

**IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM**

CIVIL CASE NO. 234 OF 2002

AZANIA BANCORP LTD..... PLAINTIFF

VERSUS

FREDRICK OLDENBURG..... DEFENDANT

Coram: S. S. H. Kaganda, J.
For Plaintiff: Mr. Chipeta
For Defendant: Abs.
CC. Masebo.

JUDGEMENT

The plaintiff is a limited Liability Company Incorporated in Tanzania under the companies ordinance, chapter 212 of the Laws. It operates under the Banking and Financial Institutions Act, 1991. Their Operations are conducted in Dar es Salaam. The Defendant is a natural person residing and working for gain in Tanga. He stood as a Surety and Guarantor to F. A. Kwamkot Limited Company in respect of some banking facilities granted by the plaintiff to the F. A. Kwamkot Company. The plaintiff claim is for the payment of Tsh. 95,733,253.95 as per 31st May, 2002 being amount due for unpaid credit facility together with interest at the contractual rate of 24% per annum and penal interest on the outstanding amount as agreed.

The story is that in 1999 the F. A. Kwamkot Company applied to the plaintiff for banking facilities and were granted by an acceptance letter dated 10th May, 1999. It was agreed that the credit was to be repaid in three Instalments of Tsh: 30 million, 15 million and 5 million by 31st December, 1999. The Company created a debenture on all assets as security to the Loan. Debenture deed signed and dated 28th April, 1999. The Defendant guaranteed and assured payment of the credit and any sums of money which may become due to the plaintiff. It Included all interests, costs, commissions, charges and expenses in relation to the company's account with the plaintiff.

The company failed to pay the amount agreed which was due by 26th September, 2000 at a tune of Tsh: 76,191,065.47. The plaintiff sent letters of demand on 26th September and 16th October, 2000.

Failing to get a positive reaction from the Company, the plaintiff sent a demand notice to the Defendant in his capacity as the Guarantor to the credit facilities advanced to the Company whose value was by that time Tsh: 77,968,857.02. The plaintiff tried to recover the money by attachment of the Company's assets but could not successfully get it right because the assets were in a poor state of maintenance and repair. All efforts to get the company or Defendant re-pay the amount due as per contract failed hence this suit. The amount by 31st May had risen to Tsh: 95,733,203.95.

Several attempts to serve the Defendant failed because his address was not clearly known the court ordered for a substituted service which was effected through the East Africa News paper of 19th August, 2002. On the date of hearing the Defendant could not appear and the court continued to hear the matter ex-parte under order ix rule 6 (a)(i) of the Civil Procedure Code, 1966. There was only one witness for the plaintiff, Sylams B. Mlola, identified himself as the Secretary to the Azania Bankcorp Ltd Bank. He gave an account of how the F.A. Kwamkot Company secured a loan in 1999. The loan was for development of a farm owned by that Company which was situated in Handeni/Tanga. The loan was Tsh: 50 million at an Interest rate of 24% for each month.

The Company's security to the loan was the same farm at Handeni. Mr. Fredrick A. Oldensurg signed as a Guarantor. He was one of the Directors to the Company. There was also a Debenture to the contract. The debt was accumulated to Tsh: 95,733,253.97 by 31st May, 2002. This was evidenced by the Companies bank statement which was tendered by P.W.1 The form and assets to the company were put under receivership but could not be sold to realise the money due. The plaintiff pray that the Guarantor be held liable for the unsettled debt. That he be ordered to pay Interest commercially at 31%; penalty at 4% as from 1st June, 2002 to the date of settlement. Also a decratal sum to the rate of 12%, general damages and costs to the suit.

Since this is an exparte proceedings the issue to be looked at is whether the Guarantor should be held liable to the debt. My first observation is that there is no dispute that Mr. F. A. Oldensurg signed the Guarantee and Indemnity memorandum.

By that act he stood as surety and Guarantor. As per Halsbury's Statutes of England 3rd Edition P. 81 it is stated:-


“ A contract of guarantee must be evidenced by a note or memorandum signed by the guarantor or some other person authorised by him. A guarantor undertakes a secondary liability to pay a debt if the principal debtor fails to pay.”

In this case, the memorandum was duly signed by the said F. A. Oldensurg, as such he took the liability to pay the debt on failure of the principal to do so. Further the Law recognises that, a contract of guarantee is a promise to answer for the debt default or miscarriage of another person and the guarantor's liability arises only upon the failure of the debtor to pay. This is the position in the case in hand. In conclusion I state that, I have given good consideration to the plaintiffs pleadings and witnesses evidence, I am therefore satisfied that the evidence adduced together with the supporting documents have proved the case on a balance of probabilities. The Company is in breach of the contract and the Defendants on F. A. Oldensurg is held liable for the Outstanding debt as a Guarantor.

The court therefore orders that:-


- (i) The Defendant be declared fully liable under the agreement as a Guarantor to the outstanding debt.
- (ii) The Defendant is to pay the agreed sum of Tsh: 50,000,000/=.
- (iii) The Defendant is to pay an Interest at the Commercial rate of 31% for the agreed sum of Tsh: 50,000,000/= as from 1st June, 2002 to this date of judgement.
- (iv) The Defendant is to pay a Penal Interest as agreed at a rate of 4% as from 1st June , 2002 to this date of judgement.
- (v) Costs to the suit.

- (vi) An Interest rate of 12% to the outstanding amount as to the Bank statement. 95,733,253.97 No order as to the general damages as no evidence has been adduced which could assist this court in assessing it, more over to me the same is recoverable by the Penal Interest which is provided in the agreement. It is so ordered.


S. S. H. Kaganda
JUDGE
14/7/2003

Court: Judgement read over and delivered in the presence of the plaintiffs this date of 15/7/2003.

Right of appeal explained.


S. S. H. Kaganda
JUDGE
15/7/2003