

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

COMMERCIAL CASE NO. 87 OF 2012

BEWTEEN

ASSUMPTER NSHUNJU MSHAMA-----PLAINTIFF

VERSUS

JOSEPH WASONGA OTIENO-----DEFENDANT

JUDGMENT

Date of the Last Order: 18/6/2015
Date of the Judgment: 26/6/2015

SONGORO, J

On the 3/8/2012 , Assumpter Nshunju Mshama , the Plaintiff, filed a Summary Suit under Order XXXV of the Civil Procedure Code, Cap 33, [R.E.2002] against Joseph wasonga Otieno, the Defendant, claiming for re-payment of outstanding loan of Shs 210, 000,000.

It the Plaint, the Plaintiff alleged that, the loan was granted to the Defendant on the 11/1/2011, and it attracted an interest of Shs. 10,000,000/= per month. The loan was supposed to be fully re-paid, within a period of six (6) months from January 2011, and has remained un-paid to-date, despite several demands. She therefore prays for the following Orders and relief's

- (i) *An order for payment of a sum of Tshs. 210,000,000/= being the principal sum.*

- (ii) An order for payment of Tshs. 10,000,000/= per month from the 10th of July, 2011 till payment of the sum in (i) above.*
- (iii) An order for payment of general damages as may be assessed by the Court.*
- (iv) An order for payment of interest at Court rate on the decretal sum from the date of Judgment till payment of the decretal sum.*
- (v) An order for payment of costs of the suit.*
- (vi) Any other relief(s) the honourable Court will deem equitable to grant.*

In response to the plaintiff claim, Joseph Wasonga Otieno the Defendant with the leave of the Court filed a Written Statement of Defence, and appeared to defend the suit.

In his Written statement of Defence, the Defendant opposed Plaintiff`s claims, and stated that, by August, 2012 he had already paid Shs. 188,000,000/= to the Plaintiff as principal sum of the loan. He also indicated in his Statement of Defence that, currently is ready to pay the remaining balance of about Shs 20,000,0000/=.

On the Plaintiff`s claim of interests in the Plaint, the Defendant said are not legally tenable because according to their Loan Agreement, the interest of Shs 10,000,000/= per month on loan, was chargeable for a period of six months only. So the Plaintiff claim of interest of

shs 10,000,000/ per Month after the expiry of six months is unfounded.

Finally, in the Written Statement of Defence, the Defendant put the Plaintiff to strict proof, and prayed to the court to dismiss the suit for lack of merit.

On the 21/6/2013, when the suit was due for hearing, the Court in consultation with the parties, framed up 6 issues, as matters for determination. The Agreed issues, were as follows;

1. *Whether there existed any loan agreement between the Plaintiff and the Defendant and if yes on what terms.*
2. *Whether the Defendant or the Plaintiff owe any contractual sum and if so whether the Plaintiff is entitled to any interest in the said sum.*
3. *if issue number 2 above is answered in the affirmed whether the Defendant has made good the payment of the loan.*
4. *Whether the **Defendant's caution** statement was solicited by duress and coercion of the Police Officers.*
5. *Whether the Defendant issued a **cheque which was dis- honoured by the bank as** one of the ways of paying the loan.*
6. *To what **relief's(s)** are the parties entitled*

Therefore the Plaintiff suit proceeded, and was concluded along the above-mentioned six agreed issues.

During the hearing of the suit, Mr. Rwenyongeza, the Learned Advocate, appeared for the Plaintiff; whereas the Defendant was represented by Mr. Marando and Mr. Mnyele , Learned Advocates.

At hearing stage it the Defendant who started to give evidence and defend himself on the claim because it was summary. However, but for convenience purpose and for better understanding of the dispute, I arranged the Judgment in a tradition way by first explaining the Plaintiff case, and the claim, and then the Defendant Defence.

Thus, the Plaintiff in pursuing her claim, she testified as PW1 and briefed the court that, she knew the Defendant in the cause of church services, and introduced himself as businessman owning, and operating supermarkets in the city.

From that point, Plaintiff said they arranged to do business together and she advanced as loan of shs 200, 000,000 which would attract an interest of shs 10,000,000, per month. For that matter they signed a Loan Agreement which stipulated the time for repayment of loan, interest to be paid, and a cause of action to be taken once the Defendant default to pay the loan.

Regarding claim of interests, PW1 said the Loan Agreement stipulated an interest of shs 10,000,000 per month for the six months period. But in reality, she is entitled to interest per their agreement, and for the whole period the loan remained un- paid.

On payment of the Loan, PW1 clarified at page 18 of her recorded testimony that, going by the Loan Agreement, the loan was

supposed to be paid in full by 6/10/2011 but on only a sum 72,780,000/= was paid.

As a guarantee for payment of the loan, the Plaintiff said was issued by the Defendant a post dated Cheque No 03-01-01 of CRDB Bank of shs 210,000,000/= which had a due date of 24/11/2011 which was in the name Joseph Otieno Wasonga. The said cheque was presented by the Plaintiff as exhibit and was admitted as Exhibit P1.

On CRDB cheque No 03-01-10 dated 24/11/2012, which was tendered as Exhibit P1, PW1 at page 14 of her recorded testimony stated that she deposited a cheque with the CRDB Bank on the 27/1/2012, and on the 28/1/2011, was returned to her dishonoured due to lack of cash in the Defendant's bank account, with " an endorsement of "Refer to Drawer".

And on her further follow up of payment, PW1 said the Defendant again paid into her bank account a sum of USD 30,000 which was equivalent of Shs 48,000,000/= in March 2012.

Also, at page 110 of her recorded testimony, the Plaintiff admitted that, the Defendant paid her an interest of shs 111, 000,000/= pursuant to the Loan Agreement which they signed.

On the Defendant`s contention that, she was paid a sum of shs 188,000,000 as part of the advanced loan, the Plaintiff briefed the court that, those payments were in respect of shop business which the Plaintiff claim she supplied mercantile goods worth shs 190 Millions to the Defendant.

She then clarified that, even the amount claimed on supplied goods, was not fully paid, instead the Defendant surrendered one of his supermarket to her, to manage and operate it , and still shs 3,335,747 ,19 has so far remained un paid

Further, she discredited payments made in petty cash vouchers, and bank pay slips which were tendered by the Defendant, that they did not bear her genuine signatures, and no money was deposited into her bank account, as part payment of the loan.

While being cross examined by Mr. Marando, Counsel for the Defendant, the Plaintiff admitted that, the interest stipulated in their agreement, required the Defendant to pay an interest of shs 10,000,000/ for six months only.

It was her further testimony that, the Defendant had paid interest up to Shs. 110,000,000 for 11 months, from January to November, 2011.

In further cross examination by Mr. Marando, the PW1 told the court that payment of shs 20,000,000 which appears in CRDB Bank pay slip was payments relating to shop business, and not loan.

Further, she informed the court that, all purported payment which appears on various Petty Cash Vouchers, most them were not done and are not genuine. And for Vouchers which were paid to her, she explained were payment for interests on loan.

Upon being cross examined by Mr. Marando, Learned Advocate for the Defendant on payments which she received from the Defendant in various petty cash, PW1 firmly explained to the court that, the payments made to her by the Defendant were on interest accrued from the loan, and on goods supplied to the Defendant's super markets.

Finally, the Plaintiff at Page 35 of her testimony briefed the court that is claiming for payment of shs 210 million which is loan due, and the amount was stated in a Cheque which was dishonoured by the bank, plus interests due, and costs of the suit.

On his part, Joseph Wasonga Otieno, the Defendant defended himself as DW1, and called Ms Anna Wandu Joseph who testified as DW2 and defended the Defendant.

On his part , DW1 told the court that is a businessman dealing with importation of goods, shop business, and manufacturing of plastic Products.

