

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
(ORIGINAL JURISDICTION)**

CIVIL CASE NO. 269 OF 2014

NIC BANK (TANZANIA) LIMITED (Previously known as **SAVINGS & FINANCE COMMERCIAL BANK**) **PLAINTIFF**
VERSUS

1. PATRIC EDWARD MOSHI **1ST DEFENDANT**
2. JANETH PATRICK MOSHI **2ND DEFENDANT**

Date of Last Order: 28/07/2016

Date of Judgment: 31/08/2016

JUDGMENT

FELESHI, J.:

The plaintiff sues the defendants among other relief(s) for payment of Tshs. 61,541,676.74/= being a credit facility advanced to the defendants by way of bank loan guarantee facility. She also prays for payment of commercial interest at 21% per annum on the principal sum, interest on decretal sum at 12%, general damages and costs of the suit.

In reply, the defendants partly admitted advancement of a loan facility to BP Tanzania Ltd but not to the amount of Tshs. 200,000,000/=. Additionally, they stated that the plaintiff breached the contract by failure to honour the bank guarantee facility rendering the claim baseless. They urged the suit to be dismissed with costs to the defendants.

Two (2) issues were framed namely:-

- 1. Whether the defendants are liable to pay a sum of Tshs. 61,541,676.74/= to the plaintiff.**
- 2. To what reliefs are the parties entitled to.**

To establish her claims, the plaintiff paraded just a single witness, that is, PW1 Hassan Rashid Singano whereas the defendants also had only one witness, that is, the testimony of DW1 Patrick Edward Moshi. The plaintiff engaged the services of C & M Advocates whereas the defendants were led by Benedict Bahati Bagiliye, learned advocate.

PW1 who works with NIC Bank Tanzania Ltd (Saving & Finance Commercial Bank Ltd) as a Credit Officer testified that, the defendants are clients who operate an account in the name of PATCO Enterprises (T) Limited. It was his testimony that, the defendants applied for a credit loan facility in the form of guarantee where the Bank guaranteed them to take fuel from BP Tanzania Ltd not exceeding Tshs. 200,000,000/= whereas they were to sell the fuel and pay to BP (T) Limited.

The applicable procedure was that a contract was to be given after approval of the application. A credit facility for Tshs. 200,000,000/= by the Saving & Finance Commercial Bank Ltd dated 28/07/2010 was admitted and marked Exhibit "P1". PW1 added, Patrick Edward Moshi & Janeth Moshi (directors of PATCO Enterprises (T) Limited) jointly and severally guaranteed the Bank in case PATCO Enterprises fails to pay the loan. The joint and several Guarantee and Indemnity dated 04/08/2010 and 03/08/2010 respectively were admitted and marked Exhibit "P2".

Then, PATCO continued to utilize the credit facility to take fuel on loan from BP and deposited money in their account at the plaintiffs' Bank wherefrom payment was made to BP. The Business continued from August, 2010 to December, 2010 whereas towards the end of December, 2010, PATCO Enterprises defaulted repayment to BP (T) Limited.

On 24th January, 2011, the Bank wrote Demand Notices to Patrick Edward Moshi and Janeth Patrick Moshi valued at Tshs. 48,638,000/= being an outstanding balance claimed by BP (T) Limited from PATCO Enterprises. Neither PATCO Enterprises nor Patrick Edward Moshi & Janeth Patrick Moshi responded to the Notice or paid the outstanding balance.

As a result, the Bank decided to pay the Tshs. 48,642,240/= to BP. Demand Notice for payment of overdue Guarantee plus interest dated 24/01/2011 addressed to Patrick Moshi and Ms. Janeth Patrick Moshi were collectively admitted and marked Exhibits "P3". It was further testimony by PW1 that, the money that the Bank paid to the BP was debited from an account held by PATCO Enterprises Tanzania Ltd which was used to deposit the fuel sales they received from the BP (T) Limited. A customer temporary Bank Statement for PATCO Enterprise (T) Ltd dated 01/09/2012 was admitted in evidence and marked Exhibit "P4".

