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

COMMERCIAL CASE NO. 198 OF 2002

NATIONAL BANK OF COMMERCE LTD.....PLAINTIFF
VERSUS
1. UNIVERSAL ELECTRONICS AND HARDWARE LIMITED.....1ST DEFENDANT

2. ELISANTE ELIKANA MURO.....2ND DEFENDANT
3. DISMAS PETER LYIMO.....3RD DEFENDANT

JUDGEMENT

KALEGEYA, J:

The Plaintiffs' prayer is for judgment and decree against the Defendants jointly and severally for:-

"(i) Payment ..... of the outstanding balance of the sum of Tshs.332,646,812/=.

(ii) Interest on (i) above at the rate of 26% per annum from 1st March, 2002 up to the date of judgment.

(iii) Interest on the decretal sum at the Court's rate from the date of judgment till final settlement and

(iv) An order of sale and or vacant possession of the properties of the 1st Defendant charged under the debenture.

(v) Costs of the suit.

(vi) Any other relief as the Honourable Court may deem just to grant."

The Plaintiffs are represented by Mr. Kabakama, Advocate, while Prof. Fimbo, Advocate, represents the Defendants.

The Plaintiffs called 2 witnesses – one Zollo (PW1), Plaintiffs' Credit Officer who also tendered Exhibit P1 – 8 and Mrindiko (PW2) who works with the Plaintiffs, stationed at their head office, Credits Department and who tendered Exhibit 9 and 10.

The Defendants called 2 witnesses- one Muro (DW1), the 1st Defendants' Managing Director who tendered Exhibit D1-2 and Lyimo (DW2), the 1st Defendants' Director and Production Manager.

Issues framed during the final pretrial and scheduling conference are as follows:-

1. Whether the 1st Defendants owed the Plaintiff shs 22,804,971/= principal and shillings 309,841,841 interest as of 28/2/2002 or whether the Plaintiffs are estopped from asserting that there was any money owing as at 31/12/2000?

2. Whether the facility extended to 1st Defendants attracted interest of shs 309,841,841?.

3. Whether the debenture dated 9th September 1994 is null and void?

4. Whether by suing on the debenture and/or the covenant to pay, the Plaintiffs discharged the 2nd and 3rd Defendants from their obligations as guarantors under the guarantee dated 28/7/1997

5. Whether this Court has jurisdiction to grant Plaintiffs' prayer for "an order of sale and or vacant possession of the properties of the 1st Defendants charged under the debenture" in view of S. 167 of land Act, No.4 of 1999?

In this controversy, key elements are not disputed. The following stand uncontroverted.

Vide Exhibit P1 (a letter of offer) the Plaintiffs offered to the 1st Defendants a renewal of an overdraft facility in the sum of Shs. 200 million for a period of 12 months, expiring on 18/12/1997. The offer was duly accepted and the facility was utilized accordingly.

Among the securities, included was a debenture created on the 1st Defendants' assests as per the Debenture deed (Exhibit P2) and which was duly registered as a charge as per Exhibit P3 (Certificate of Registration). Also, the 2nd and 3rd Defendants provided personal guarantees as per Exhibit P4 (a guarantee deed dated 28/7/1997) which they both signed. Also, as per Exhibit D2 (mortgage Deed), the 1st Defendants, landed property on Plot No 108, Industrial Area, Mbezi (Dsm) with certificate of Occupancy No. 29968

(Exhibit D1) was mortgaged.It transpired however that the facility was not serviced as required such that by 27/6/2000 (as per Exhibit P5, 1st Defendants' statement of Account for the period of 1/1/1998 to 31/12/2000) the outstanding liability was Shs. 123, 414,873.25 as principal sum while the interest was Shs. 165,013,103.45.

On the said date (27/6/2000), the Bank's Samora Branch charged off the liability by issuance of three vouchers, tendered collectively as exhibit P6, making the account (Exhibit P 5) to read "0.0" balance.

The account was then transferred from the Branch to the head office.