Then DW1 explained to the Court that on 11/1/2011 they entered into an agreement with the Plaintiff, and he borrowed Shs.200,000,000 on the understanding that, the amount will be repaid in six months, and the loan attracted an interest of Shs 10,000,000 per month.

To substantiate that he borrowed shs 200,000,000/= payable within six months, and the loan attracted interest of Shs 10,000,000/= for a period of six months, DW1 then ,tendered a document which has a title of "*Mkataba wa Kukopeshana Fedha*" a Loan Agreement dated 11/1/2011, it was admitted in Court as Exhibit D1. Exhibit D1 mention the Plaintiff as "*Lender*" while the Defendant is mentioned as a "*borrower*".

Next, the DW1 briefed the Court that, indeed he has paid the whole amount of loan through the plaintiff bank accounts at CRDB Bank, Women Bank, NMB Bank, and even through Petty Cash vouchers.

To support his testimony on repayment of loan, he tendered a bunches of *bank pay in slips* and of Petty Cash Vouchers which were admitted collectively in court, and marked as Exhibit D2.

Then DW1 relying on Bank Pay Slips, Receipts, and Petty Cash Vouchers he clarified that, a total of Tshs.84, 380,000 was paid to the Plaintiff through her NMB Plaintiff's bank account.

Secondly, he said a sum of Shs.113,600,00 was paid the through Plaintiff's CRDB Bank Account.

Thirdly a sum of Shs. 4,200,000/= was paid to the Plaintiff through her Women's Bank Account.

Fourthly, he clarified that a sum of shs 37,200,000 was paid through petty cash vouchers to the Plaintiff, and her relatives who were sent to collect money.

On payments made, DW1 briefed the Court that a total sum of Shs. 239,380,000/= was fully paid to the Plaintiff, out of shs Shs,260,000,000/=:, and so far the remaining balance is Shs 20,600,020/=.

Finally, DW1 prayed to the court to dismissed the suit with costs in his favour, for lack of merit.

After DW 1 testified, he called Anna Wandu Joseph who also testified as DW2.

In her testimony DW2 told the court that, is a wife of the Defendant and together they own three supermarket in the City. Regarding the loan which was advanced by the Plaintiff, DW2 admitted they Defendant was issued with a loan of Shs 200,000,000/=.

She then narrated to the court that, so far the entire sum of loan has been repaid to the Plaintiff, and she even personally paid certain amount.

To support her assertion that, she paid part of the Loan, DW2 tendered payment vouchers, and Bank pay slips as Exhibits and claim she paid as part of the loan.

On payment vouchers, DW2 said at page 7 of her typed testimony that she also paid the Plaintiff and four of her relatives, and payment vouchers bears their signatures.

Upon being cross examined by Learned Advocate for the Plaintiff, on payments made to different persons, DW2 at Page 10 of typed proceedings admitted that in payment vouchers admitted in court that, in Exhibits, there is nowhere she endorsed, or stated in the Vouchers, that was paying the Plaintiff's loan.

She even admitted at Page 11 of her typed testimony in Court that, in payment vouchers which were admitted in court, they do not state, the purpose of payments made.

All in all DW2 during the re-examination by the Defence Counsel, explained to the court that, the loan has been fully re-paid and the plaintiff claim is not true.

After both the Plaintiff, and Defendant closed their cases, Counsels were given an opportunity to make submission, and only the

Plaintiff`s Counsel filed their Written submissions and presented them in court.

In his Written Submission, Mr. Rwenyongeza for the Plaintiff indicated that, the Defendant in his Written Statement of Defence and his testimony is not disputing that, he took a loan and was under obligation to repay the loan. For that matter the first agreed issue of whether there was a Loan Agreement, should be answered in affirmative.

Submitting on the issue, on whether interest due to loan, applies after the expiry of the agreement period, Mr. Rwenyongeza submitted that, there was a default in payment and due to that default the Plaintiff was denied to use her money, and that was wrong.

He then clarified that where there is wrong, there is a remedy, and it follows therefore interest is payable because the Defendant had the plaintiff money throughout, and she was denied to use the money.

The Learned Counsel for the Plaintiff maintains that, "default to pay" always attracts interests, and claim of interests is payable, and the loss should fall, were it lies.

Further, the Plaintiff`s Counsel submitted that due to the fact that the Plaintiff has lost her money which have been in the hands of the Defendant, indeed under Section 73 (1) the Law of Contract, Cap 345 [R.E.2002] the Plaintiff is entitled to compensation. He then

added that, the delay in payment of interest should generate the same amount of interests.

Turning on the claim of principal sum of the loan, the Plaintiff Counsel submitted that, in certain instance Defendant claimed that he has paid shs 255,560,100 therefore the loan had been fully paid. Further, the Defendant changed the position, and said, he has paid Shs 188, 000,000/= and there is an outstanding loan of shs 20,000,000/= .

In the light of different figures of money which Defendant claims, to have paid, the Plaintiff`s Counsel submitted that the Defendant is not speaking the truth on payments made, because he has been speaking of different figures.

The Plaintiff counsel then elaborated that, from the evidence before the court, there is a *prima facie* evidence that the Plaintiff was indebted shs 210,000,000/= an amount which is visible in the Cheque issued by the Defendant.

He then said there is no evidence, if the amount stated in the cheque was paid. The Plaintiff Counsel submitted that instead of presenting evidence which shows, the loan has been paid, the Defendant wrongly took receipts, and payment voucher of another liability relating to shop, and presented them in court claiming that the loan has been paid.

Finally, the Plaintiff Counsel submitted that, the Defendant did not discharge his burden of proving on the balance of the probability if the loan has been fully paid.

For that reasons he prayed to the court to give Judgment in favour of the Plaintiff, and order the Defendant to pay the loan, and grant relief's prayed.

The court has carefully considered the Plaintiff`s claim, the Defendant defence, and submission, and find there are mainly three key points for determination which are (1)whether there was loan agreement which binds the Parties, and what were its terms, (2)whether there is an outstanding loan, or interest which is due, and (3)what reliefs are parties entitled too. Also in the due course other issues whether there was *dishonoured cheque*", and whether there was *caution statement* of the Defendant which was *made under duress, or was solicited* which appears at agreed issue No 4 and 5 will be addressed also.

To start with, the court assessed issue No 1 of Whether there is existed any loan agreement between the Plaintiff and Defendant and what were its terms.

On the existence Loan Agreement , I find there is Exhibit D1 which was signed on the 11/1/2011 by both the Plaintiff and Defendant. It seems me Exhibit D1 was a Loan Agreement entered by Plaintiff and Defendant, which is enforceable, and none of the parties seriously contested its contents.

Turning to the agreed issues No 2 and 3 on if the plaintiff is indebted of the Principal loan and interest, I find that requires examination of terms of the Loan Agreement and payments made.

On terms, and conditions of Loan Agreement, I noted that the loan agreement has several clauses, but have *two key borrowing, and repayment terms*" which were stated in Swahili language. The main borrowing terms stated in *Swahili language* , states as follows;

1. Kwamba Mkopaji anakopa toka kwa mkopeshaji na Mkopeshaji anamkopesha Mkopaji fedha shs 210,000,000(Shiling Million Mia Mbili na Kumi)
2. Kwamba Mkopaji atarudisha mkopo wote na juu yake riba ya Shs 10,000,000/= (Millioni Kumi tu) kwa kila Mwezi kwa Miezi sita tu ambapo mkopaji anarudisha Mkopo wote pamoja na riba yake ndani ya miezi sita tu (Shilling Milioni mia mbili na Kumi)

In my liberal English translation, condition No. 1 of the Loan Agreement cited above, stated that the Plaintiff is lending shs 210,000,000/= to the borrower who is the Defendant. It seems to me the above mentioned lending term was fully implemented and is not subject of dispute in this suit.

Another term of the Loan Agreement, is in condition No 2 and it stated that, the borrower who is the Defendant will repay the loan within six months, and an interests of shs 10,000,000/ for six months only.

Condition No 2 of interests on loan stated in Swahili language that;

Kwamba Mkopaji atarudisha mkopo wote na juu yake riba ya Shs 10,000,000/= (Millioni Kumi tu) kwa kila Mwezi kwa Miezi sita tu ambapo mkopaji anarudisha Mkopo wote pamoja na riba yake ndani ya miezi sita tu (Shilling Milioni mia mbili na Kumi)

Close perusal of condition No 2 of the Loan Agreement cited above, dictates that the loan was to be paid within six months period from date stated in the agreement and final payment was expected to have been paid on or by the end June, 2011.

On payments of interest, the Loan Agreement stated that the amount payable as interest, is interest of "Millioni kumi kwa kila mwezi *kwa miezi sita tu ambapo mkopaji anarudisha mkopo na riba*" expressly limits the interests of Shs 10,000,000/= to six months only.

To conclude on payment of interests envisaged under condition No 2 of the Loan Agreement, Exhibit D1, it is court finding that, the agreed interest rate of shs 10,000,000/= per month was payable for six months only. In simple mathematics, the interests per condition No 2 of agreement was of shs, 60,000, 000 per months for six months only.

On the interest chargeable after six months, the Loan Agreement was silent, and mum on the interest to be charged after six Months.

Thus on the Plaintiff claim of interest of shs 10,000,000/- per months, after six months, honestly I find there is no need to re-write condition No 2 of the Loan Agreement on interest payable after six months because the duty of the Court is to enforce what was agreed upon by the parties. So the claim on interests of shs 10,000,000 per months after six months is not supported by the Loan Agreement.

So going by the Court finding that, the agreed interest on condition No 2 of loan agreement in total was shs 60,000,000/= for six months, it follows therefore any amount paid over, and the above shs 60,000, 000/= **should immediately be treated and counted as payment of Principal sum of the loan.**

On the Plaintiff claim that, a sum of Shs. 110,000,000 paid to her was on interest for 11 Months from January 2011 to November, 2011, I find is not proper, and not even supported by Condition No 2 of the Loan Agreement.

To conclude on interest payable under Condition No 2 of the Loan Agreement, I maintained that the plaintiff is entitled to a sum of shs 60,000,000 as interests.

Reverting back to the claim of Principal sum , the court find that pursuant to Condition No 2 of the Loan Agreement- Exhibit D1,

signed on 11/1/2011, it was agreed that the borrower who is the Defendant will repay the loan, within the period of six months to the Plaintiff.

So the burden of proof, is on the Plaintiff to prove, if the Principal of loan of shs 210, 000,000 was advanced to the Defendant and has not been paid. Indeed, Section 110 (1) of the Evidence Act Cap 6 R.E 2002 requires who alleges must prove. The section states that;

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

In proving her case the Plaintiffs has been relying on the Loan Agreement which has a title MKATABA WA KUKOPESHANA FEDHA dated 11/1/2011 - Exhibit D1, and a dishonoured Cheque No. 03-01-01 Exhibit P1, which established that a sum of shs 210,000,000 which is the Principal sum, has remained un paid

Defendant at a certain interval in his statement in court, he claim to have paid a sum Tshs.188, 000,000 as loan , and said the debt now stand at Shs 20,000,000/= only. And at a certain instance, the Defendant claim to have paid up to Shs. 255,560,100 and said the Plaintiff claim nothing.

To strengthen his arguments on payment made to the Plaintiff, the Defendant drew the attention of the court to payments made by

him, and DW2 in Petty Cash Vouchers, and Bank Pay Slips. He then maintained that, the Plaintiff claim nothing from him.

I have revisited the oral testimonies of DW1, DW2 plus the Defendant's exhibits and find payment which Defendant's said he made may be grouped in three categories.

First category of payment alleged to have been made is on Petty Cash Vouchers which reads some payments were made to the Plaintiff or her relatives. Vouchers were collectively admitted as Exhibits D2.

