IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: WAMBALI, J.A., KEREFU, J.A. And MASOUD, J.A.)

CIVIL APPEAL NO. 182 OF 2020

AHMED FREIGHT LIMITED.....1ST APPELLANT
MUNIR ABDALLAH AHMED .....2ND APPELLANT
VERSUS
ECOBANK TANZANIA LIMITED ..... RESPONDENT
(Appeal from the Judgment and Decree of the High Court of Tanzania, Commercial Division at Dar es Salaam)

(Mruma, J.)

Dated the 18th day of April, 2018
in
Commercial Case No. 33 of 2016
.....

JUDGMENT OF THE COURT

3rd July, 2023 & 12th March, 2024

WAMBALI, J.A.:

The respondent, Ecobank Tanzania Limited, instituted a summary suit at the High Court of Tanzania, Commercial Division at Dar es Salaam (the trial court) in Commercial Case No. 33 of 2016. The suit was against Ahmed Freight Limited as first defendant (the first appellant), Anwar Ahmed Abdallah as second defendant (not a party to the appeal), Munir Abdallah Ahmed as third defendant (the second appellant) and Salum Said Matumla as fourth defendant (not a party to the appeal). Basically, the first appellant was sued for recovery of TZS.

610,066,197.01 being the outstanding amount advanced by the respondent in terms of Credit Facility Letter No. 3 which was restructured after the failure to service the loans in the previous two credit facilities. On the other hand, the second appellant and the two persons stated above were sued as guarantors of the loans advanced to the first appellant.

It was the respondent's case that on 7th September, 2011, she advanced to the first appellant a loan of USD 500,000.00 under Credit Facility Letter No. 1 which was tendered at the trial by Naomi Octavia Ambwene (PW1) and admitted in evidence as exhibit P1. The advanced loan was for financing the purchase of four units of Youtong buses Model ZK 6116D and three units of Toyota Pickups. On 22nd December, 2011, through Credit Facility Letter No. 2, the respondent advanced another loan facility of USD 600,000.00 which was later varied on 30th May, 2012. The advanced amount aimed to finance the purchase of fifteen units of Scania Trucks, fifteen units of Scania Trailers and six units of Luxury busses from Benbros Motors to strengthen the first appellant transportation business. It was agreed that the principal sum and interest for the loan advanced under Credit Facility Letters No. 1 and

2 were repayable in 36 equal monthly instalments from the date of disbursement.

As the first appellant defaulted to repay the amount advanced in Credit Facility Letters No. 1 and 2, on 17th December, 2013, the parties agreed to restructure and reschedule the liabilities of the first appellant. Thus, the repayment had to be made within 36 months' instalments from January, 2014. Nonetheless, the first appellant failed to repay the principal amount and interest.

The first and second appellants lodged a joint written statement of defence and maintained that all defendants were not aware of the existence of the Credit Facility Letter No. 3. Though they acknowledged the existence of Credit Facility Letters No. 1 and No. 2 and the modality of payment, they averred that, the contract of guarantee was signed on behalf of the first appellant by its directors/shareholders namely Anwar Ahmed Abdallah and Munir Ahmed Abdallah. They maintained that the second appellant, Munir Abdallah Ahmed was not one of the directors/shareholders of the first appellant and therefore not liable for the debt signed by the said directors.

It is noteworthy that Anwar Ahmed Abdallah and Salum Said Matumla neither filed the written statements of defence nor entered

appearance. As a result, on 16th September, 2016, acting under rule 22 of the High Court (Commercial Division) Procedure Rules, 2012, the trial judge entered a default judgment against them.

On the other hand, to resolve the dispute between the respondent and the first and second appellants, the trial court framed and recorded the following issues:

1. *Whether the first appellant executed the Credit Restructuring Facility Letter dated 17th December, 2013.*
2. *If the answer to the first issue was in the affirmative, then whether or not the first appellant discharged its obligation or liabilities under the said credit letters.*
3. *Whether or not the second appellant guaranteed repayment of all monies, obligation and liabilities of the first appellant to the respondent.*
4. *To what reliefs were the parties entitled.*

At the trial court, the respondent's case was supported by the evidence of PW1 who also tendered nine documentary exhibits, whereas the second appellant who testified as DW1 and tendered one documentary exhibit was the sole witness for the appellants. After evaluation of the parties' evidence on the record, the trial court answered all issues in favour of the respondent and entered judgment against the first and second appellants.

The disagreement by the first and second appellants with the decision of the trial court prompted the instant appeal premised on five grounds of appeal outlined hereunder:

"1. *That the learned trial judge erred in law and in fact, by holding that the 2nd Appellant,* ***Munir Abdallah Ahmed*** *is one of the Directors of the 1st Appellant while the Director is* ***Munir Ahmed Abdallah.***

2. *That the learned trial judge erred in law and in fact by holding that the 2nd Appellant, Munir Abdallah Ahmed who is not the Director of the 1st Appellant executed a Deed of Guarantee and other documents concerned (sic) the Credit Facilities.*

3. *That the learned trial judge erred in law and in fact by holding that the 1st Appellant Munir Abdallah Ahmed guaranteed repayment of all monies, obligations and liabilities of the 1st Appellant to the Respondent.*

4. *That the learned trial judge erred in law and in fact by holding that the 1st Appellant did not discharge its obligation and liabilities to the Respondent which is different from exhibits tendered before the trial court.*

5. *That the learned trial judge erred in law and in fact by ordering the 1st and 2nd Appellants to pay Tshs. 610,066.197.01 plus interests to the Respondent."*

At the hearing of the appeal, Mr. Reginald Shirima, learned advocate who appeared for the appellants, combined the first, second and third grounds and argued the fourth and fifth grounds conjointly.

Submitting in support of the first, second and third grounds of appeal, Mr. Shirima stated that the second appellant, Munir Abdallah Ahmed is not the director of the first appellant as held by the trial judge. He argued that the second appellant is the Operations Manager while Munir Ahmed Abdallah was the director of the first appellant. The learned advocate submitted further that the first appellant did not execute the Credit Facility Letters concerning the said loan advanced by the respondent as wrongly found by the trial judge. He emphasized that it was wrong for the trial judge to have compared the disputed signatures in the Memorandum of Association of the first appellant, the passport (exhibit D1) and the facility letters (exhibits P1, P2 and P9) and concluded that it was the second appellant who signed as the guarantor of the first appellant. He contended that during cross-examination by the respondent's counsel, the second appellant insisted that he was not the director of the first appellant but the operational manager. In his submission, since the second appellant is not a director of the first appellant, he could not have signed the deed of personal guarantee.

Besides, he stated, the names in those documents differed and thus there was need for the trial judge to have considered other evidence, which was unfortunately lacking on the record. He therefore prayed that the respective grounds of appeal be allowed.

In response, Ms. Miriam Bachuba, learned advocate who appeared for the respondent strongly supported the trial judge's finding on the involvement of the second appellant in relation to Credit Facility letters and the deed of guarantee. She submitted that according to the record of appeal, though during cross- examination the second appellant denied being the director of the first appellant, the affidavit which he deposed in support of Miscellaneous Commercial Application No. 74 of 2016 for leave to defend the suit in Commercial Case No. 33 of 2016 shows that he introduced himself as the Managing Director of the first appellant. She added that during the hearing of the application, his lawyer also introduced him as the Managing Director of the first appellant as reflected at page 173 of the record of appeal. Indeed, she stated, the signature in the affidavit do not differ with those found in exhibits P1, P2, P9 and D1. In her view, the second appellant used the names Munir Ahmed Abdallah and Munir Abdallah Ahmed interchangeably. She insisted that the trial judge correctly found that the

second appellant was the same person who signed the respective documents and testified at the trial as DW1.

Having heard the submissions of the parties and reviewed the judgment in the record of appeal, we entertain no doubt that the complaints of the appellants revolves around the findings of the trial judge with regard to the first and third issues reproduced above. For clarity, the trial judge reasoned and concluded as follows:

> *"... counsel for the plaintiff has submitted that the Facility Letter was signed by Munir A. Ahmed who signed it as the Managing Director of the 1st Defendant and Anwar Ahmed who signed it as the Director. On the other hand, the defendant's counsel has submitted that his clients are not aware of the Credit Rescheduling Facility Letter (Exhibit P9)."*
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> *From the evidence adduced at the trial court, there is no much dispute that two directors signed the Facility Letter (Exhibit P1) and the same two persons signed Exhibit P9 which is the Credit Rescheduling letter. DW1 contention is that Munir Abdailah Ahmed (who signed as Managing Director) and Munir Abdailah are two distinct persons. This contention might be true, however, it should be noted that Munir Abdailah Ahmed, a*

holder of Passport No. AB 173283 who signed the Facility Letter (Exhibit P1) did also sign the Joint and Several Personal Guarantee (Exhibit P6) guaranteeing repayment of all monies borrowed by the first Defendant's Company. Similar signature appears over the name of Munir Abdallah Ahmed in the Credit Rescheduling Facility Letter (Exhibit P9). This very person came to this court and testified as DW1. He admitted in cross-examination that Passport No. AB173283 (Exhibit D1), was his passport. The holder of that passport signed the facility letter (Exhibit P1) and the Joint and Several Personal Guarantee (Exhibit P6) where his photograph was appended thereto. Apparently together with the second Defendant Anwar Ahmed Abdallah he is also a signatory to the Memorandum and Articles of Association of the first Defendant's Company as having subscribed to the Company which was tendered and admitted as part of Exhibit D1. By admitting that the passport (Exhibit D1) was his passport and on the evidence that the holder of that passport signed the Joint and Several Guarantee repayment of the loan at issue, he also signed the Rescheduling Facility Letter dated 17th December, 2017. This answers the first issue in the affirmative. That is to say the first Defendant

executed the Credit Facility Letter dated December, 2013."

Moreover, the trial judge dealt with the issue of who guaranteed the repayment of the first appellant's loan and stated:

> *"The next issue is whether or not the third Defendant guaranteed repayment of the monies ioaned to the 1st Defendant. I have substantially dealt with this issue when dealing with the first issue. But as shown above there is evidence that the third defendant who testified as DW1 signed a personal guarantee deed (Exhibit P6) in which he agreed to guarantee and pay on demand all monies and discharge all obligations and liabilities of the 1st Defendant's Company to the plaintiff's bank. Among the undertaking under the personal guarantee were to pay all liabilities of the 1st Defendant whether actual or contingent present or at any time thereafter due and incurred to the plaintiff and such rate of interest at the rate as shall be determined by the plaintiff (see clause 1 of Exhibit P6).*
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> *As correctly submitted by the plaintiff's counsel, efforts to incite the court to beware that the person who signed deed of personal guarantee and the 3rd Defendant are two different persons were contradicted by the Defendant's own*

evidence which showed that his passport (Exhibit D1) is the same passport which was mentioned and referred in the deed of personal guarantee (Exhibit P6). This answers the third issue in the affirmative. That is to say the third Defendant guaranteed repayment of all monies, obligations and liabilities of the 1st Defendant's Company. Third Defendant has no defence to the action."

Considering the evidence on the record, the reasoning and conclusion of the trial judge, we entirely agree that the second appellant is the director of the first appellant and that he is the one who signed the deed of personal guarantee (exhibit P6). We hasten to add that, as correctly submitted by Ms. Bachuba, though in his witness statement and during cross-examination the second appellant (DW1), testified that he was the operations manager and not the director of the first appellant, the same is not backed by the other evidence on the record. It is apparent in the affidavit in support of an application for leave to defend the suit that the second appellant introduced himself and verified that he is the Managing Director of the first appellant. To be specific, on 19th April, 2016 he deposed and verified as follows:

"I Munir Abdallah Ahmed, Adult, Muslim, Resident of Dar es Salaam do hereby AFFIRM and state as follows:

1. *That I am the 3rd Applicant and the 3rd defendant in the main suit as well as the Managing Director of the 1st Applicant in the above named Application and thus conversant with the depositions I am about to make.*

VERIFICATION

MUNIR ABDALLAH AHMED, the 3rd Applicant and the Managing Director of the 1st Applicant DO HEREBY state that all what is stated herein above from paragraphs .... inclusive are true to the best of my knowledge being the 3rd Applicant and the Managing Director of the 1st Applicant."

Besides, as stated by Ms. Bachuba, during the hearing of the said application, the second appellant was introduced as the Managing Director of the first applicant by Mr. Shirima, his lawyer, as reflected at page 173 of the record of appeal. In this regard, we do not need any further evidence to demonstrate that the second appellant lied in his joint written statement of defence, witness statement and during cross-examination that he was an operations manager of the first appellant. The said averment and testimony are contrary to his disposition in the affidavit reproduced above.

We are also satisfied that the second appellant signed the deed of personal guarantee (exhibit P6) because the comparison made by the trial judge with regard to the signatures in exhibits P1, P2, P9 and D1 was proper and legally sanctioned. The second appellant's averment in paragraph 5 of his witness statement that the person who signed the deed of guarantee was Munir Ahmed Abdallah, the director and not Munir Abdallah Ahmed, is equally misleading. Having scrutinized and examined the evidence on the record and the circumstances, the trial judge was entitled to conclude that the second appellant was the same person who also used the name of Munir Ahmed Abdallah interchangeably.

We hasten to state that, the dispute concerning the signatures contained in exhibits P1, P2, P9 and D1 was properly resolved by the trial judge by comparing the same and forming an opinion that they were those of the second appellant.

Generally, handwriting or signature may be proved on admission by the writer or by evidence of a witness or witnesses in whose presence the document was written or signed. Moreover, the disputed hand writing or signature may be proved by opinion of the handwriting expert, evidence of persons who are familiar with the writing of a person

who is said to have written a particular writing as provided under sections 47 and 49 of the Evidence Act, Cap. 6 R. E. 2022 and through comparison by the Court with a writing made in the presence of the court or admitted or proved to be the writing or signature of the person. The decision of the Court in **the DPP v. Shida Manyama @ Seleman Mabuba** (Criminal Appeal No.285 of 2012) [2013] TZCA 168 (25 September 2013, TANZLII) is relevant for this stance. In that decision, the Court made reference to the decision of the Supreme Court of India in **Fakhruddin v. State of Nadhya Pradesh**, AIR 1967 SC 1326 where it was stated that:

> *"In either case the court must satisfy itself by such means as are open that the opinion may be acted upon. One such means open to the court is to appiy its own observation to the admitted or proved writings and to compare them with the disputed one, not to become a handwriting expert but to verify the premises of the expert in the one case and to appraise the value of the opinion in other case ..."*

Indeed, in **State of Gujarat v. Vinaya Chandra Chhotalalpathi**, AIR 1967 SC 778 which was also referred by the Court in the said decision, it was stated:

"A court is competent to compare disputed writings of a person to be his writings ... in order to appreciate the other evidence produced before it in that regard."

In the event, considering the available evidence on the record, we do not find any justification to interfere with the finding of the trial judge who saw and heard the evidence of the second appellant in court and compared the different signatures in the said exhibits he tendered and concluded that they belonged to him. The trial judge was thus better placed to assess the demeanor and credibility of the second appellant who testified as the sole witness of the first appellant in relation to the available evidence on the record.

We are thus satisfied that the second appellant was liable under the contract of guarantee to bear the obligations and liabilities of the first appellant after the alleged default of repaying the loan advanced by the respondent. As stated by Geraldine Andrews and Richard Millet in the book titled, **Law of Guarantees**, 6th Edition, Sweet & Maxwell, London 2011 at page 271:

"A contract of guarantee is an accessory contract, by which the surety undertakes to ensure that he performs the principal's obligation. It has been described as a contract to indemnify the creditor

upon the happening of a contingency, namely the default of the principal to perform the obligation.

In the circumstances, we dismiss the first, second and third grounds of appeal for lacking merit.

With regard to the fourth and fifth grounds, Mr. Shirima essentially argued them together as intimated earlier on. He criticized the trial judge for finding that the first and second appellants did not discharge their obligations and therefore they are liable to pay the respondent TZS. 610, 066, 197. 01 as the outstanding amount plus interests. He submitted that the said amount was fully contested by the first and second appellants in their joint written statement of defence and the testimony of DW1. He further argued that DW1 stated that according to the last bank statement of 2015, the unpaid loan was TZS. 385, 968, 005.47 and that following the attachment and sale of two buses and two trucks by the respondent, the entire outstanding sum was liquidated. He contended that given the evidence on the record, the trial judge's finding to the contrary was materially wrong. Finally, Mr. Shirima prayed that the fourth and fifth grounds be allowed.

For her part, Ms. Bachuba submitted that the appellants did not tender sufficient evidence at the trial to show that the outstanding

amount was fully paid to the respondent as argued by Mr. Shirima. She stated that according to the evidence on the record, PW1 stated clearly in her witness statement that as of 30th June, 2015 the outstanding loan was TZS. 610, 066, 197.01 which was supported by the Bank Statement (exhibit P8).

Ms. Bachuba maintained that the appellants did not present cogent evidence to substantiate the allegation that they had fully paid the loan to the respondent. She added that the second appellant guaranteed the payment of the loan upon default by the first appellant. She thus prayed for the rejection of the appellants' complaints on the fourth and fifth grounds. Ultimately, she urged us to dismiss the appeal with costs.

According to the record of appeal, the evidence of the respondent through PW1, exhibit P3 (a demand notice from her lawyer, IMMMA Advocates dated 19th August, 2015) and exhibit P8, the outstanding amount as of 30th June, 2015 was TZS. 610,066,197.01. The said loan arose from the Credit Rescheduling Facility Letter No. 3 (Facility Letter No. 3) dated 17th December, 2013.

However, in their defence the appellants maintained that they were not aware of the Facility Letter No. 3 and that the loan had been

fully settled after two buses and two trucks were attached and sold by the respondent to clear the outstanding amount of TZS. 385,968,005.47 as per the last bank statement.

The trial judge considered the said defence and found that the appellants did not produce in court any documentary evidence to counter the evidence that as of 30th June, 2015 there was no outstanding loan claimed by the respondent.

With respect, we agree with the finding and conclusion by the trial judge that the appellants did not substantiate their contention that the outstanding loan was settled before the suit was instituted on 16th March, 2016. It is on the record that the respondent pleaded in paragraphs 10, 16, and 20 of the amended plaint that until the suit was filed, the outstanding loan had dropped from TZS. 991,710,544.95 to TZS. 610,066.197.01. We note that the respondent's claim was supported by the evidence of PW1 in her witness statement and during cross-examination. Equally important, exhibit P3, a demand letter, indicates that the appellants were given seven days to settle the said loan. However, there is no indication from the evidence on the record that the same was settled as contended by the appellants. In addition,

exhibit P8, a bank statement, indicates that as of 30th June, 2015 the outstanding loan was TZS. 610,066,197.01.

Gauging from the pleadings of the parties and the evidence on the record, it cannot be concluded that the appellants proved on a balance of probabilities that the outstanding loan had been settled as strongly argued by their counsel. We hold this view because; **one**, though the appellants in paragraph 6 of the joint written statement of defence stated that they were not aware of the Facility Letter No. 3, paragraph 5 which was in response to paragraphs 14, 15, 17 and 18 of the amended plaint shows that they did not dispute the existence of the stated outstanding loan. For clarity, we deem it appropriate to reproduce their averment thus:

> *"5. The contents of paragraphs 10, 16 and 20 of the plaint are noted that loan amount has dropped from Tshs. 991,710,544.95 to Tshs. 610,066,197.01."*

Two, the testimony of DW1 that the outstanding loans was TZS. 385,968,005.47 and that it was settled in December, 2015 after the respondent sold two buses and two trucks is not borne out of the pleadings as there is nothing in the joint written statement of defence to that effect. Therefore, the testimony of DW1 cannot be relied upon to

substantiate the contention of the appellants. We note that, though he stated in paragraph 14 of his witness statement and orally during the trial that the settlement of the said amount was according to the last Bank Statement of the year 2015, he did not produce it in court as an exhibit. In this regard, the evidence of DW1 on this matter remains as bare assertion.

Considering the evidence of the respondent on the record, the appellants had the onus proving on balance of probabilities that the said outstanding loan had been settled to dispute the respondent claim. Unfortunately, according to the evidence on the record, the respondent's claim on the outstanding loan of TZS. 610,066,197.01 was not challenged by the appellant. Having regard to the evidence of DW1 and exhibit D1 which comprised copies of the passport of the second appellant and Memorandum and Articles of Association of the first appellant, we have no hesitation to state that, the appellants did not discharge the burden of disapproving the evidence of the respondent.

It is common knowledge that in a civil case, the court will sustain such evidence which is more credible than the other on a particular fact to be proved.

In a book by M.C. Sarkar, S.C. Sarkar and P.C. Sarkar, titled Sarkar's Law of Evidence, 18th edition, published by Lexis Nexus, it is stated thus at page 1896:

> *"... the burden of proving a fact rests on a party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof. It is a ancient rule founded on consideration of good sense and should not be departed from without strong reason... until such burden is discharged, the other party is not required to be called upon to prove his case. The court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such conclusion, he cannot proceed on the basis of weakness of the other party..."*

Thus, in the case at hand, the doubt has to be resolved in favour of the respondent as in terms of sections 110 and 111 of the Evidence Act, Cap. 6 a person who desires a court to give judgment in his favour must prove to its satisfaction. We wish at this juncture to reiterate what we stated in **Anthony M. Misanga v. Penina (Mama Migesi) & Lucia (Mama Anna)** (Civil Appeal No. 118 of 2014) [2015] TZCA 556 (18 March 2015, TANZLII) that:

> *"...let's begin by re-emphasizing the ever cherished principal of law that generally proof lies on the party who alleges anything in his favour. We are fortified in our view with the provisions of sections 110 and 111 of the law of Evidence Act, Cap. 6 of the Revised Edition, 2002 ... It is again trite that the burden of proof never shifts to the adverse party until the party on whom the burden lies discharges his and that the burden of proof is not diluted on account of the weakness of the opposite party's case."*

In the circumstances, the complaint of the appellants in the fourth ground of appeal that the trial judge wrongly found that the first appellant did not discharge its obligation and liabilities to the respondent on the contention that it is against the exhibits tendered at the trial is totally not supported by the evidence on the record. It is apparent that exhibit D1 has nothing to substantiate that the appellants claim that the obligations and liabilities against the respondent were discharged. Essentially, the said exhibit contains copies of passports of the second appellant and the Memorandum and Articles of Association of the first appellant.

Having reached the finding and conclusion with regard to the fourth ground of appeal, it is our settled view that the fifth ground has

no basis as the trial judge correctly ordered the appellants to settle the outstanding loan claimed by the respondent. In the event, we dismiss the fourth and fifth grounds of appeal.

From the foregoing, we have no hesitation to confirm the trial court's decision and ultimately, dismiss the appeal with costs.

DATED at **DAR ES SALAAM** this 8th day of March, 2024.

F. L. K. WAMBALI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

B. S. MASOUD
JUSTICE OF APPEAL

The Judgment delivered this 12th day of March, 2024 in the presence of Mr. Reginald Shirima, learned counsel for the appellants who also holding brief for Mr. Gaspar Nyika, learned counsel for the respondent; is hereby certified as a true copy of the original.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL