

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 74 OF 2018.

NCBA BANK TANZANIA LIMITED

(formerly NIC Bank Tanzania Limited) PLAINTIFF

VERSUS

NADIR ENTERPRISES LIMITED 1ST DEFENDANT

KHATIBU SAID HAJI..... 2ND DEFENDANT

MOHAMED SAID FARAJI..... 3RD DEFENDANT

OMARY AHMAD KHASIM..... 4TH DEFENDANT

MAHMOUD HASSAN MGIMWA..... 5TH DEFENDANT

Date of Last order: 22/09/2021

Date of Judgement: 18/10/2021

EX-PARTE JUDGEMENT

MAGOIGA, J.

This is an ex-parte judgement. The plaintiff, **NIC BANK TANZANIA LIMITED** by way of plaint instituted the instant suit against the above-named defendant praying for judgement and decree in the following orders, namely: -

- i. A declaration that the defendants are in breach of the overdraft facility agreement entered between plaintiff and the 1st



defendant and contracts of guarantee entered into between and the 2nd, 3rd, 4th and 5th defendants by their failure to discharge their obligation under the said contracts;

- ii. That the defendants jointly and severally be ordered to immediately pay the plaintiff the outstanding amount of TZS 898,303,031.36 (say Tanzania Shillings Eight Hundred Ninety-Eight Million, Three Hundred and Three Thousand Thirty-One and Thirty-six Cents only) being the outstanding principal amount and interest as of 28th February, 2017;
- iii. That the defendants be ordered to pay to the plaintiff contractual rate of interest of 23% per annum charged from 1st March, 2017 to the date of judgement;
- iv. That the defendants be ordered to pay to the plaintiff a penal interest over and above the contractual rate of 12% per annum charged from 1st March, 2017 to the date of judgement;
- v. That the defendants be ordered to pay to the plaintiff interest on decretal sum from the date of judgement to the date of full payment thereof at the prevailing court rate of 12%;
- vi. Payment of general damages to cover the loss the plaintiff suffered for defendants' failure to discharge their obligation under the said deed of settlement;



- vii. The defendants be condemned to pay the plaintiff costs of and any incidental detriments to the suit;
- viii. Any other relief(s) the Honourable court may deem fit to grant;
- ix. Any other reliefs this Honourable court may deem fit and just.

Upon being served with plaint, the defendants filed joint written statement of defence disputing every claim of the plaintiff and consequently prayed that the instant suit be dismissed with costs.

The brief facts of this suit are imperative to be stated for better understanding the gist of this suit. According to pleadings, it is alleged that on 3rd May, 2011 plaintiff and 1st defendant executed a loan agreement whereby the 1st defendant was granted an over draft facility to the tune of TZS 400,000,000.00 for financing working capital requirements. Facts go that, at the request of the 1st defendant to enhance the existing credit facilities, on 14th December, 2011 the 1st defendant overdraft of TZS.400,000,000.00 was enhanced to TZS. 600,000,000.00 as an overdraft. Further, 11th May, 2012 the 1st defendant requested for sanction of additional temporary overdraft, with that request temporary over draft of TZS 320,000,000.00 was granted making total limits to TZS 920,000,000.00 which was for a period of two months. Further facts are that, on 9th August, 2012 at the request of 1st



defendant the overdraft facility was enhanced to TZS.1,300,000,000.00 for twelve months. Later on 6th January, 2014 again at the request of the defendant the overdraft of TZS.1,300,000,000.00 was renewed for another period of twelve months.

As a security for the overdrafts, the 2nd and 3rd defendants created a legal mortgage and personal guarantees for TZS 1.625 Billion each in their respective landed properties in favour of the plaintiff. And 2nd to 5th defendant signed director and shareholders guarantees in favour of the plaintiff. Other securities were registered debenture for TZS.1.625 over the company's fixed and floating assets both present and future.

Facts went on that the facilities were not operated as per the agreement and as result on 5th July, 2016 the plaintiff issued statutory notices of default for auctioning the mortgaged properties and eventually the exercise fetched TZS.225 million which was credited into the account of the defendant to reduce the loan in dispute leaving a balance of TZS.898,291,231.36, hence, this suit claiming the same with consequential orders as in the plaint.

On the part of the defendants admitted some key facts but ended up blaming the plaintiff for selling the properties at throw away price while



their values was enough to pay the whole balance. As such the defendant pressed that the instant suit be dismissed with costs.

The plaintiff at all material has been enjoying the legal services Ms. Hamisa Nkya, learned advocate. On the other adversary part, the defendant at all material time was equally enjoying the legal service Mr. Erick Ndwella learned advocate.

Before hearing started, the following issues were proposed by the plaintiff, recorded and adopted for determination of this suit, namely; -

1. Whether there was a breach of the overdraft facility agreement executed between the plaintiff and 1st defendant;
2. If the first issue is answered in affirmative, whether the 2nd, 3rd, 4th and 5th defendants are liable for the default made by the 1st defendant?
3. What reliefs parties are entitled.

However, it should be noted that the defendants and their advocate defaulted to appear several Final Pre Trial conferences and eventually were served by publication on 14/07/2021 in Daily News and Mwananchi Newspaper but yet defaulted appearance.



In the circumstance, the learned counsel for plaintiff prayed to proceed ex-parte against all defendants. This court granted the prayer, hence, this ex-parte judgement.

In proof of the suit the plaintiff called one witness by the name, Mr. HASSAN RASHID SINGANO (herein after to be referred as '**PW1**'). PW1 through his witness statement adopted as his testimony in chief told the court he is the employee of the plaintiff as Assistant Manager-Recoveries whose duties includes management of overdue accounts, monitor repayment arrangement to ensure compliance and track and document problems.

PW1 further testimony was that he knows the defendants and that the 1st defendant was a customer to their bank. PW1 told the court that in the period between 3rd May, 2011 and 6th January, 2014, the 1st defendant obtained lines of credit facilities from the plaintiff as follows:-

- i. On 3rd May, 2011 an overdraft of TZS.400,000,000.00;
- ii. On 14th December 2011 the first facility was enhanced to TZS.600,000,000.00;
- iii. On 11th May, 2012 additional temporal overdraft TZS.320,000,000.00 and enhanced the former facilities to TZS.920,000,000.00;



- iv. On 9th August, 2012 the amount of overdraft was enhanced from TZS.600,000,000.00 was enhanced to TZS.1,300,000,000.00.

According to PW1, all overdrafts were secured by legal mortgage for 500 million over property located on plot No. 457/1 and 458/1 Block 'B' Kimara Matangini area, Kinondoni Muniapality Dar es Salaam held under Certificate of Title No. 52041 in the name of Khatibu Said Haji (shareholder and director of the 1st defendant and 2nd defendant), debenture for TZS.500,000,000 over Company's fixed and floating assets, personal guarantee of Khatib Said Haji and directors/shareholders joint and several guarantees by Omary Ahmad Khasim (4th defendant), Khatib Said Haji, Mahmoud Hassan Mgimwa (5th defendant) and Mohamed Said Faraj (3rd defendant).

PW1 went on to tell the court that additional securities were:-

- i. Fresh Deed of Variation of Debenture (present and future assets) to be registered for TZS.750,000,000.00;
- ii. Fresh Deed of Variation for Directors/shareholders joint and several guarantees for TZS.750,000,000.00 by Omary Ahmed Khasim, Khatib Said Haji, Mahmoud Hassan Mgimwa and Mohamed Said Faraj;



- iii. Legal mortgage of TZS.750,000,000.00 over property located on plot No.36 Block 'D' Mnyanjani area, Tanga city held under Certificate of Title No.28626 in the name of Mohamed Said Faraj (shareholder and director of the 1st defendant).

PW1 further testimony was that repayment arrangement of the overdraft as enhanced was for twelve months after disbursement. In case of default a penal interest of 12% per annum above the applicable rate of 23% per annum was to be charged. According to PW1, all amount outstanding amount run through account No.2000079343. Further, PW1 told the court that as of 28th February, 2017 the outstanding amount was TZS.898,291,231.36 which is a default on the part of the defendants.

PW1 went of testifying that following the default as stated above, issued statutory notice of 60 days requiring the defendants to remedy the situation and the notice declared the intention of the plaintiff to sell the mortgaged properties.

PW1 told the court that, the 60 days notice befallen on deaf ears and the plaintiff was obliged to exercise its rights under mortgage by auctioning the landed property held under C.T No.52041 and fetched TZS.225,000,000,00 which was current market price due to fall price in

real estate for consecutive 2 years, as such reducing the balance to TZS.898,291,231.36. PW1 told the court that since the balance remained unpaid, the plaintiff issued demand notices to all defendants to remind them that their obligations to repay the outstanding amount remain intact.

On that note, PW1 prayed for judgement and decree as claimed in the plaint.

In proof of the plaintiff's case the following exhibits, namely:-

1. A certificate of change of name, public notice, no 25848 and the letter from BOT to LBA (T) as **exhibit P1a-C**;
2. Facility letters dated 3/5/2011, 14/12/2011, 11/5/2012, 9/8/2012 and 6/1/2014 collectively as **exhibit P2a-e**;
3. Mortgage deed over property located on plot No 457/ 1 and 458/1 Block B, Kimara Matangini area, Kinondoni, Municipality, held under CT No 52041 dated 12/5/2011, Registered legal mortgage over property located at plot No 36 Block D, Mnyanjani area, Tanga city held under CT No 28626 and addendum thereto (deed of variation of the said mortgage dated 16/8/2012, Registered second deed of variation of debenture dated 27/6/2012, Registered Director guarantee and indemnity agreement signed by

- parties on 2/5/2011 and the addendum thereto (deed of variation) of joint and several guarantee and indemnity agreement signed by the parties on 16/8/2012 collectively as **exhibit P3a-f**;
4. Affidavit as to the authentication of computer printout and Bank statement of the 1st defendant for overdraft collectively admitted in evidence as **exhibit P4a-b**;
 5. 5 Demand notices and 5 default notices are collectively admitted as **exhibit P5 a-b**;
 6. Certificate of sale of plot No 457/ 1 and 458/1 collectively as **exhibit P6**.

This marked the end of hearing of this suit ex-parte. The task of this court now is to determine the merits or demerits of this suit. However, pleadings and testimony of PW1 in this suit, I noted some facts not in dispute and wish to point them out and narrow down non contentious issues; **One**, it is not disputed by the parties herein, that parties entered into loan facilities which was categorized as an overdraft in terms and conditions as evidenced by **exhibit P2a-e**. **Two**, it is not disputed that the said facilities were guaranteed by 2nd 3rd 4th and 5th defendants' properties as per exhibit **P3a-f**. **Three**, it is not disputed that the 1st defendant landed property standing on plot No 457/1 and 458/1 Block B



held Under CT No 52041 was sold in 2016 for TZS 22,000,000.00. to liquidate the existing unpaid loan.

Now back to the suit and determination of issues. I will start with 1st issue which was couched that “whether there was a breach of the overdraft agreements executed between the plaintiff and 1st defendant and guaranteed by the 2nd, 3rd, 4th and 5th defendants? According to the evidence on record, there is no dispute that parties executed several lines of overdraft facility as exhibited in exhibit P2a-e. and that same was guaranteed by 2nd, 3rd, 4th and 5th defendants as exhibit in exhibit P3a-f. More so, there is no dispute that according to exhibit 4b, the balance unpaid is TZS.898,303,031.36, hence, this other than default.

Without much ado, I find issue number one in the affirmative.

This takes me to the second issue which was couched that “whether the 2nd, 3rd, 4th and 5th defendants each breached the contracts of guarantee each entered into with the plaintiff by not discharging the obligations each undertook as a guarantor? This issue will not detain this court much, in as much as the first issue has been answered in the negative, the simple conclusion is that the 2nd to 5th defendants inclusive are in breach of their obligations under the guarantee they gave much as the unpaid balance is in the books of the plaintiff.



This trickles to issue number three couched that, "whether the plaintiff's rights to recover the outstanding amount of the loan is limited to collaterals created to secure the loan granted pursuant to the credit facility in question?" This issue like issue number two above will not detain this court much. PW1 testimony was clear and coupled with documentary evidenced the securities under this dispute was not limited to the collaterals but went into personal guarantees of the all defendants. This is to say the plaintiff is entitled to recover from present and future assets of the 1st defendant, the personal guarantees of the 2nd to 5th defendants and as well as sale of the remaining collateral until the whole unpaid amount is paid in full. The defence that the plaintiff right to exercise is limited to collateral is unfounded and do not carry the order of the day.

The last issue was couched that, what reliefs are the parties entitled to? Based on the above findings in issues 1 to 3 above, the prayer by the defendants to dismiss this suit is unfounded. The plaintiff truly has discharged her legal obligation to the standard of proof required in civil cases.

That said and done, I enter judgment against all defendants on the following orders, namely:



- i. I declare that the defendants are in breach of the overdraft facility agreements entered between plaintiff and the 1st defendant and contracts of guarantee entered into between and the 2nd, 3rd, 4th and 5th defendants by their failure to discharge their obligation under the said contracts;
- ii. That the defendants jointly and severally are ordered to immediately pay the plaintiff the outstanding amount of TZS 898,303,031.36 (say Tanzania Shillings Eight Hundred Ninety-Eight Million, Three Hundred and Three Thousand Thirty-One and Thirty-six Cents only) being the outstanding principal amount and interest as of 28th February, 2017;
- iii. That the defendants are ordered to pay to the plaintiff contractual rate of interest of 23% per annum charged from 1st March, 2017 to the date of judgement;
- iv. That the defendants are ordered to pay to the plaintiff a penal interest over and above the contractual rate of 12% per annum charged from 1st March, 2017 to the date of judgement;
- v. That the defendants are ordered to pay to the plaintiff interest on decretal sum from the date of judgement to the date of full payment thereof at the prevailing court rate of 12%;



- vi. Payment of Tshs. 5,000,000.00 being general damages to the plaintiff;
- vii. The defendants are condemned to pay the plaintiff costs of this suit.
- viii. It is so ordered

Dated at Dar es Salaam this 18th day of October, 2021.



A handwritten signature in blue ink, consisting of a series of vertical, wavy lines that form the name "S.M. Magoiga".

S.M. MAGOIGA

JUDGE

18/10/2021