Second category of payments are several , Bank Pay Slips which reads some amount of monies were deposited into Plaintiff`s bank accounts on several banks.

The third category of payment are payments which were made and admitted by the Plaintiff. The court examined all categories of payments alleged to have been made in line with the Plaintiff denial that the outstanding loan has remained unpaid.

Turning on Petty Cash Vouchers which Defendant and DW2 tendered in court as exhibits on payments on loan, the court noted that PW1 is claiming that payments made in petty cash vouchers, and bank pay slips contained monies paid to her in connection with

shop business pursuant to the Memorandum of Understanding signed by them on the 25/10/2011 admitted as Exhibit D3.

In view of that tug of war, between the Plaintiff, and Defendant on the payment made on Petty Cash Voucher, and bank pay slips, I first revisited 15 Petty Cash Vouchers which was admitted in court collectively as Exhibit D2, to ascertain the purpose, or the intent of payment, and if the money was paid to the lender who is the Plaintiff.

Petty Cash Vouchers which were perused by the Court are (1) Petty cash vouchers of shs 9,800,000 dated 8/2/2012, (2) Voucher of shs 600,000/= dated 26/7/2011 (3) Voucher of shs 10,000,000 dated 13/1/2011 (4) Voucher Dated 17/9/2011 of shs 5,000,000/= (5) a note dated 7/6/2011 of shs 400,000, (6) Voucher Dated 10/8/2011 of shs 400,000/= (7) Voucher Dated 11/8/2011 of shs 400,000/=(8) Voucher Dated 12/8/2011 of shs 400,000/= (9) Voucher Dated 13/8/2011 of shs 400,000/= (10) Petty Voucher dated 14/8/2011 of shs 400,000/= ,11. Petty Voucher dated 15-22/8/2011 of shs 3,200,000/= 12. Petty Voucher dated 24-26 of Shs 1,200,000, 13. Voucher Dated 29/8/2011 of shs 400,000/= 14. Petty Voucher dated 30/8/2011 of shs 1,600,000 15. Petty voucher dated 9/12/2011 of shs 3,000,000/= and I find the payments stated in above stated 15 vouchers, are silent on if the amount stated were for payment on loan.

This court is mindful, and even Parties are aware that, the local and even international business, and accounting practices, requires if a payment made is for specific undertaking, like payment of loan, or school fees then a payment voucher, or a bank pay slips must state so. On Petty Cash Vouchers which were admitted in Court as exhibits there is a column which reads "*Required for....*" meaning the money is required for which was supposed to be filled the purpose of payments. But the columns were not filled, if the purpose of payment was to pay for loan.

The absence of a the Defendant statement in Petty Cash Vouchers if payments made were for purpose of setting the loan, I finds the claim that, the monies stated in vouchers were for payment of loan was not substantiated.

Another shortfall on monies stated in Petty Cash Vouchers" is that the there is no credible and convincing proof from the Defendant himself, or DW2, if the monies stated in the payment vouchers were received by "*lender*" who is the "Plaintiff".

It is in view of the above-mentioned shortfalls, the court find the evidential value of all Petty Cash Vouchers to be too marginal, and has no weight as far as the repayment of the loan is concerned.

Moving to 25 "Bank Pay Slips" which were also tendered in a bundle, and admitted as Exhibit D2 I revisited the following Bank Pay Slips (1). CRDB Bank Pay slip dated 27/4/2011 of 20,000,000/= (2) CRDB Bank Pay Slip of 8/3/2012 of USD 30,000, (3) CRDB Bank Pay slip dated 21/8/2011 of shs 10,000,000/= (4) CRDB Bank Pay slip of 24/9/2011 of shs 3,000,000/= (5) CRDB Bank Pay Slip of 15/7/2011 (6) CRDB Bank Pay slip of 11/7/2011 of shs 5,000,000/= (7) CRDB Bank Pay Slip of 16/7/2011 of shs 2,000,000/= (8) CRDB Bank Pay Slip dated 27/6/2011 of shs 3,000,000=, (9) CRDB Bank Pay slip dated 30/6/2011, 10. CRDB Bank Pay slip of 21/6/2011 of shs 5,000,000 11. CRDB Bank Pay slip of 22/6/2011 of shs 1,500,000/= , and 12. CRDB Bank pay slip dated 11/6/2011 of shs 1,600,000/=

Also, I revisited the Credit Voucher of (13) Tanzania Women Bank of 8/7/2011, (14). Credit Voucher of Women's Bank of 2/7/2011 (15). Post Bank Credit Voucher of Women's Bank of 17/6/2011 of shs 400,000 (16) Women's Bank Voucher of 11/6/2011 of shs 800,000/= , (17). Women's Bank Voucher of 13/6/2011 of shs 800,000/= (18) Photocopy of NMB Cash Deposit Slip dated 14/5/2011 of shs 7,000,000/= (19) Photocopy of NMB Cash Deposit of shs 2,980,000 dated 16/5/2011, (20) Photocopy of NMB Cash Deposit of shs 12,000,000 dated 1/6/2011, (21) Photocopy of NMB Cash Deposit of shs 10,000,000 dated 14/4/2011 (22) Photocopy of NMB Cash Deposit of shs 10,000,000 dated 18/3/2011, and (23) Photocopy of NMB Cash Deposit of shs 10,000,000/= of shs 15/2/2011.

Further, the Court perused (24). NMB Cash Deposit of shs 17,400,000 dated 7/5/2011, and (25) NMB Cash Deposit of shs 10,000,000 dated 25/7/2011, and others and find except for payment made via CRDB Bank Pay Slip of 8/3/2012 of USD 30,000 which was equivalent to shs 48,000,000/= the payment are silent if were for payment of loan.

Bearing in mind what I have stated above on the Petty Cash Voucher that, payment stated in on loan should be (1) specific, (2) has to state so, (3) has to be made to the right person who is the lender, I find the absence of a the Defendant statement on the Bank Pay Slips if payments made were for loan, I finds the Defendant's assertion that the monies stated in Bank Pay Slips were for payment of loan was not substantiated.

Another shortfall on monies stated in the Bank Pay Slips is that the Plaintiff claims that, they were paid to her in the connection of shop business which I find the Defendant did not refute his involvement on shop business.

In the absence of statements in Bank Pay Slips on if the payments were made to offset the loan, or part of it I find the testimony of PW1 that payments made in Bank Pay slips was for shop business is

more persuasive, and agree with her except on payment of USD 30,000 which she admitted was paid to offset the loan.

To sum on the alleged "payment made by the Defendant " which do not state the purpose or intention of payment in the Petty Cash vouchers and Bank Pay slips I would borrow the words stated in cases of Logicrose Ltd v Southend United Football Club [1988] 1 WLR 1256, and Hurstanger Ltd v Wilson [2007] 4 All ER 1118 that "payee" who make payment, without disclosing the purpose of payment made, and without approval of his claimant, is making that payment at his own risks.

To conclude on alleged payments made in 25 Bank Pay slips out of 26, Receipts and Payment Vouchers which do not indicate the purpose of payment, I find are not credible and reliable evidence on payment of the loan for reasons which I have explained above.

It follows therefore going by the evidence, and calculations of monies paid as loan, un-paid principal amount of Loan has to be calculated on the total payment which the Plaintiff admitted to have received. And at page 19 of her recorded statement, Plaintiff admitted that she was paid first a sum of shs 72,780,000

Then at pages 19 and 21 of her recorded statement, she said after being paid shs 72,780,000, the Defendant again paid her a sum of

USD 30,000 which was equivalent to shs 48,000,000/= by that moment.

Thus going by her testimony, I find from page 18 to 21 of her recorded court statement the Plaintiff admits to have received a sum of shs 72, 780,000 and shs 48,000,000/ in total Shs 120, 780,000/=. Thus If you minus shs 60,000,000 which was paid as interests, then a sum of Shs 60,780,000/= remains, and has to be accounted as amount of loan which has been paid.

So if you take a sum of shs 210,000,000 which is the principal amount of loan and **minus** shs 60,780,000 which Plaintiff was previously claiming was an interest, the Court find the unpaid and outstanding loan is Shs 149,220, 000/=. And this is the amount which is due, and Defendant is liable to pay as per loan Agreement and that addressed issue No 2 and 3 of the Agreed issues

After addressing the issues of interests which was due be paid, and outstanding loan, I now turn to issue No 4 and 5 which the Court may say a word or two on them

First is on issue of "dishonored cheque" honestly I find it was issued by the Defendant that was proved by the Plaintiff who tendered a bounced cheque which was admitted as Exhibit P1.

Further on issue 5th issue of whether the defendant caution statement was made under duress, or solicited honestly I did not find any credible and convincing evidence if the Defendant was compel to make a caution statement alleged to have been made.

And it seems to me, if the Defendant had a complaint that was forced or compel to make caution statement, still he had ample time, and opportunity to go to any police station, or to justice of peace, and make another free and voluntary statement, which in his view would have been freely and correct as far as his liability of his loan is concerned

That is all the court may say about dishonoured cheque, and a complaint on defendant's caution statement.

Moving to issue No 6 on what relief's are parties entitled too, I find the Plaintiff has applied to the court for general damages and repayment of the loan. I have said the outstanding loan of Shs 149,220, 000/= has to be paid. On claim for damages, I find in their agreement the Defendant agreed to pay entire sum of loan within six months, and large amount of money has remained un paid.

Failure on the Part of the Defendant to pay the entire loan in sixth months period as agreed in the Loan Agreement was a breach of express terms of the Loan Agreement.

On breach of contract, Section 73(1) and (2) of the Law of Contract Cap_345 [R.E 2002] statutorily stipulates that a party affected by

the breach is entitled to compensation of any loss, or damage directly arising from the breach. Sections 73(1) states that;

When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

It follows therefore that, since substantial part of the loan has remained un paid, contrary to condition No 2 of the Loan Agreement dated 11/1/2011, which required the entire loan of shs 210, 000,000 be repaid in sixth Months, I find, that was breach of Loan agreement, and it attracts general damages on unpaid loan.

For that matter, I assesses a sum of shs 5,000,000/ as general damages to be paid by the Defendant to the Plaintiff. In essence the Plaintiff case succeeds with the following relief's against the Defendants as follows;

- i. The Defendant is ordered to pay the Plaintiff a sum of Shs 149,220, 000/= as part of outstanding loan.
- ii. The Defendant is ordered to pay the Plaintiff general damages to the sum of shs 5,000,000/=
- iii. The Defendant is ordered to pay the Plaintiff an interest of 5% per annum on a sum of shs 149,220,000/= which is an outstanding loan from the date the suit was filed to the date of Judgment.
- iv. The Defendant is ordered to pays the Plaintiff an interest of 4 per annum on the Decretal sum from

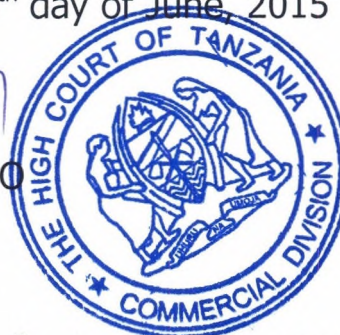
that date of the Judgment to the date of final payment.

- v. The Defendant is also ordered to pay the Plaintiff costs of the suit, she incurred in pursuing the suit.

Consequently the Plaintiff suit succeeds to the extent , I have stated above . The right of appeal was fully explained to the Parties.

Dated at Dar es Salaam this 25th day of June, 2015


H.T.SONGORO
JUDGE



Delivered at Dar es Salaam this 25th day of June , 2015


H.T.SONGORO
JUDGE



The Judgment was delivered in the presence of Ms. Consolata Mtana Learned Advocate and absence of the Plaintiff and her Counsel.