IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LILA, J.A., MWANDAMBO, J.A, And FIKIRINI, J.A.)

CIVIL APPEAL NO. 381 OF 2019

NATIONAL BANK OF COMMERCE LIMITED.....APPELLANT

VERSUS

MAPELE ENTERPRISES COMPANY LIMITED.....1st RESPONDENT

AYOUB SAMSON SANGA.....2nd RESPONDENT

LUCIA SAMSON SANGA (the Administrator of

The Estate of the Late Sadick Sanga).....3rd RESPONDENT

(Appeal from the Judgment and decree of the High Court of Tanzania (Commercial Division) at Dar es Salaam)

(Phillip, J.)

dated the 17th day of June, 2019

in

Commercial Case No. 106 of 2018

.....

JUDGMENT OF THE COURT

7th November, 2022 & 26th May, 2023.

FIKIRINI, J.A.:

The appellant (then plaintiff), the National Bank of Commerce Limited and the respondents (then defendants), Mapele Enterprises Company Limited, had a business relationship as a banker and its customer. Through that relationship, the appellant advanced a renewable multi-option credit facility by way of an overdraft facility to the first respondent amounting to

TZS, 800,000,000/= lasting for one year from July 2013 to July 2014. Securing the facility, the second and third respondents executed personal guarantees executed by the 2nd respondent Ayoub Samson Sanga and 3rd respondent, the late Sadick Samson Sanga, and a fixed and floating debenture registered and stamped covering all of the first respondent's assets, for an unspecified amount.

Before the High Court (Commercial Division) the appellant sued the respondents claiming a sum of TZS. 1, 104,954,166.53 as an outstanding balance from a renewable overdraft facility extended to the first respondent and guaranteed by the second and third respondents.

In their written statement of defence, the respondents, whereas they acknowledged the advancement of the credit facility to the first respondent secured by the second and third respondents, they disputed one, the amount claimed, and two, the claim that they have not fully serviced their overdraft facility which expired in July 2014.

The trial court dismissed the suit for lack of proof hence, the instant appeal.

The suit before the High Court was premised on the following facts discerned from the witness statements filed pursuant to rule 49 (2) of the High Court (Commercial Division) Procedure Rules, 2012. Both witnesses were subjected to cross-examination during the trial. To prove her claim the appellant did so through a witness statement of Fredrick Mtei (PW1) while the respondents had filed a witness statement of Ayoub Samson Sanga (DW1). In addition, the appellant witness tendered four (4) exhibits namely; Multi Option Facility Commercial Terms (exh. P1), a contract of guarantee between the N. B. C. and the 2nd and 3rd respondents (exh. P2), Debenture instrument issued by the first respondent (exh. P3) and bank statements covering 1st July 2013 to 31st December, 2016 in respect of account number 019103011770.

The trial court framed four (4) the following issues:-

(i) Whether the plaintiff, through a Multi-Option overdraft facility, advanced money to the first defendant to the tune of TZS. 800,000,000/=.

(ii) Whether the defendants are in default in repayment of the loan/money advanced to the first defendant to the tune of TZS. 1,408,951,166.53.

(iii) Whether the plaintiff issued notice of default to the defendants.

(iv) To what reliefs are the parties entitled.

What transpired before the trial court in answering the above framed issues, was that while the appellant claimed to owe the respondents an outstanding balance of TZS.1,408,954.166.53, the respondents disputed any debt owed. It was their case that the debit balance carried forward of TZS. -401,292,496.57 was unsubstantiated as no letter or bank statement was produced to prove the existence of the claimed facility. The respondents further contended that if such an arrangement existed, the debt had been cleared considering that no demand for payment or notice of default had been issued prior to the institution of the suit or tendered in court to prove existing liability. Therefore, they claimed that the balance carried forward which included TZS. - 401,292,496.57 was misleading.

Having heard the parties and due consideration of their evidence, the trial Judge dismissed the suit reasoning that the appellant failed to lead evidence proving existence of a previous overdraft facility letter dated 12th July, 2012 and the bank statement resulting into a debt of TZS. 1,408,954,166.53. The more so due to the appellant's failure to issue a notice of default.

Aggrieved by the decision, the appellant preferred this appeal comprising four paraphrased grounds namely:

1. *The learned trial judge erred in law and fact by holding that the appellant had failed to prove its case for the previous overdraft facility letter dated 12th July, 2012 not tendered in evidence while in fact the previous facilities were not in dispute and the respondents never challenged the transactions shown in the bank statement.*
2. *That the learned trial judge erred in law and in fact by holding that the appellant had failed to establish to the standard required by the law that the respondents are in default in repayment of the claimed amount to the tune of TZS. 1,408,954,166.53, while the bank statement (exh. P4) shows all the transactions that were never challenged.*
3. *That the learned trial judge misdirected herself by misconstruing Article 8.1 of the Standard Form (exh. P1) whereas the Article deals with a situation where the bank had to demand repayment before expiry of the overdraft facility or cancellation of the facility,*

and held that it was mandatory for the appellant to serve the respondents with a Notice of Default.