In a bid to recover the debt, the Plaintiffs instructed IMMA, Advocates, who made a demand on 19/6/2001 by letter as acknowledged by the 1st Defendants' letter (Exhibit P10) dated 3/8/2001 and subsequently, by further demand notices, Exhibit P7 and P8, both dated 12/4/2002.

Between 13/11/2000 and 6/11/2001, as per the Bank statement, (Exhibit P9), the 1st Defendants paid into the account a total of shs 100,609,901.90 (shs 2,000,000/= on 13/11/2000 + 2,063,072.00 on 28/5/2001 + 82,646,829.90 on 7/8/2001 + 3,900,000 on 7/3/2001 + 10,000,000 on 6/11/2001). The said Exhibit P9 indicates that by 31/12/2001 the outstanding liability was shs.22,804,971.35 as principal sum and shs 288,755,581.64 as interest, all totalling to shs 311,560,552.99.

Now, for the contested part. As already indicated, the center of contention is very fine indeed.

The Defendants urge that the moment the Bank wrote of the debt, their liability got discharged. DW1 insisted that Bank officials told him that the liability had been discharged and referred to representations allegedly made to him by one Byeshulilo. On this, part of his testimony runs as under:-

> *"Removal from the balance sheet means removal from liabilities. Shortly before removal there was an asset. This is shs 288,427,976.70. This was a property to the Company. Before removal it should be on assets side of NBC. This is earmarked to be receivable. Accounts receivable are any monies that are given to creditors and then looking forward to receiving them notwithstanding uncertainty. Once it is removed from the balance sheet it becomes no asset.*
>
> *To my knowledge one gets tax relief once you declare it to be a loss. This is an International standard ……*
>
> *This is a letter dated 7/8/2000. It is a demand notice. The figure is shs 288,427,977 being the principal sum together with accrued interest. It is signed by one Joseph M. Byeshulilo.*
>
> ***On receipt of the letter, I immediately contacted Joseph who gave me***

details that the debt had been written off. This was in his office, NBC head office. That's when I first knew that NBC had decided to write off the debt. This was a relief on our operations. We knew that NBC had decided to assist businesses instead of killing them. We would be able to operate fully without liabilities hence with a better balance sheet". (emphasis mine).

That was during examination in Chief. In cross examination, DW1 went on :-

"*I received a demand notice on 9/8/2000 from NBC. We had a liability to the Bank at the time (witness shown Exhibit P6). We had already discussed the possibilities of debt compression or reduction on interest and that's when Joseph told me that the debt had been written off*"

DW1 also challenges the rate of interest. On this he had the following to say (after making reference to paragraph 5 of the Plaint):-

" This shows that the principal sum was shs 22,804,971 while the interest was 309,841,841. ***What I can say is that the rate of interest is absurd.*** *Overdrafts attract fluctuating interest and at one stage interest was 35%.* ***The interest here far exceeds the principal contrary to any business practice".*** (emphasis mine).

And, Prof. Fimbo, in his final submission, very strenuously expanded the arguments by insisting that the Plaintiffs having written off the debt, they are astopped from lodging the present claims. The Prof., making reference

to the **Banking and Financial Institutions Act (No. 12 of 1991), S.15 and 16, urged that** the Banks or Financial Institutions have to make provisions for bad, doubtful debts and losses which is a public duty and after which they would get Tax relief in terms of **S. 16 of the Income Tax Act (No.33 of 1973)** and that therefore under the estoppel principle of law enunciated under **S. 123 of the Law of evidence and Act, 1967,**no claim, as the current one, can be lodged. He also made reference to **Nurdin Bandali vs. Lambark Tanganyika Ltd (1963) EA 304; Bank of Uganda vs. Banco Arabe Espanol (2002) E.A 333**

On interest, in the alternative, Prof. Fimbo argued that shs 22,804,971 as principal sum to attract shs 309, 841841 as interest is extortionate and illegal as the rate would be 1,386.66% per annum.

And yet still, the Pro. fronted another argument – that the court has no power to grant prayer (iv) because, first, the Bank could only proceed by appointing a Receiver and Manager as per the provisions of the Debenture deed (Exhibit P2), making reference to **Shinyanga Regional trading Co. Ltds vs. Another** (but failed to provide a proper citation), and secondly, because S. 167 of the Land Act, No. 4/99, grants exclusive jurisdiction on land matters to named courts other than the High Court, Commercial Division.

Finally, the Prof. argued that by suing the 2nd and 3rd Defendants as guarantors, secondary securities, before proceeding on the primary securities of the 1st Defendants as per debebture, the said 2nd and 3rd Defendants are

deemed to have been discharged and made reference to **Reid vs. National Bank of Commerce (1971) E.A 525.**

On the other hand, in his final submissions, Mr. Kabakama for the Plaintiffs maintained that the existence of the liability has not been challenged; that the writing off of the debt was just an internal matter as per Bank of Tanzania Guidelines (Guidelines on Management of Risks, Assets classification of Loans and other risk Assets, Provisioning for losses and Accrual of interest) in operation since 1991 and finally gazetted on 9/3/2001 under G.N. 38 of 2001 as **Management of Risk Assets Regulations, 2001,** whose objective is to have "probable losses" kept off the balance sheet to avoid overstatement of income but not to exonerate liability holders; that Defendants could not have been orally notified of no longer being liable as these alleged oral representations would over-ride the terms of the written contract, making reference to **Jacobs vs. Batana and Generals Plantations Trust (1924) 1 Ch.287 and Cheshire and Fifoots Law of Contract, 10th Ed. Butter worths, 1981, at page 107 and Sarkar on Evidence, Vol.1, 14th Ed, at page 1212;** that the principle of Estoppel is inapplicable as it cannot be used to stop one from asserting his rights, again making reference to **Sarkar on Evidence, Vol.2, page 1559;** that the debenture stands valid and undischarged whether or not the execution mode is made through the court; that this Division of the High Court is seazed with jurisdiction in terms of **Rule 5 A and 2 of the High Court Registries (Amendment) Rules, 1999 (GN 141/99)** as the relationship between the parties, inclusive of execution and enforcement of the debenture, fall under item (iv) of Rule 2 because it is the liability of a Commercial or Business organization or its officials arising out of its Commercial or Business activity and that in terms

of clause 2 of Exhibit P2 the entire assets of the Company were encumbered and not confined to land.

Mr. Kabakama insisted further that while the Plaintiff could appoint a Receiver and Manager without using the court, the latter's jurisdiction is not ousted and that it is proper to sue the 1st Defendants together with 2nd and 3rd Defendants as guarantors to avoid "multiplicity of recovery procedures on a single credit transaction", and made reference to **Bradgate, R. Commercial Law, 2nd Edition, Butterworths at page 433.** Mr. Kabakama insisted that the alleged discharge by the 2nd and 3rd Defendants is unknown in law because in terms of clause 1 of Exhibit P4 and S. 80 of the Law of Contract Ordinance, these Defendants are either solely or jointly liable with the 1st Defendants hence there is no question of primary or secondary security, distinguishing the **Reid case** in the process.

Now for the merits.

During the composition of this judgment I have found it necessary to rephrase the issues as empowered in terms of OXIV, Rule 5 of the Civil Procedure Code, which permits the Court at any time before passing a decree to amend, frame additional issues or strike out any issue that appear to be wrongly framed or introduced. Thus, issue one is broken into the following issues:-

1. Whether the Plaintiffs' writing off of the debt from the Samora Branch books on 27/6/2000 discharged the Defendants from

liability hence plaintiffs are estoped from making any further claims?

2. If the answer is in the negative, whether the 1st Defendants owed the Plaintiffs shs 22,804,971 as principal sum and shs 309,841,841as interest as of 28/2/2002?

In view of issue one as rephrased the current issue 2 in superfluous. It is accordingly struck out. The current issues 3 and 5 are maintained but issue four is rephrased.

