

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

**COMMERCIAL CASE NO. 133 OF 2014**

**DIAMOND TRUST BANK (T) LIMITED ..... PLAINTIFF**

**VERSUS**

**KAHELA TRADERS LIMITED**

**DORIS MARTINE AND DAALGREEN GASPER**

**As Administrators of the estate of Gasper John Minja**

**(Deceased)**

**ALEX YAKOBO KAHELA**

**ASTERIA SUGWELO KAHELA**

**...DEFENDANTS**

20<sup>th</sup> October & 16<sup>th</sup> December, 2015

**JUDGMENT**

**MWAMBEGELE, J.:**

The plaintiff is a limited liability company engaged in the banking business in Tanzania. By a credit facility of 28.05.2012, the first defendant; a limited liability company registered under the Companies Act, 2002, received a credit facility of the sum of Tshs. 50,000,000/= from the plaintiff. The facility was guaranteed by the late Gasper John Minja, Alex Yakobo Kahela (third defendant) and Asteria Sungwejo Kahela (fourth defendant). Gasper John Minja pledged a house standing on plot No. 34 Block "GG", Kijenge Area in Arusha Municipality being mortgaged as security for the loan; a house which

is claimed by the second defendants to be a matrimonial home. The second defendants – Doris Martine and Daalgreen Gasper – are, respectively, administratrix and administrator of the estates of the late Gasper John Minja.

It is the plaintiff's case that the first defendant did not service the facility. No single cent was repaid and by 30.09.2014, the first defendant's account was in arrears of Tshs. 82,335,332/66 hence the present suit claiming for the following reliefs:

- (a) An order for payment of Tshs. 82,335,332/66 being the principal sum with interest accruing thereon as at 30.09.2014;
- (b) An order of payment of interest at the rate of 20% per annum from 01.10.2014 to the date of filing;
- (c) General damages of an amount the court may deem fair;
- (d) Interest at the court rate of 12% per annum from the date of judgment to the date of full satisfaction of the decree; and
- (e) Costs of this case.

The suit proceeded *ex parte* against the first, third and fourth defendants having defaulted to enter appearance after service by publication.

On 30.05.2016 the following issues were agreed by learned counsel for the parties - Mr. George Vedasto for the plaintiff and Ms. Dorice Busee for the second defendants - and the court adopted them. These are:

1. Whether the plaintiff granted to the first plaintiff an overdraft facility of Tshs. 50,000,000/=;
2. Whether the second, third and fourth defendants guaranteed clearance of the facility in case of any default by the first defendant;
3. Whether the defendants serviced the loan; and

#### 4. To what reliefs are the parties entitled

The plaintiff and second defendants fielded only one witness each in proof and defence of their respective cases. The Plaintiff tendered four exhibits and the defendants tendered four exhibits as well.

Betty Rupia PW1; the only witness for the plaintiff testified that in May 2012, the first defendant applied for and was granted an overdraft facility of Tshs. 50,000,000/= which was governed by the terms and conditions in the Credit Facility Agreement (Exh. P1). The facility was guaranteed by Gaspar John Minja vide a Deed of Guarantee and Indemnity dated 06.06.2012 (Exh. P2) and by Alex Yakobo Kahela and Asteria Sugwejo Kahela vide a Deed of Guarantee and Indemnity also dated 06.06.2012 (Exh. P3). She added that the overdraft was recoverable in twelve months but the same was not repaid as scheduled and Gaspar John Minja passed away on 15.11.2013 after expiry of the twelve months and before repayment of the overdraft. That the second defendants stepped into the shoes of the deceased as administratrix and administrator of the estates of the deceased Gaspar John Minja. She testified that efforts to ask the defendants pay the loan as agreed proved futile hence this suit.

The second defendants, through Doris Martine who testified as DW1, essentially, do not dispute the plaintiff's averments. However, DW1 comes up with a defence that she never consented to the matrimonial home standing on plot No. 34 Block "GG", Kijenge Area in Arusha Municipality being mortgaged as security for the loan. She adds that the Spouse Consent Form which shows that she consented to the matrimonial home being mortgaged as security is forged and the picture on the form is not of her. She tendered her Marriage Certificate as Exh. D1, the letter of appointment as joint

administratrix together with Daalgreen Gasper; administrator) of the estates of the late Gasper John Minja (as Exh. D2; a photocopy of Mortgage of a Matrimonial Home (in which she is alleged to have consented but which bears a picture of another woman and alleges the consent was forged) as Exh. D3 and a photocopy of her Identity Card as Exh. D4.

She thus prays that the suit be dismissed with costs.

The learned counsel for the parties agreed to file their respective written closing submissions by 20.10.2016. However, by that date, it was only the learned counsel for the plaintiff who had walked the talk. I therefore have composed the present judgment without the advantage of the second defendants' closing submissions.

The learned counsel for the plaintiff, in his closing submissions, has submitted on the first issue that there was ample evidence that the first defendant obtained a credit facility of Tshs. 50,000,000/- through Exh. P1. That the facility was not repaid as shown in the Bank Statement Exh. P4 and so confirmed by the plaintiff's witness. That the second defendant has not disputed in her written statement of defence and evidence. The learned counsel thus beckons the court to answer the first issue in the affirmative.

On the second issue which is whether the second, third and fourth defendants guaranteed clearance of the facility in case of any default by the first defendant, the learned counsel for the plaintiff has submitted that the Guarantee and Indemnity by Gasper John Minja (Exh. P2) and the Guarantee and Indemnity by Alex Yakobo Kahela and Asteria Sugwejo Kahela (Exh. P3) speak it all and that the same is testified to by the second defendant in her testimony-in-chief to the effect that her husband was a guarantor to the loan

and that he pledged the matrimonial home as collateral is clear evidence to answer the issue in the affirmative.

The learned counsel dismisses the second defendant's evidence to the effect that the spouse consent produced to the bank was forged arguing that that amounts to an admission which dismisses the allegation of forgery. The learned counsel states that under section 99 of the Probate and Administration of Estates Act, Cap. 352 of the Revised Edition, 2002, as an executor or administratrix of the deceased DW1 is his legal representative for all purposes. That is, the presence of the administratrix of the estates of the deceased is as if the deceased himself was before the court. On this premise, the learned counsel for the plaintiff urged the court to answer the second issue in the affirmative.

On the third issue which is whether the defendants serviced the loan, the learned counsel for the plaintiff states that through the evidence of PW1 and Exh. P4 it is clear that as at 30.09.2014, the first defendant's Bank Statement was reading Tshs. -82,335,332/66 and that nothing has been done to clear the debt to that date.

As for reliefs to which the parties are entitled which is the subject of the last issue, the learned counsel for the plaintiff submitted that the reliefs sought in the plaint should be granted as prayed.

Having summarized the background of the present case, the evidence of both parties to the suit as well as the closing submissions for the plaintiff, I should now be in a position to confront the issues as framed for determination. However, before I do that, I find it appropriate to discuss first the defence raised by one of the second defendants; an administratrix of the estate of the late Gasper John Minja. As shown above, the second defendants' story told

by the administratrix of the estates of the deceased Gasper John Minja is that she never consented to the matrimonial house being pledged as security of the loan to the first defendant. This issue, I should confess, has taxed my mind a great deal. However, having considered the law and injected common sense to the issue, my answer is this. The administratrix has been sued in place of the deceased Gasper John Minja. She is standing in court in his place. As such it is odd to hear from her as an administratrix that she did not consent to the matrimonial house being pledged as collateral. It is like hearing the deceased stating that "I guaranteed the loan facility given to the first defendant. The first defendant did not service the same. My wife did not consent to the matrimonial house being pledged as security. The plaintiff's suit should therefore be dismissed" The question which I pose to myself at this stage is: what is the effect of that allegation on the credit facility? To my mind, that allegation does not invalidate the fact that the late Gasper John Minja guaranteed the loan given to the first defendant. Neither does it invalidate the facility itself. The administratrix of the estates of the late Gasper John Minja cannot play a double role here; as an administratrix of the estates and as an objector at the same time. What she was supposed to do, in my view, was to file an objection as an objector; not to bring such defence as an administratrix of the estates. By this lame defence, it seems to me, the administratrix is just ploughing the sands.

The foregoing said, I dismiss the administratrix's contention.

Reverting to the issues framed, the first issue is whether the plaintiff granted to the first plaintiff an overdraft facility of Tshs. 50,000,000/=. The evidence on record speaks loudly and clearly that the overdraft facility was granted to the first defendant. This is evidenced by a document titled CREDIT FACILITY: OVERDRAFT FACILITY OF TZS 50,000,000/= (NEW) which was tendered and

admitted in evidence as Exh. P1. This document was signed on 28.05.2012 by Shazia Rashid and Rahim Kanji as, respectively, Relations Officer, Corporate Banking and Manager, Corporate Banking for the plaintiff bank on the one hand and the first defendant (signed by on its behalf by two Directors Alex Yakobo Kahela and Asteria Kahela) and the three guarantors; Alex Yakobo Kahela, Asteria Kahela and Gaspar John Minja. Likewise PW1 aptly testified on this. Luckily, the second defendants, through DW1, do not dispute this glaring fact. I therefore answer this issue in the affirmative; that is, the plaintiff granted to the first plaintiff an overdraft facility of Tshs. 50,000,000/=.

The second issue is whether the second, third and fourth defendants guaranteed clearance of the facility in case of any default by the first defendant. This issue will also not detain me much. I have already stated in the foregoing paragraph that the guarantors signed Exh. P1. The late Gaspar John Minja committed himself by signing under the following clause:

"AS PERSONAL GUARANTOR WE HEREBY ACCEPT  
THE TERMS AND CONDITIONS CONTAINED IN  
THIS LETTER OF OFFER DTB/CB/1006/2012  
DATED MAY 23RD, 2012"

Likewise, the third and third defendants committed themselves by signing under the following clause:

"AS GUARANTORS WE HEREBY ACCEPT THE  
TERMS AND CONDITIONS CONTAINED IN THIS  
LETTER OF OFFER DTB/CB/1006/2012 DATED  
MAY 23RD, 2012"

In addition to that, Gaspar John Minja and the third and fourth defendants executed Guarantee of Indemnity instruments which were tendered in evidence and admitted and marked Exh. P2 and P3 respectively. In Exh. P2, the late Gaspar John Minja, whose estates are administered by Doris Martine and Daalgreen Gasper, guaranteed to repay the overdraft facility given to the first defendant. So did the third and fourth defendants in Exh. P3. This is enough evidence to answer the second issue in the affirmative; that is, the second, third and fourth defendants guaranteed clearance of the facility in case of any default by the first defendant.

Next for consideration is the third issue which is whether the defendants serviced the loan. Again, this issue is not difficult to answer. The testimony of PW1 is to the effect that the defendants never serviced the facility and that as at 30.09.2014 the first defendant's Bank Statement was reading Tshs. - 82,335,332/66 and that nothing has been done to clear the debt to the date she was testifying. Exh. P4 lends credence to the testimony of PW1. This fact, apparently, is also not disputed by the second defendants. In short, the evidence on record shows without any iota of doubt that the loan facility was advanced to the first defendant and that it was guaranteed by the other defendants but no single cent was repaid to service it. The third issue is therefore answered in the negative; that is, the defendants did not service the loan.

The last issue is about reliefs. As shown at the beginning of this judgment, the plaintiff has prayed for an order for payment of: Tshs. 82,335,332/66 being the principal sum with interest accruing thereon as at 30.09.2014, interest at the rate of 20% per annum from 01.10.2014 to the date of filing, general damages of an amount the court may deem fair, interest at the court rate of 12% per annum from the date of judgment to the date of full



satisfaction of the decree and costs of this case. I find no justification in granting the second prayer as the interest prayed for has been included in the first prayer. Likewise, I find no justification for payment of general damages. As for interest at the court's rate from the date of judgment to the date of full satisfaction of the decretal sum, I find the 12% per annum prayed for to be on the high side. In its stead, I grant 7% per annum as interest payable on the decretal sum.

In the final analysis, the issues having been answered in the manner discussed and shown hereinabove, this suit is decided for the plaintiff and, in terms of rule 67 (3) of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012, I proceed to decree as follows:

1. The defendants should, jointly and severally, pay the plaintiff Tshs. 82,335,332/66 being the principal sum with interest accruing thereon as at 30.09.2014;
2. The defendants should, jointly and severally, pay the plaintiff interest at the court's rate of 7% per annum on the decretal sum from the date of judgment to the date of satisfaction in full; and
3. The defendants should, jointly and severally, pay the plaintiff costs of the suit.

Order accordingly.

DATED at DAR ES SALAAM this 16<sup>th</sup> day of December, 2016.

**J. C. M. MWAMBEGELE**  
**JUDGE**