4. *That even if it was mandatory to serve a Notice of Default, the learned trial judge erred in law and fact by holding that failure to serve Notice of Default to the respondents was fatal and extinguished the right of the appellant to recover the outstanding amount.*

Dr. Onesmo Michael Kyauke and Mr. Amini Mshana, learned advocates, appeared for their respective clients before the trial court and this Court. They both filed written submissions in support of their respective stance according to Rule 106 (1) and (7) of the Tanzania Court of Appeal Rules, 2009 (the Rules). We shall deal with the first and second grounds for convenience as the issues are closely related. We shall also combine the third and fourth grounds of appeal.

Submitting on the two grounds, Dr. Kyauke contended that the overdraft credit facility was an extension of the previously offered credit facilities per exhibit P1. Expounding, Dr. Kyauke contended that, in his evidence, DW1 admitted the existence of the overdraft facility extended to the first respondent running from 18th July, 2013 to 18th July, 2014 by

which it was allowed to withdraw amounts not exceeding TZS. 800,000,000/= guaranteed by the 2nd and 3rd respondents. According to Dr. Kyauke, since there was no issue before the trial court in relation to the existence of the previous credit facilities, tendering of the facility letters and bank statements was unnecessary.

Insisting on the point, Dr. Kyauke contended that, the issue linked to the previous credit facility was neither pleaded nor evidence led in that regard, such that it was improper for the trial judge to decide on the point. According to him, the only important document was the bank statement through exhibit P4 whose transactions were unchallenged and that should have been sufficient to prove the outstanding balance. Besides, DW1's admission that as of 19th July, 2014 the outstanding balance was TZS. -765,370,917.22 should have been taken into account. He equally contested the respondents' assertion that the deposits made into the account were more than withdrawals such that there was no outstanding balance by the time the overdraft period expired.

In reply, Mr. Mshana contended that without producing the letter of credit and bank statement proving the alleged previously approved credit facility, the appellant's assertion was baseless. He further contended that if

the said Facility ever existed, there was no breach or default as no demand or default notice was tendered in court to support the claim. He thus challenged the unexplained balance that formed part of the alleged outstanding balance of TZS. 1,408,954,166.53.

A convenient starting point in our deliberation, we think, is on exhibit P1, the Multi-Option Facility Commercial Terms signed stipulated that the current credit facility was an extension of the previous one. This agreement was signed between the appellant and the first respondent and guaranteed by the second and third respondents on 15th July, 2013. For ease of reference, part of the letter of credit issued to the first respondent stated as follows:

> *"**We refer to the Facility Letter dated 12 July, 2012 as amended or varied from time to time, and confirm that National Bank of Commerce Limited (Bank) is pleased to continue to offer the Borrower various facilities (collectively) referred as the Facility) on the terms and conditions contained in this document (the Commercial Agreement**). Capitalised terms not defined in these Commercial Terms shall have the*

meaning as defined in the Standard Terms."
[Emphasis added]

It is evident that, Ayubu Samson Sanga and Sadick Samson Sanga (the second and third respondents) were signatories to the agreement on behalf of the first respondent. Therefore, even without the letter dated 12th July, 2012, the information contained in exhibit P1 sufficiently answered in the affirmative the first issue that the appellant, through a multi-option overdraft facility, extended an overdraft facility to the first respondent to the tune of TZS. 800,000,000 guaranteed by the second and third respondents.

There is also abundant evidence that the disputed overdraft facility stemmed from the previous credit facility even though this was not part of the pleadings *per se*, neither was it one of the issues framed before the trial court nor was evidence explicitly adduced in that regard.

Further proof of the existence of the disputed credit facility can be gathered from paragraph 6 of their joint written statement of defence which initially denied the existence of the credit facility pleaded in

paragraph 6 of the plaint. Paragraph 6 is reproduced below for ease of reference:

> *"The contents of paragraph 6 of the plaint are also* ***denied.*** *The 1st defendant admits to having applied for the said overdraft facility, and the 2nd, and 3rd respondents admit to having guaranteed the same. However, the 1st defendant states no money was actually advanced to her by the plaintiff."*

Additionally, in paragraphs 3 and 5 of the witness statement, DW1 admitted the existence of the credit facility subject of this appeal. It is evident that the respondents did not deny the existence of the overdraft facility. They only denied that the appellant actually advanced to the first respondent any money.

