavit as evidencing the 1st Defendant's application letter and the Facility Letter dated 27th April 2017 and 19th May 2017 respectively.

It was further averments of Mr Sibtain that, vide a letter of guarantee dated 3rd November 2017, the third Defendant guaranteed to the Plaintiff a full repayment within 14 days after demand, of all monies due to the Plaintiff from the Principal together with interests, charges and/or costs. The letter of guarantee was attached as **Exh.P-2** forming part of the affidavit.

Besides, the deponent disclosed in the affidavit that, the credit facilities were secured by various type of securities. However, despite the steps taken by the Plaintiff's in exercise of its rights of recovery and pre-maturely

encashing on the securities to clear the loan following the 1st Defendant's default in repayment, the securities could not satisfy the whole amount which, as of 27th April 2017 stood at **TZS 1,410,000,000.00**.

The affidavit discloses that as of now, there stands an outstanding amount of **TZS 233,549,245.53** which is yet to be cleared, and therefore, being claimed from the 1st and 3rd Defendants jointly and severally on the account of the overdraft facilities advanced to the 1st Defendant and guaranteed by the 3rd Defendant. Attached to the affidavit was **Annexure P.6**, a bank statement showing the outstanding amount.

I have carefully looked at the affidavit regarding proof of this claim and the relevant annexure attached to it. I have also looked at

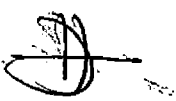


their originals which were availed to this Court. The issue which I am called upon to determine is whether the plaintiff is entitled to the prayers and reliefs sought in Form No.1 filed in this Court.

Essentially, the filing of Form No. 1, seeking for a Default Judgment in favour of Plaintiff, is a matter of exercise of statutory right, open to the Plaintiff in a case where the Defendant(s) has declined to defend his case.

Such particular right 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:

"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 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 claim, enter judgment in favour of the plaintiff."

From the above provision and looking at the facts and evidence adduced in this case, it is clear that the Plaintiff has complied with rule 22(1) by filing Form No.1 in this Court applying for a default judgment following the failure by the Defendants to file a Written Statement of Defence.

It is also clear that the 1st and 3rd Defendants were given ample time to file their Written Statement of Defence but never showed up and never filed such a defence despite summoned by way of a substituted



service and notice published in the **Guardian News paper dated 14th February, 2020.**

As once stated by this Court, in any sort of loan advanced to a borrower, timely re-payment of the principal sum and its interest is at the core of the lender's expectations. See the case of **Bank of Africa (Tanzania) Limited v Joram General Enterprises Limited & 2 others commercial case No. 197of 2017.**

Consequently, and as once stated by this Court in the case of **First National Bank of Tanzania Limited v Josin Company Limited & 2 Others, Commercial Case No. 16 of 2019 (unreported)**, failure to repay the loan, amount to an express breach of the loan agreement.



That being the case, I am satisfied, as regards the recent case at hand, that, the 1st and 3rd Defendants defaulted in repaying the loan as per the agreement and the Plaintiff is entitled to recover the outstanding amount from the 1st and 3rd Defendant jointly and severally. The issue I raised herein above, therefore, is responded to in affirmative.

In view of the above reasoning, and in terms of Rule 22 (1) of the High Court (commercial Division) Procedure Rules, 2012 (as amended, 2019); this Court enters judgment in favour of the Plaintiff and against the 1st and 3rd Defendant, jointly and severally, and declares as follows:

1. That, the 1st and 3rd Defendants are jointly and severally in breach of the Credit Agreement, as constituted under the Facility letter.



2. That, due to the breach of the Facility Agreement as stated in No.1 above, the Plaintiff is entitled to realize the securities pledged by the 1st Defendant and over any other securities executed in favour of the Plaintiff for full payment of the Facility extended to the 1st Defendant.

3. Further, that, this Court hereby Orders the 1st and 3rd Defendant to jointly and severally:

(a) Pay the Plaintiff **TZS 233,549,245.53** (**Two Hundred Thirty-three Million Five Hundred Forty-Nine Thousand Two Hundred Forty-Five Cents Fifty-Three**)

being amount due and owing to the Plaintiff on the account of Credit Facilities granted to the 1st Defendant and whose repayment in full was guaranteed by the 3rd Defendant.



(b) Pay interest on the above stated amount at a rate of 17% *per annum* from the date when that amount became due to the date of this judgment.

(c) Pay interest of the decretal sum in No. 3(a) above, at the Court rate of 7% from the date of judgment until full repayment of the loan.

(d) Pay Costs of this suit.

Further orders:

(e) 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 judgment, 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

DATED at DAR-ES-SALAAM, this 25th June, 2021



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

**HON. DEO JOHN NANGELA
JUDGE**