Moreover, Certification of Bank statements and certification to Security of Electronic Generated Bank statements from the Account No. 0059277 and Account No. 2000052437 in the name of M/S PATCO Enterprises TZ Ltd was admitted and marked Exhibit "P5".

PW1 added that, up to 30/06/2014, the Bank's claim against PATCO Enterprises TZ Ltd was Tshs. 61,541,676/=. The figure triggered from Tshs. 48,642,676/= paid to the BP on 17/03/2011 and 25/03/2011 where Tshs. 48,600,000/= and Tshs. 42,240/= respectively were paid in two installments plus interest. It is the interest that accrued from 25/03/2011 to 30/06/2014 which raised to Tshs. 61,541,676/= per Exhibit "P4".

PW1 thus prays the Court to be pleased to order Patrick Edward Moshi and Janeth Patrick Moshi to pay Tshs. 61,541,676/= and interest at 21% interest from 01/07/2014 to the date of Judgment. PW1 also prays for the defendants to be ordered to pay 12% interest of Tshs. 61,541,676/= from the date of Judgment to the date of payment in full, costs of the suit and general damages to the tune of Tshs. 20,000,000/=.

He added that, it was PATCO Enterprises TZ Ltd that authorized the plaintiff Bank to remit the money to pay for the invoice issued by the BP. The payment was guided by invoices whereas three invoices issued by the BP constituted the claim of Tshs. 48,642,240/=. Upon receipt of the three invoices, the Bank consulted PATCO Enterprises by telephones followed by Demand Notice issued to the directors of PATCO Enterprises (T) Limited.

Besides, there was no Demand Notice sent to PATCO Enterprises (T) Limited. The Loan facility was taken by PATCO Enterprises & Ltd under the guarantee of Patrick Edward Moshi and Janeth Patrick Moshi. Upon the default by PATCO Enterprises Tanzania Ltd, the BP issued a demand letter to the plaintiff Bank indicating that PATCO had failed to pay for the fuel.

Upon receipt of the invoices from BP, the Bank wanted for PATCO Enterprises (T) Ltd to issue payment instructions. It was only for two invoices where the Bank acted adding that Patrick Edward Moshi issued payment instructions to the Bank for PATCO Enterprises (T) Limited.

In defense, DW1 testified that, in 2010, PATCO Enterprises (T) operated by Patrick Edward Moshi & Janeth Patrick Moshi was given Bank guarantee by the NIC Bank for Tshs. 200,000,000/= for DW1 to order petrol and diesel fuel from BP Tanzania Ltd. DW1 added that, they used to issue delivery notes to BP

(T) Limited for the quantity of fuel they needed whereas it was BP (T) Limited who supplied fuel to the petrol station.

However, prior to the supply, they used to send receipts and invoices to the Bank. DW1 added that, they are not liable to the NIC Bank in respect of any claim. Wherever he deposited money to his account, he was being issued with deposit slips adding that there was no point of time the Bank deposited money in his account. To that effect, no evidence was adduced that the Bank deposited money in his account.

DW1 agreed that, he executed an agreement with the NIC Bank though he did not remember the quantity of fuel he was to be supplied adding that all the fuel supplied to DW1 was paid for. Besides, it was for the Bank to pay BP (T) Limited upon DW1's confirmation of the supplied fuel and the money came from the account of PATCO Enterprises (T) Ltd.

It was DW1's further testimony that, he lastly deposited money in his account in 2010 adding that, BP (T) Limited could not have been paid if no money was available in his account. By 30/06/2014, there was minus Tshs. 61,541,676/= in the account. DW1 last took fuel from BP (T) Ltd in 2010.

In November, 2010, the Bank told DW1 that he could no longer get fuel as his company was under receivership. He added that, he has no unsettled claims with the plaintiff and that the agreement involved PATCO Enterprises (T) Ltd whereas DW1's role was only that of guarantor.

Under normal circumstances, it was PATCO Enterprises (T) Limited who was supposed to be sued first and upon his failure to satisfy the agreement, that is where the guarantors could have been brought in. It was his further testimony that any claim would have been directed to the receiver manager whereas the

receiver manager one K & M Advocates said that they have never been contacted by the Bank.

In final submission, the defendants' counsel submitted that, PATCO Enterprises (T) Limited was procuring fuel on credit from BP (T) Limited and deposited the Money in PATCO's Bank account. The defendants also agree that the fuel taken on credit from BP (T) LTD was paid from PATCO's Bank account after verification of the unpaid invoices and upon satisfying themselves that the invoices submitted to the plaintiff match the fuel taken on credit. The defendants' role as directors of PATCO could only authorize the plaintiff to remit the amount due as per verified unpaid invoices.

The defendants' counsel further submitted that, they (defendants) strongly disagree with the plaintiff regarding the allegations that PATCO Enterprises (T) Limited procured fuel from BP (T) Limited which remained unpaid, that the plaintiff deposited her money in PATCO's bank account and that after depositing her money, she remitted the payments to BP (T) Limited of the alleged unpaid fuel supplied to PATCO by BP (T) Limited. He added, no evidence was advanced that PATCO procured fuel from BP (T) Limited which remains unpaid.

Furthermore, BP (T) LTD was issuing fuel to PATCO Enterprises (T) Limited upon PATCO pressing an order specifying the quantity of fuel needed to be supplied. Upon BP (T) Limited supplying the ordered fuel to PATCO, the defendants as directors of PATCO could sign the delivery notes as a symbol of acknowledging receipt of the delivered fuel.

Notably, no delivery note was availed in evidence. He cited the case of **Engen Petroleum (T) Limited vs. Tanganyika Investment Oil and Transport Limited, Civil Appeal No. 103/2003 (Unreported), (Dar es Salaam Registry)** where the Court of Appeal underscored that:-

"Ground two of the appeal has been made simpler by the concession by counsel for the appellant, that the appellant did not establish the claim on the balance of probability. That is indeed the position because no invoices and delivery notes were produced to prove that petroleum products supplied to the respondent were not paid for."

Besides, no officer of the plaintiff was called to testify or tender a Pay in Slip that he deposited the said money. Besides, the plaintiff was also duty bound to prove that she paid the money to BP (T) Limited.

On their part, the plaintiff's counsel submitted that, the defendants severally and jointly guaranteed a loan facility advanced to PATCO Enterprises (T) Limited dated 28/07/2010 marked Exhibit "P1" vide a Joint and Several Guarantee which was admitted and marked Exhibit "P2" upon default to pay by the said PATCO Enterprises (T)Limited.

Besides, the defendant' company denied honouring the above debt whereas as a result, the plaintiff decided to pay the same through the Bank account of PATCO Enterprises (T) Limited after a Demand Note from BP (T) Limited. Moreover, since the defendants' company did not pay the said debt, the same escalated as by 30/06/2014 with arrears rising to Tshs. 61,541,676.74 per the Bank Statement marked Exhibit "P4".

The plaintiff's counsel added that, there is no legal requirement of listing a debt to an appointed receiver and manager especially by an unsecured creditor like the plaintiff. Also, liability of a surety is coexistent with that of a debtor unless otherwise provided for by the contract. The plaintiff's counsel urged for the prayers in the plaint to be granted.

Having considered the evidence on record, the following are the deliberations of this Court in disposal.

As to the 1st issue as to whether the defendants are liable to pay a sum of Tshs. 61,541,676.74/= to the plaintiff, at the outset, per Exhibit "P1", the loan facility was entered between "Savings & Finance Commercial Bank Limited" and not "Savings & Finance Commercial Bank" as cited by the plaintiff in her pleadings.

Besides, there is no document showing how the plaintiff who was not party to the loan facility acquired the right to sue in respect of the said loan facility. Moreover, the said loan facility was advanced by "Savings & Finance Commercial Bank Limited" to PATCO Enterprises (T) Limited and not the defendants, that is, Patrick Edward Moshi & Janeth Patrick Moshi. Notably, the defendants herein that is, Patrick Edward Moshi & Janeth Patrick Moshi were mere guarantors to an intended loan facility not exceeding Tshs. 200,000,000/= as clearly testified by both PW1 and DW1 in evidence.