Mr. Mshana's submission that without proof that a previous credit facility was extended such that the present one was a continuation is thus misconceived. Moreover, that was not a dispute before the court neither was there any issue framed on which evidence could have been led to prove the existence of the credit facility in 2012. In our view, basing her decision on that aspect as reflected on pages 438-439 of the record of appeal, the trial judge went beyond the principle that no party could

traverse beyond its pleadings, underscored in **Nkulabo v. Kibirige** [1973] E. A. 102, **James Funke Gwagilo v. The Attorney General** [2004] T. L. R. 261 and **ScanTan Tour Ltd. v. The Catholic Diocese of Mbulu**, Civil Appeal No. 78 of 2012 (unreported).

By deciding on the point without hearing the parties, the trial court denied the parties the right to address her on the issue, which offended the cardinal principle of natural justice that, no one should be condemned unheard. On the contrary, had the judge examined exhibit P1 closely, she should have come to a different conclusion that it established that the current facility was a continuation of the previous credit facility, and an outstanding balance was not from nothing.

The respondents' contention in paragraph 3 of their joint written statement of defence and DW1's witness statement that no money was deposited in the first respondent's account, as no transactions were shown in that regard is unsound. We think it is important at this point to bring to the fore what the term overdraft means. An extract from Chris Parry et al., book on "Corporate Lending and Securities" paragraph 8.2 have defined the term as follows:-

> *"An overdrawn current account balance is a simple current account balance owed to the bank instead of by the bank. The bank permits overdrawing within a limit which is agreed upon with the customer for a period, often a year. A short facility letter usually sets out the period; the maximum amount or limit; and formula for interest – such as 1% above the bank's base rate each day on the daily cleared balance; the intervals at which interest will be debited (usually quarterly), and any provisions concerning security, default or cross-default. There may be provision for a commitment commission."*

The book further explained overdrafts to be contractually repayable on demand, but in practice, they are regarded as available for the stated period of (say) a year. Therefore, a facility's undrawn balance constitutes liquidity for the borrower.

On the same point, Paget in the book Law of Banking, 14th Edition, at paragragh 5.14 has defined the term overdraft as:-

> *"An overdraft as the money lent: a payment by a bank under an arrangement by which the customer*

may overdraw is a lending by the bank to the customer of the money."

Going by the above definitions on what is an overdraft, we find the respondents' assertion that they were depositing more than withdrawing not seem right because if they had sufficient monies, they would not need to sign an agreement to secure a credit facility, as is the case in the instant appeal. If the first respondent genuinely deposited more than what was withdrawn, surely there would have been no unserviced overdraft resulting in the claimed debt. Exhibit P4 had all the transactions, and DW1, when cross-examined, as shown on page 471 of the record of appeal, he admitted that by 17th July, 2014, the outstanding balance was TZS. -778,000,000.00. To us, this speaks volumes. Based on exhibit P1 which governed the parties' contractual agreement and exhibit P4 which showed all the transactions, we find no reason not to go with that evidence in the absence of any other document contrasting the two documents and PW1 and DW1's evidence.

In addition, we have been wondering about the first respondent's reaction after what it learnt on 17th July, 2014, when the credit facility was about to expire. If indeed the first respondent knew what was an

outstanding balance as of the stated date and did not raise any concern, in our view, cannot be interpreted in any other manner except that, the first respondent was indebted to the appellant. Notwithstanding the respondents' contention, we could not find evidence that the respondents deposited more than what the first respondent withdrew. In the upshot, we allow the first and second grounds of appeal.

We shall now turn our attention to the third and fourth grounds. The third ground relates to a complaint against erroneous interpretation of Article 8.1 of exhibit P1 and holding that it was mandatory for the appellant to issue a notice of default whereas the fourth ground is an alternative to ground three whereby the appellant complains that even if it was mandatory to issue a notice of default, failure to issue it was not fatal to the appellant's claim.

On the default notice issue, Dr. Kyauke contended that Article 8:1 of exhibit P1 does not relate to default notice but rather a payment and cancellation before the expiry of the overdraft which is not the case in the appeal. Mr. Mshana, on the contrary, contended that, the appellant was aware that the default notice was necessary and that explains her pleading in paragraph 12 of the plaint despite which, she did not tender the notice

in evidence. issued despite being pleaded in paragraph 12 of the plaint *vis a vis* paragraph 8 of the joint written statement of defence and later featured in paragraph 14 of the witness statement. Mr. Mshana extensively submitted on the issuance of the default notice which, according to him, were in line with the requirements of Article 8:1 and 8:2 - exhibit P1 that, notice should have been issued. He equally argued that failure to issue a demand or default notice should connote that, there was no breach of the terms stipulated in exhibit P1.