Issues now appear as follows. Apart from the new issues 1 and 2 reflected just above, issue 3 reads:

3. Whether action could be commenced on guarantors only after recovery by way of realization of the debenture had failed to discharge the liability and whether suing simultaneously the two Guarantors and 1st Defendants on debenture discharged the said 2nd and 3rd Defendants' liability.

The current issue 5 becomes issue 4 while a new issue 5 is framed as follows:-

5. To what reliefs are parties entitled?

Starting with issue 1, with respect to Pro. Fimbo and DW1, this can only attract a negative answer.

PW1 stated categorically and unchallengedly that the writing off of a debt was just an internal matter. He deposed,

> "*Procedurally, if facility remains unserviced for a long time in the banks balance sheet, we remove the debt and transfer it to the off-balance sheet. Thus, on 27/6/2000 we charged off the said account. We debited Bank's Books and credited the customers ..... Thereafter the debt was transferred to the Bank's head office for intensive recovery follow-up. Thereafter, we in the branch we were being informed of steps being taken. We were then informed that the matter had been handed over to our lawyer*"

Under the Professor's rigorous cross examination, PW1 reiterated the position thus,

> "*We have not written off the debt and we did not so inform the lawyers. We have never informed the customer that the debt had been written off. It was not written off but removed from the balance sheet. I have never told the customer that the debt had been written off*".

Apart from the above-unchallenged testimony, if what the Defendants allege was correct, as rightly submitted by Mr. Kabakama, it would have sounded odd in that the Plaintiffs would have varied the terms of the written contract, verbally.

Although DW1 states that one Byeshulilo (already quoted) and Derek are the ones who told him that the liability had been discharged, his other part of the testimony is incompatible with the allegation.

If indeed he had so been informed, what would be the basis of the following part of his testimony,

> *"I also had discussions with Derek Velliers. This was a person dealing with debt collections in NBC, the new Bank. This was in his office at the headquarters. He said that we should give him shs 50 million before anything otherwise he would allow dogs. Those were his words. It is immediately after receiving the letter from Joseph".*

Now, if indeed he had earlier on been informed that they were no longer liable as the debt had been written off what then had he visited the said offices for. Of course, I do appreciate that these are public offices hence can be visited by any person. However, in this situation, DW1 does not tell us what was the mission of his visit. More surprising however, he does not tell us how the discussion went on and whether he challenged Derek, and what the outcome was. A person of DW1's caliber and who was informed and believed that the liability was no longer in existence could not simply stomach Derek's statement. In the circumstances, I am satisfied that he knew then, as he has all along known, that the liability still existed.

The above apart, if indeed he had been notified of the extinction of the liability shortly after 10/8/2000, when he alleges to have met Byeshulilo which is said to have been immediately after receiving the demand letter of 10/8/2000, common sense can not give the type of allowance fronted; that he

(DW1) could have proceeded to author Exhibit P10 dated 3/8/2001 (almost a year later) with the following contents:-

"RE: OUTSTANDING ACCOUNT WITH NBC LTD

Please refer to your letter dated June 19, 2001 Ref No. IMMA/NBC/UEH regarding the above captioned subject.

1. *Universal Electronics & Hardware (T) Limited (Universal) is glad to inform NBC that the Government has finally paid Universal Tsh 82,646,829.90 (Eighty Two Million Six Hundred Forty Six Thousand Eight Hundred Twenty Nine Cents Ninety Only). This amount was owed to Universal by the Government since 1997.*

   As mentioned in several discussions between NBC and Universal, the overdraft facility was used to cover Government obligations in Kisarawe Brick Factory (KIBRICO) owned 70% (Universal) and 30% (Government) on pro-rata basis. Consequently, both the Government and Universal have agreed that the Government make the payment to NBC directly.

   Both the Government represented by (PSRC) and Universal will be grateful if NBC will acknowledge receipt of the enclosed payment of Tshs 82,646,829.90 (PSRC Cheque No. 000511 National Micro Finance Bank, Bank House Branch) and relieve Universal's liability to NBC accordingly.

2. *Universal is requesting NBC for an appointment to discuss the repayment arrangement of the balance due once the above mentioned cheque has been cleared.*

Finally, Universal wishes to thank NBC for theirs patience and understanding in this issue.

Yours truly,

UNIVERSAL ELECTRONICS & HARDWARE LTD

E.E. MURO

MANAGING DIRECTOR

"Encls" PSRC Cheque No. 000511 National Micro Finance Bank,

- *Bank House Branch.*
- *Letter from IMMMA Advocates –Ref. No. IMMAMA/NBC/UEH*

c.c. *The Executive Chairman*
PSRC
Dar es Salaam

Attn: Mr. Temba

Mr. W.L. Nyachia
The Treasurer Registrar
Ministry of Finance
Dar es Salaam.

Mr. Derek De Villiers
Manager Collections
NBC Limited
Dar es Salaam."

Further to the above, if a they knew that the debt no longer existed as early as August 2000 why then go on servicing the same such that between 13/11/2000 and 6/11/2001 they paid a total of shs 100,609,901.90, and why, in terms of clause 2, on the last page of ExhibitP10 (quoted), pray to have discussions held on repayment? The totality of the above is incompatible with what the Defendants are trying to impress.

On the whole, on facts alone, I am satisfied that no one ever represented to Defendants that they were no longer liable starting from 27/6/2000. I am satisfied further that the writing off of the debt was just an internal mechanism intended to clear their books but not to discharge debtors from liability. And, legally, this was allowable by the Banks' Guidelines, which as rightly explained by Mr. Kabakama, were finally gazette vide GN No. 38 of 2001. Under these guidelines, while providing for debt or loss write offs, they don't discharge customers' liabilities as such as they are categorical that there may be partial future recoveries. Defendants were never cleared of the liability.

With this finding, breath should not be wasted discussing the patently inapplicable principle of estoppel.

We turn to issue 2. Also, on the evidence available this should be answered positively.

PW1 and PW2 tendered Exhibit P5 and P9, statements of Accounts which indicate the extent of Defendants' liability and which the latter never legally challenged. I should hurriedly add that the denials leveled here and

there in Prof. Fimbo's final submission are of no effect as a final submission is not evidence.

Exhibit P5 is a statement for the period between 1/1/98 and 31/12/2000, indicating withdrawals, commissions and interests. It indicates the status when the internal write – off was effected. The Defendants do not challenge the computation. They in fact adopt it because they rely on "0.0" balance indicated thereon.

Exhibit P9 is a summary statement of an account which PW2 described thus,

> *"This is a statement of Account of 1st Defendant for the period of 13/11/2000 – 29/2/2004. This is for account No. 126513000042, maintained at the head office, originating from Samora Branch, collection Unit"*

This Exhibit shows how the liability progressed since 13/11/2000. As of 28/2/2002 it is indicated that the owing principal sum was shs 22,804,971.35 while the interest was 301,986,882.58.

Again, the Defendants did not front any challenging evidence apart from DW1's branding of the interest amount as "absurd" and which charge I will shortly demonstrate as unjustified.

Now, in terms of the law, once the Plaintiffs had discharged the burden of proof as above, the onus swung to the Defendants to tilt it and erect otherwise. However, both DW1 and DW2 close their respective testimonies without tilting the balance. The brief cry by DW1, supported by

Prof. Fimbo in his submission, that the interest charged is illegal don't advance their case as much as they simply fly over in the face of the evidence offered by the Plaintiffs. With respect, the Prof. and DW1 seem to misconceive facts. I failure to see where they gather the assertion that the interest indicated is computed on sh 22 million as principal.

The plaint is very categorical that the overdraft facility was shs 200 million. It is trite law that in construing a claim the plaint should not be segmented but read as a whole. Thus para. 5 of the Plaint should not be read in isolation. Read as a whole, the Plaint leaves no one in doubt that shs 200 million was utilized by 1st Defendants and that that this is the basis of the claim for the outstanding of shs.22,804,971 as principal and shs 332, 646,812 as interest as of 28/2/2002. The picture of deductions is verified by Exhibit P.9 which shows that on the 13/11/2000 the principal sum was shs 121,413,873.25 while the interest was shs 189,873,224.39 and that after the five deposits made by 1st Defendants (and already referred to) between 13/11/2000 and 6/11/2001, including the shs 82, 646,829.90 referred to in Exhibit P10, the liability had gone down as per figures reflected for 28/2/2002. And, Exh.P1 clearly shows that the interest rate chargeable was 28% p.a. while a penality "interest of 5% p.a. above the normal rate" was to "be charged on all excesses created without prior arrangements and on expired limit". The Defendants' complaint on interest therefore is without support.

Treading on Exhibit P9 however, the amount due as of 28/2/2000 was shs 22,804,971.35 as principal and shs 301,986,882.58 as interest and not shs 22,804,971 and shs 309,841,841, respectively as claimed. However, as a

party should not be awarded what he has not claimed, the liability under issue two is decreed to be shs 22,804,971 on principal. On interest, as the sum claimed is above that established by evidence (Exhibit P9) it is decreed that the interest due was shs 301,986,882.58.

We turn to issue 3. With respect to Prof. Fimbo, the argument pegged on primary and secondary securities does not apply in this situation. As rightly stated by the Plaintiffs' Counsel, S. 80 of the Law of Contract Ordinance which provides,

> *"The liability of the surety is coextensive with that of the principal debtor, unless provided by the contract"* ,
> read together with clause I of Exhibit.P4 which reads
>
> "*We the undersigned hereby guarantee to you the payment of and undertake on demand in writing made on the undersigned by you or…… an authorized agent to pay to you all sums of money` which may now be or which hereafter may from time to time become due or owing to you anywhere from or by the Principal either as principal or surety and either solely or jointly with any other person……",*

do not permit the arguments presented to stand. The terms of the contract stand against what is urged by Prof. Fimbo. Thus, the 2nd and 3rdDefendants have not been discharged from the liability by the Plaintiffs' failure to exercise the options provided under Exhibit P2.

On issue four, I should only say that S. 167 of the Land Act is not applicable. The said provision provides:

"S.167 (1) The following courts are hereby vested with exclusive jurisdiction, subject to the provisions of this Part, to hear and determine all manner of disputes, actions and proceedings concerning land, that is to say:-

(a) The Court of Appeal
(b) The Land Division of the High Court established in accordance with law for time being in force for establishing courts divisions:
(c) The District Land and Housing Tribunals:
(d) Ward Tribunals;
(e) Village Land Councils"

In my considered view, the action before us does not concern land as such. What is before us is an action, concerning a Commercial transaction whereby 1st Defendants received a facility which they did not service and they are now being sued for its recovery. The question of realization of a debenture or mortgage is just ancillary to the action and this comes into play once the main action has been decreed in favour of the Plaintiffs. In my view, in enacting S. 167, the Legislature had in mind an action which centers on land, pure and simple. Thus, I hold that this court has jurisdiction. And, I should add that in the early stages of this matter the Professor had raised a general preliminary objection that this Court had no jurisdiction to no avail.

Finally, we come to reliefs.

This follows the consequences of the findings made. Judgment is hereby entered in favour of the Plaintiffs as per prayers' paragraph (i) and (ii) with a qualification that the interest sum to which the Plaintiffs are entitled is shs.301,986,882.58 as established by evidence, bringing the sum awarded to shs.324,791,853.93 (shs.22,804,971.35 + 301,986,882.58) instead of shs.332,646,812/=. On prayer (iii), the decretal sum to attract 7% interest from the date of judgment till payment in full. Prayer (iv) to be invoked in the event the decretal sum is not paid. Defendants are also condemned in costs.

L.B. KALEGEYA

JUDGE

Delivered in the presence of Prof. Fimbo. Plaintiffs to be notified.

L.B. KALEGEYA
JUDGE
10/12/2004

4,281 words

I Certify that this is a true and correct of the original order Judgement Ruling
Sign ..... Registrar Commercial Court Dsm.
Date 10/12/04