At any stretch of imagination, being guarantors, "Savings & Finance Commercial Bank Limited" or the plaintiff ought to have sued the said PATCO Enterprises (T) Limited as the proper party with the current defendants, that is, Patrick Edward Moshi & Janeth Patrick Moshi pleaded as necessary parties in the capacity of guarantors in the advanced loan facility.

It is unfound that the plaintiff opted to sleep on her right to levy her claims against PATCO in person or her receiver while according to the testimony by DW1, the said plaintiff was since November, 2010 aware that the Company was under receivership. This is according to the testimony by DW1 that in November, 2010, the Bank told him that he could no longer get fuel as his company was under receivership.

The reason as to why the said PATCO Enterprises (T) Limited who was as such advanced the loan facility ought to have been joined as a proper party to the suit is because the said PATCO Enterprises (T) Limited is a limited company

thus a legal entity capable of suing and being sued. The same legal entity has its properties and in case of winding up of the company, the same (as a beneficiary of the advanced loan facility) is liable for repayment of all the dues in respect of the said loan through sale of all the properties belonging to the said company.

Considerably, even if the defendants were guarantors in the loan facility, the duty to repay the same primarily rests to the borrower, that is, PATCO Enterprises (T) Limited who as such, conceived the idea of obtaining the said loan, received it, made use of it and lastly enjoyed the fruits of the said loan facility. That is the essence for the name of PATCO Enterprises (T) Limited to appear in the loan facility as a borrower.

In the Demand Notices addressed to the 1st and 2nd respondents (Exhibit "P3") the two reads at their 3rd and 4th paragraphs as follows:-

"Patco Enterprises (T) Limited was placed under Receivership effectively from 9th November, 2010. This makes the Guarantee Facility amounting to TZS. 200,000,000.00 which was granted to BP Tanzania Ltd, repayable on demand and entitles the bank the right to demand immediate payment as stipulated in the said offer letter with reference: ADV/EN/491/2010.

We regret to observe that this facility is due to payment to the tune of TZS. 48,638,240.00 being settlement of outstanding invoices for the fuel supplied to Patco Enterprises (T) Limited by BP Tanzania Limited".

As earlier pointed out, upon being put under receivership, the plaintiff ought to have sued PATCO Enterprises (T) under receivership of the appointed receiver where repayment stand levied in the properties under receivership with the outstanding debt at last revolving to the guarantors of the loan facility because primarily, the guarantors are distinct from PATCO Enterprises (T) Limited despite being directors of the same.

From the above, with due respect to the submission by the plaintiff's counsel on listing of debts to an appointed receiver and or manager, this Court is

of the firm stand that such view is seriously misconceived because ultimately, the role of a receiver or manager is to manage the said properties of a company under receivership and pay all the outstanding debts that is, both secured and unsecured and disburse the remainder.

The fact that the defendants, that is, Patrick Edward Moshi & Janeth Patrick Moshi are both Directors to PATCO Enterprises (T) Limited and guarantors of the same, that alone cannot justify shifting of liability. In accordance with the loan terms under Exhibit "P3", PATCO Enterprises (T) Limited was placed under receivership effectively from 09/11/2010. As aforesaid, the said fuel was supplied to PATCO Enterprises (T) Limited by BP (T) Limited.

In the famous case on company law of **Salomon vs. Salomon** (1897) A.C 22, the Court observed at page 30 that:-

" It seems to be impossible to dispute that once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are".

Difference in personality between the persons with authority of a company and the company itself as clearly stated in **Salomon vs. Salomon** (supra) was approved in the case of **Yusufu Manji vs. Edward Masanja & Abdallah Juma [2006] T.L.R 127** where the Court of Appeal of Tanzania cited at page 128 that:-

"While a company is at law a different person altogether from the subscribers, in certain special and exceptional circumstances, the Court may go beyond the purview of this principle by what was described in SOLOMON vs. SOLOMON as lifting the veil".

Though item 16.2 under Exhibit "P2" dated 04/08/2010 is to the effect that "Savings & Finance Commercial Bank Limited" was at liberty to enforce the guarantee by instituting legal proceedings in the High Court of Tanzania against

the guarantors, that cannot relieve to implicate the proper parties to the loan facility which as such, as earlier noted, was not impleaded for any payment and fuel delivery was made in her favour.

In other words, the loan facility agreed was just a "guarantee" to supply fuel to PATCO Enterprises (T) Limited to a value not exceeding Tshs. 200,000,000/= as testified by PW1 obviously to be proved by evidence. In the circumstances, one cannot thus say that there was as such a deal completed in advancing the loan. From the above in unison, the suit ought not to have been instituted by the plaintiff against the defendants.

On the other hand and upon assuming that the case was properly filed in Court, as correctly submitted by the defendants' counsel, the plaintiff has failed to establish how she paid the outstanding debts to BP (T) Limited including, though not limited to, under whose instructions and as to what amount in a particular transaction the same was paid.

The need to establish the above is not hard to grasp. The plaintiff not being a party to the loan facility has to make a case as to how she was obliged to make the said payments. Moreover, as correctly submitted by the defendants' counsel, no payment can just be paid unless one is dully instructed so to act. Notwithstanding, the same ought to have reasonably be adduced in Court in evidence in justification.

For that matter, with due respect to the plaintiff's counsel, it will be unbecoming for a Bank to tender somebody's Bank Statement without tendering any evidence showing the instructions he was acting upon in effecting the payments. Worse is that, it is the same Bank which failed to bring some instructions to pay has tendered a Bank Statement of the defendants showing how they paid the said money.

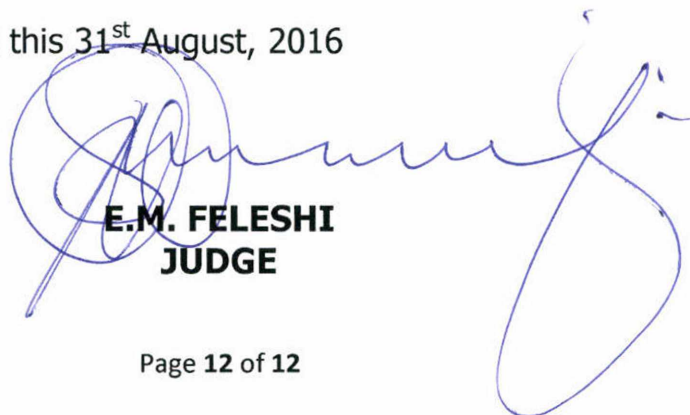
Under such circumstances, one will be unsure if the said Bank paid the said money at their volition and not under the instructions of the defendants. As earlier observed, if the loan was advanced to PATCO Enterprises (T) Limited, how could one argue that PATCO had to take fuel from BP (T) Limited in respect of the same agreement, yet, on credit?

Besides, if PATCO was supplied with fuel by BP (T) Limited on credit, how can now the plaintiff formerly "Savings & Finance Commercial Bank" finds her way and sue without establishing any link through evidence involving the plaintiff or "Savings & Finance Commercial Bank", BP (T) Limited, PATCO Enterprises (T) Limited and the defendants?

Notably, the referred BP (T) Limited who was as such paid the said money was not summoned in Court in proof that they were so paid by the plaintiff for the purposes of clearing the outstanding debt emanating from the fuel supplied in favour of the defendants and or PATCO Enterprises (T) Limited. Besides, as correctly submitted by the defendants' counsel, no delivery notes were tendered in Court to establish the claimed fuel supply.

It is worth also saying that, no Overdraft Facility was ever established in evidence to justify issuance of the claimed sum of money to BP (T) Limited by the plaintiff. From the above in composite, the suit lacks bases in law. Hence, the 1st issue is answered in the negative. Resorting to the 2nd issue in consequential, the suit is hereby dismissed with costs. It is so ordered.

DATED at Dar es Salaam this 31st August, 2016



E.M. FELESHI
JUDGE