Starting with what is on record, the respondents denied having been issued with a notice of default as required under section 125 (1) of The Land Act, 1999, Cap. 113. Whereas the trial court dismissed the respondents' complaint yet, it blamed the appellant for not serving the respondents with default notice in terms of Article 8:1 of the facility agreement (exh. P1). We entirely agree with Dr. Kyauke's contention that, issuance of the default notice pursuant to Articles 8:1 and 8:2 (exh. P1) was not pleaded or evidence led in defence and parties were not afforded the right to be heard on it. Moreover, the Article did not contemplate default, but repayment and cancellation.

Be it as it may, we agree with Dr. Kyauke that clause 8.1 of exhibit P1 was relevant when the Facility is cancelled before the expiry of its period. In our view, as there was no cancellation of the credit facility extended, the appellant expected the debt to be serviced with or without default notice. Moreover, even assuming demand or default notice was required, non-issuance of it did not extinguish the first respondent's liability. Although, we agree with the trial judge's observation at page. 439 of the record of appeal that the breach period had extended to six (6) years without any action taken leaves a lot to be desired, it is our firm view that, non-issuance of the demand or default notice did not extinguish the appellant's right to claim the outstanding balance.

In **Exim Bank (Tanzania) Limited v. Dascar Limited & Another,** Civil Appeal No. 92 of 2009 (unreported), citing with approval from the decision of the High Court in the case of **The City Brewery Limited v. Chhaganlal Jeraj Ganarar & Oghvji Jeraj** [1959] 1 E. A. 1030, the Court had this to say:-

> *"Liabilities of surety to a loan agreement would not be discharged because of the creditor's failure to promptly issue default notice to the principal debtor unless the contract specifies the time within which*

the creditor is required to do so. ***Undoubtedly, the position equally applies to the principal debtor."*** [Emphasis added]

It is an undisputed fact that the appellant never issued a demand or default notice in relation to the credit facility subject of this appeal before the institution of the suit in 2018 would suggest that the appellant's relationship with the first respondent continued.

We have pondered on what would be the consequences of not issuing a demand or default notice upon the expiry of the facility. In this case, since the credit facility had a specific period, the appellant's claim should thus only be limited to the end of that contract on 18th July, 2014. Even though DW1's statement was that by 17th July, 2014 the outstanding balance was TZS. -778, 000,000.00, the figure is different from that reflected in exhibit P4 on page 357 of the record of appeal showing a balance of TZS. -765,370,917.22. Taking as long as four years later we think it had a bearing on the respondents notwithstanding Article 8.1 of exhibit P1.

The sanctity of contract is established upon adherence to the cardinal principle of the law of contract is that parties are bound by the terms of

the agreement they freely entered into. In this appeal likewise, we think parties are bound by their contract. Since there is abundant evidence that an overdraft facility was extended to the first respondent, guaranteed by the second and third respondents, we do not find any reason as to why the respondents should not abide by what they have contracted for. By not repaying the outstanding amount of the credit facility as contracted the respondents are in breach of contract. See: **Simon Kichele Chacha v. Aveline M. Kilawe,** Civil Appeal No. 160 of 2018 (unreported) which referenced the case of **Abualy Alibhai Azizi v. Bhatia Brothers Ltd.** [2000] T. L. R 288, and **Harold Sekiete Levira & Another v. African Banking Corporation Tanzania Limited (Bank ABC)**, Civil Appeal No. 46 of 2022 (unreported) on the sanctity of contracts.

In the upshot and after careful consideration, we hold that the appellant deserved repayment of the unpaid overdraft facility plus interest as at the date of expiry of one year to the date of judgment.

In light of the foregoing, we find merit in the appeal and allow it. Consequently, the judgment of the trial court dismissing the appellant's suit is quashed and substituted with a decision granting judgment in favour of the appellant on the amount outstanding on the date of expiry of the

overdraft facility payable with interest at the contractual rate of 24% per annum to the date of judgment and a further interest at the court's rate of 7% per annum from the date of judgment to the date of full satisfaction.

Considering the appellant's failure to issue a demand notice prior to the institution of the suit, we make no order as to costs here and before the trial court.

DATED at **DAR ES SALAAM** this 25th day of May, 2023.

S. A. LILA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered this 26th day of May, 2023 in the presence of Mazoea Africa, learned counsel for the Appellant and Ms. Anitha Fabian, learned counsel for the Respondent, is hereby certified as a true copy of the original.

R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL