

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

COMMERCIAL CASE NO. 83 OF 2001

NATIONAL BANK OF COMMERCE LIMITED.....PLAINTIFF  
VERSUS  
TRADEX INTERNATIONAL LIMITED.....1<sup>ST</sup> DEFENDANT  
HUSSEIN OMARI.....2<sup>ND</sup> DEFENDANT  
SALIMA HUSSEIN.....3<sup>RD</sup> DEFENDANT

J U D G M E N T

KIMARO, J.

This case was tried with aid of assessors. They are Gentlemen Assessor Khafan and Mugaṇḁa. They have done a commendable job which requires recognition by this court. Reasons will become apparent at a later stage in this judgment.

The plaintiff is bank and is licenced under the Banking and Financial Institutions Act, 1991 to carry on banking business in the country. IMMA ADVOCATES represented the plaintiff. TRADEX INTERNATIONAL LTD, HUSSEIN OMARI and SALIMA HUSSEIN are the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants respectively and they were represented by Advocates Richard Rweyongeza and Lebba.

The plaintiff prayed for the following relief's against the defendants.

- (i) *Foreclosure and sale of the properties over CT. NO.29997, Temeke, Dar es Salaam and CT.No.29404, Mbezi Dar es Salaam.*

- (ii) *Payment by the Defendants of Tshs. 120,997,200 minus the sum to be realized from (i) above.*
- (iii) *Interest on (ii) above at the rate of 26% per annum from 1<sup>st</sup> January 2001 up to the date of judgment.*
- (iv) *Interest on the decretal sum at the court's rate of 12% per annum from the date of judgment till final settlement.*
- (v) *Costs of the suit.*
- (vi) *Any other relief as the Honourable Court may deem just to grant."*

At the same time the defendants filed a counter claim in which they are also praying for the following reliefs against the plaintiff –

- " a) Judgment for T.shs 69,499,605/=*
- b) Interest on the sum under item (a) above at current commercial bank rate from the date the cause action arose to the date of judgment.*
- c) Further interest on items (a) and (b) from the date of judgment to the date of payment in full.*
- d) Costs of the counter claim*

e) *Any additional relief as the Honourable Court may deem fit."*

A brief summary of the facts of the case is as follows:

The plaintiff claimed to have granted the 1<sup>st</sup> defendant an overdraft facilities which was secured by mortgages in respect of certificates of title numbers 29997 and 29404 for properties in Temeke and Mbezi respectively. The properties are owned by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The plaintiff claimed that there was a default in repayment of the loan and that is why it is claiming for the relief's mentioned above.

The defendants did not dispute receipt of the credit facility from the plaintiff and also the execution of security for the credit facility. They did not also dispute default in the repayment of the loan. However, they blamed the plaintiff for contributing to their default because of its failure to honour some of the conditions which were agreed upon by the parties.

The plaintiff pleaded that the overdraft facility was advanced to the 1<sup>st</sup> defendant on different dates. By 31<sup>st</sup> December, 2000, the debt it stood at T.shs 120,997,200/=. The defendants on the other hand admitted receipt of T.shs 96,578,050/= only, giving a detailed break down of how disbursements were made. The defendants pleaded in their counter claim that they had contracts with SHIRECU and the World Food Programme (WFP) of which performance depended on the credit facility. They blamed the plaintiff for its conduct in altering the terms of the letter of credit which were initially allowed by

the plaintiff, and also for withholding vital documents for clearance of the goods from the port. The plaintiff was equally blamed for failure to release a Performance Bond in time. The defendants averred that the plaintiff's conduct led to the cancellation of the two contracts of which they are claiming for compensation amounting to T.shs 69,499,750/= being compensation for loss of income anticipated from the two contracts.

The issues framed for the determination by the court were:

*"i. Whether or not there was an overdraft agreement between the plaintiff and the defendant and if the answer is in the affirmative, what were the terms and the conditions.*

*ii. Was there any breach by the 1<sup>st</sup> defendant of the terms and conditions referred to in issue 1 above.*

#### Counter Claim

*iii. Whether the plaintiff breached the overdraft agreement and thereby caused loss to the 1<sup>st</sup> defendant.*

*iv. Whether the plaintiff unlawfully failed to submit to WFP a bid performance bond it had approved in favour of the 1<sup>st</sup> defendant to meet conditions for the contract for the supply of maize.*

*v. To what reliefs are the parties entitled to."*

As regards the first issue, both gentlemen assessors opined that the parties are not at issue on the grant of the overdraft facility. This court entirely agrees. Even the defendants did not dispute that they were granted the overdraft facility. It is only the amount which has to be repaid, which was in dispute.

The plaintiff claimed for T.shs 120,997,200/= as a blanket figure without giving a breakdown of what was the principal and what was the interest. The 1<sup>st</sup> defendant on the other hand claimed to have drawn only T.shs 96,578,050/= and repaid T.shs 9,000,000/=. Going by the 1<sup>st</sup> defendant's calculations, the outstanding principal is T.shs 87,578,050/=. At the same time, Mr. Arcadi Kaijage (PW2) testified that the principal amount, according to his records, was T.shs 86,369,499/= and the interest should be calculated at 26%. Gentleman Assessors Khalfan opined that the amount of T.shs 87,578,050/= should be taken as the principal outstanding. Gentleman Assessor Muganda said the principal amount should be 85,537,592/=. This figure has been arrived at because Assessor Muganda took the submissions made by the Advocate for the defendant s on the amount repaid by the 1<sup>st</sup> defendant to be correct. Mr. Lebba submitted that the 1<sup>st</sup> defendant repaid T.shs 11,040,538/=.

Under Section 110 and 112 of the Evidence Act, 1967, the party who alleges existence of certain facts is the one who has to prove the existence of those facts so as to be granted judgment by the court. The case was filed by the plaintiff. It is the plaintiff who has the burden to prove its case. According to the plaintiff's witness, Mr. Arcadi Kaijage, the principal amount outstanding is T.shs 86,369,499/=. This is the amount which is taken by this court

to be outstanding balance together with interest. According to exhibit P1, (the document which showed that the plaintiff approved an overdraft facility of T.shs 50,000,000/= to the 1<sup>st</sup> defendant) the rate of interest in respect of the facility is given. It is 21%, and another 5% penalty on the expired limit, and any excesses created without prior arrangements. The witness for the defendants (DW1) did not deny that the defendant failed to repay the loan. This means that the default attracted penalty interest. The rate of interest of 26% claimed by the plaintiff is right. The answer to the first issue is that there was an overdraft agreement between the parties and the defendant defaulted. As a result an amount of T.shs 86,369,499/= remains outstanding as the principal amount together with interest at 26%.

The answer to the first issue simplifies the answer to the second one. Both gentlemen assessors answered the issue positively. They are correct. All the defendants admitted failure to liquidate the overdraft loan on the contracted dates. The first defendant gave excuses which will be discussed later. But all in all this is a straight forward issue. The first defendant is in breach of the terms and conditions of the agreement. There was a default in repayment of the loan facility which is admitted by the first defendant. There is therefore no debate on the matter. Before I move to another issue, there is a matter which requires elaboration by this court. Gentleman Assessor Muganda was of an opinion that the rate of interest which should be paid by the 1<sup>st</sup> defendant should apply up to the date when the case was filed in court. The logic for this computation is that the plaintiff's records for the 1<sup>st</sup> defendant's Account's were called at the Head Office. The plaintiff's account was charged thus denying the 1<sup>st</sup>

defendant the opportunity of conducting business from which it would have continued repaying the bank. Reference was made to exhibit P5. This is a demand notice which was served on the 1<sup>st</sup> defendant reminding it of the repayment of the loan. It was issued by the head office while the 1<sup>st</sup> defendant's Account was at Kichwele Branch. What I would say is that there was no such evidence tendered in court. The court acts on evidence which is tendered in court. It can not import its own opinion which is not supported by evidence.

The issues remaining for determination is on the counter claim. The ~~first~~ one is whether or not the plaintiff breached the overdraft agreement and thereby caused loss to the first defendant. According to the testimony of Hussein Omari Mwasia (DW1) part of the overdraft facility was to be used to facilitate performance of a contract between the 1<sup>st</sup> defendant and SHIRECU.

The 1<sup>st</sup> defendant was required to supply jute gunny bags to SHIRECU. The plaintiff approved a Letter of Credit for T.shs 25,000,000/=. DW1 said the conditions were that the 1<sup>st</sup> defendant had to pay 25% of the Letter of Credit amount to enable the plaintiff open it in favour of the Supplier in Bangladesh. Another 25% had to be paid on arrival of the shipment. The 1<sup>st</sup> defendant paid 25% of the letter of Credit for opening it. But on arrival of the shipment, the 1<sup>st</sup> defendant was required to pay the full balance of 75%. DW1 said this was not the condition which was agreed upon before. Although a direction was given by the head office to the branch, requiring the branch to comply with the conditions which were agreed upon before, the branch remained

adamant and refused to release the documents to the 1<sup>st</sup> defendant for the clearance of the cargo. Consequently, the clearance was delayed for four months. Eventually, the plaintiff instructed a Clearing and Forwarding Agent of the 1<sup>st</sup> defendant to clear the cargo and auction the jute bags. DW1 said the delay in the clearance of the cargo ruined the cargo as part of it was destroyed by rain. The ruin on the cargo together with a short notice which was given before the action, made the cargo to fetch only T.shs 9,000,000/= which was far below the value of the cargo itself. DW1 said the value of the cargo was T.shs 28,649,628/30 inclusive of customs charges while the sale value was T.shs 58,429,750/=.

DW1 testified further that the failure by the 1<sup>st</sup> defendant to supply the goods as agreed upon, led to the cancellation of that contract, together with others, with SHIRECU and the 1<sup>st</sup> defendant suffered loss. Mr. Aloyce Limbe DW2 – corroborated the testimony of DW1 that SHIRECU had to cancel their contracts with the 1<sup>st</sup> defendant because of its failure to supply the jute bags.

The opinion of both gentlemen assessers was that the issue should be answered positively. This court supports their opinion. They both blamed the plaintiff's conduct for having occasioned the loss to the 1<sup>st</sup> defendant. A verbatim reproduction of their opinion will show how their opinion was arrived at, and also the importance of the banks to observe business ethics:

**Assesser Muganda** had the following opinion:



*"The basis of how the Plaintiff handled matters related to the import documentations for the Defendants' SHIRECU supply contract, my answer to this question is in the affirmative.*

*Firstly out of facts presented and documents tendered, it amply clear that the plaintiff did change the terms of the overdraft Agreement in relation to the L/C amount. The Defendants were required to pay before the release of the consignment import documents. It is noteworthy that in so doing, the Plaintiff did not even bother to assign any reasons as to why. This conduct on the part of the Plaintiff completely upset the Defendants who as evidenced by their letter ref.No.TIL/NBC/01/2000 of 15<sup>th</sup> January, 2000 bitterly cried foul and asserted that this action rendered the logic of the security cover for the overdraft facility meaningless. Secondly, it was also noted that the Plaintiff lost the originals of the Import Documents for the SHIRECU order without which the goods could not be cleared. By the time a dispensation was made to clear the goods with copies a lot of time (about four months) had been lost and this led to the destruction of the goods, a salvage of which was sold at a throw away price. Definitely, this act by the Plaintiff directly contributed to a significant loss income to the Defendants. I have also been persuaded by the Defendants submission and evidence adduced by DW2 that the result of the above negligence by the plaintiff emensely contributed to the cancellation of the orders by SHIRECU because of poor performance and lack of credibility.*

**Assesser Khalfan**, on the other hand had the following opinion:

*The fact that the Plaintiff had a confront of a relatively fair mortgage security of two houses valued totally at T.shs 173,500,000/= for the overdraft facilities, and the amount for the balance of the overdraft for the LC was relatively small in the sum of Tshs. 13,578,050/= whose repayment had been agreed to from the proceeds of the sale of the jute bags and the Defendant had a prior commitment to supply the jute bags to Shirecu at a substantial margin of profit in the proceeds of sale which the First Defendant had informed the Plaintiff as having agreed to apply towards the reduction of the debt owing to the Plaintiff, a breach of the agreement by the Plaintiff at the crucial time of the arrival of the goods has caused loses to the first Defendant in the import of the jute bags and not only deprived them of the profits from the supply of the bags to Shirecu but also soured the previous good business relation between the said parties. A Bank lending has become an important service to the Customers in the conduct of commerce and consequently contributes to the economic growth at the national level. As a lender requires protection of its moneys and dues and indeed ensures it by insisting on and holding a security so as to continue gainfully the lending services, a borrower too requires protection against any arbitrary decisions of the lender, if the lender decides unlawfully to disturb an agreement and occasion the borrower to suffer the consequences which include the snowballing of interest despite the comfort of the security. The consequences include also rendering the credit worthiness of the borrower*

*into disrepute in the business community. The first Defendant has as the consequence of the unlawful delay suffered a loss in the import of the packaging materials and in addition a loss of the profit from the failure to deliver the said materials to Shirecu."*

The opinion expressed by both assessors gives an elaborative picture of the whole transaction. This court does not have any addition to what has been expressed by the gentlemen assessors. I find that the plaintiff breached the overdraft agreement by refusing to accept 25% of the LC upon arrival of the goods and also for failing to release the documents for the consignment to the 1<sup>st</sup> defendant so as to allow clearance of the cargo and subsequent performance of its contract with SHIRECU.

The second issue is whether the plaintiff failed to submit to WFP a bid performance bond it had approved in favour of the 1<sup>st</sup> defendant to meet conditions for the contract of supply of maize.

Earlier on, while DW1 gave his testimony, DW1 told the court that it won a tender for supply of maize under the World Food Programme. There were preliminary conditions to be fulfilled before the 1<sup>st</sup> defendant was allowed to sign the contract with WFP. One of the conditions was to secure a Performance Bond of T.shs 17,080,000/= in favour of the WFP equivalent to 5% of the order of the maize. DW1 said that the plaintiff agreed to issue the performance bond but then it was not issued in time. Consequently the order was also cancelled. The 1<sup>st</sup> defendant is also claiming damages for loosing the contract with WFP.

The Gentleman Assessors differed in their opinion on this issue. Assessor Muganda was of an opinion that the plaintiff contributed to the cancellation of the order because despite being aware of the time when the Performance bond was require, it was not issued in time nor was any reason assigned for the plaintiff's action.

Assessor Khalfan on the other hand was of the opinion that the 1<sup>st</sup> defendant failed to adduce evidence to show;

*One) that the award of the contract was withdrawn on the sole reason given by DW1 and*

*Two) that the application for the bond was made by the defendant to the plaintiff in good time and the plaintiff committed itself to issue the same but failed to honour its undertaking.*

Assessor Khalfan wondered how the 1<sup>st</sup> defendant could have purchased lots of maize from farmers while it had in its hands only an award which was equivalent to an offer of a contract.

In this respect I agreed with the opinion of Assessor Khalfan, (and with full respect to Assessor Muganda). The 1<sup>st</sup> defendant failed to tell this court whether the cancellation of the order by WFP was occasioned by only its failure to provide Performance bond. The witness did not tender any document in court to show what conditions were given by the WFP. It was vital to have such evidence. Such evidence would have enabled the court to see the actual conditions which were given by the WFP and make appropriate assessment of the evidence. The 1<sup>st</sup> defendant's

failure to supply such a document leaves this court with a number of questions which have no answers. For this reason I hold that the issue is answered negatively. Even the way the issue is framed suggests that more than one condition had to be fulfilled by the 1<sup>st</sup> defendant before the WFP made a Contract with the 1<sup>st</sup> defendant.

Lastly is the reliefs to which the parties are entitled to and I will start with the plaintiff: The plaintiff managed to prove that an overdraft facility which was secured by mortgages in respect of properties with Certificate of Title No.29997 Temeke and No.29404 Mbezi was granted to the 1<sup>st</sup> defendant and secured by the 2<sup>nd</sup> & 3<sup>rd</sup> defendants. The principal amount outstanding is T.shs 87,578,050/= together with interest at 26%.

The 1<sup>st</sup> defendant should pay the above amount or else the properties which were mortgaged should be sold. The properties should be sold in a manner which will would allow the plaintiff to recover as much of the decree as possible. The plaintiff is also granted interests at the court's rate of 12% from the date of the judgment till payment in full, plus costs.

As regards the counter claim, this court held that the plaintiff did contribute to the loss which the 1<sup>st</sup> Defendant suffered as a result of the cancellation of he contract with SHIRECU. The 1<sup>st</sup> defendant has to be compensated by the plaintiff for the loss suffered. As to how much the plaintiff is entitled to; I will take the opinion of Assesser Khalfani. He said and I quote:

- 342 -

*" The relief to the First Defendant is therefore a compensation or damages which I opine in the sum of T.shs 19,600,000/= for loss on shipment and T.shs 24,800,000/= for loss of profit from failure to deliver the goods to Shirecu, that is a total of Tshs. 44,400,000/=. With regard to the component of the loss of profit, I have taken into account the fact that the quantity of the import was 206 bales and the profit derivable was proportionate to that quantity and not 225 bales which Shirecu had agreed to purchase.*

*According to my assessment, the goods would normally have been cleared, supplied to the purchaser in Dar es Salaam and payment therefore received in three weeks from the date of the arrival at the port which was 27<sup>th</sup> December, 1999. The entitlement of the compensation or damages which I recommend is therefore from 18<sup>th</sup> January, 2000 with interest at the same rate of 26% per annum as charged by the Plaintiff on the debt owing by the First Defendant."*

I find the assessment being reasonable and consonant to business practices in that the calculation has taken into consideration the period of clearance and payments and the profit which was expected from the consignment if he arrangements had gone as planned. I therefore grant the 1<sup>st</sup> defendant-T.shs 44,400,000/= being compensation for the loss suffered because of the cancellation of the contract with SHIRECU. The 1<sup>st</sup> defendant is also granted interest at 26% from 18<sup>th</sup> January, 2000 until the date of judgment. Thereafter, interest to be calculated at the court's rate of 12% till full satisfaction. The defendants is also granted costs.

Since both the plaintiff and the 1<sup>st</sup> defendant have been granted judgment to the extent shown in the judgment, the amount which the 1<sup>st</sup> Defendant is claiming from the plaintiff, should be set off from the amount of the decree due to the plaintiff. After that, the 1<sup>st</sup> defendant will have to pay the balance if any, to the plaintiff. In the event of failure to pay, then the plaintiff will be at liberty to sell one, or both properties which were mortgaged, to recover the balance. In so doing the plaintiff is bound to use the best method which will ensure recovery of as much as possible of the amount of the decree. The properties should not be sold simultaneously. Sale should be one property after the other, depending on the amount of the decree, particularly after the set off which the 1<sup>st</sup> defendant has been granted against the plaintiff, and efforts by the defendants to pay the balance, if any.

I commented earlier that the gentlemen assessors did a commendable job. I am sure this judgment must have reflected the reasons for my assessments. All having been said, I enter judgment for the plaintiff and the 1<sup>st</sup> defendant as given in this judgment.

N.P.KIMARO,

JUDGE

15/12/2003

Date 17.12.2003

Coram: N.P.Kimaro, J.

For the Plaintiff – Mr. Ngowi.

For the 1<sup>st</sup> Defendant }  
For the 2<sup>nd</sup> Defendant } Mr. Lebba.  
For the 3<sup>rd</sup> Defendant }

Assessors (1) Mr. Khalfan

(2) Mr. Muganda.

CC: R. Mtey.

Court: Judgment is entered for the parties as elaborated in the judgment.

Order: Judgment for both the plaintiff and the 1<sup>st</sup> defendant as elaborated in the judgment.

N.P.KIMARO,

JUDGE

17/12/2003 + p. 347

Court: Both gentlemen assessors are marked and discharged.

N.P.KIMARO

JUDGE

17/12/2003

3,982 - words

I Certify that this is a true and correct  
of the original order Judgment Ruling

Sign

Registrar Commercial Court Dsm.

Date

22/12/03