

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL CASE NO. 217 OF 2017

NMB BANK PLC PLAINTIFF

VERSUS

ANDREW KENETH SHANGO DEFENDANT

Date of last Order: 13/05/2020

Date of Judgment: 29/05/2020

EXPARTE JUDGEMENT

MGONYA, J.

In order to appreciate the Plaintiff's claim in this case, the brief background in relation to this matter is of importance. The same is as below:

The Defendant herein one **ANDREW KENETH SHANGO** was an employee, of the Plaintiff's Bank (**NMB BANK PLC**). Being an employee it was open for him to seek for unsecured staff loan which the Plaintiff has been granting her employees after doing assessment. The Defendant sought the said loan which both parties signed Loan Agreement and an amount of **Tshs. 43,000,000/=** was granted to the Defendant.

Further, that sometimes later in November, 2015 the Defendant issued a 24 hours resignation notice for the reason that he intends to undertake further studies; the same was accepted by the Plaintiff subject to the Defendant to honour the loan agreement. However, since the Defendant left his Employer, he has never served the said loan as directed in both Facility Letter and Loan Agreement, and instead he has opted not to remit any amount thus this suit.

Out of the above history, the Plaintiff is now before the court for some specific prayers. My eyes have caught the 9th and 10th paragraphs of the Plaint, which for clarity and to attract the cause of action in this case, deserves to be quoted:

"9. That despite being aware of the conditions given by the Plaintiff for her resignation to be accepted by the Plaintiff, the Defendant opted to go ahead and leave his employment with the Plaintiff without giving a viable way as to how he was going to settle his dues with the Plaintiff.

10. That despite the Plaintiff efforts to contact the Defendant to settle his dues, the Defendant neglected and ignored to overdue credit facility with the Defendant to date. "

The above cause of action prompted the Plaintiff to seek the redress on the following reliefs pleaded in the Plaint as realized below:

- (i) Payment of Tshs. 54,432,536.86 being the principle balance and interest of the loan granted to the Defendant;**
- (ii) Payment of commercial interest at 23% per annum of the above sum from the date of filing this suit to the date of Judgment;**
- (iii) Court interest at 12% per annum from the date of judgment until the granted amount will be paid in full;**
- (iv) General damages not less than Tshs. 50,000,000/=;**
- (v) Cost of this suit; and**
- (vi) Any other reliefs this honourable court deems fit to grant.**

Pursuant to the Order of this Court dated 28th February, 2018, the Plaintiff was allowed to proceed to prove her case **Exparte** upon the Defendants' failure to avail himself before the court and especially after the court being satisfied that there was a service to the Defendant herein through

publication in Mwananchi Daily Newspaper dated 1st August 2018 at page 36; hence this *Exparte* Judgment from the *Exparte* proof.

Before commencement of the trial, the Court and the Plaintiff's Counsel herein framed three issues for determination as herein below:

- i. Whether there is Loan Agreement between the parties herein;***
- ii. If the first issue is answered in affirmative, whether the Defendant breached the said Loan Agreement; and***
- iii. To what reliefs are the parties entitled to.***

During the hearing, the Plaintiff's case was proved by **MS. MWAJABU MUSIRIKALE ABEDI (PW1)**, the Plaintiff's Recovery Officer who was the sole witness led by the Plaintiff's Counsel **Mr. Emmanuel Mbuga learned Counsel**. In the course of testifying, PW1 in brief identified her duties to be, among others, dealing with transactions in offering loan / advances to individual, institutions and Plaintiff's staff.

PW1 testifying particularly on the dispute at hand, averred that, the Defendant herein one **ANDREW KENETH SHANGO** in this case was once a Plaintiff's staff whose work station was at Arusha. PW1 testifies that, the Defendant as an employee of

the Plaintiff's bank, in 2015, opted to apply loan to the Plaintiff of which his application was sent to Plaintiff's Head Quarters at Dar es Salaam which made assessment and made an approval that the Defendant was qualified to be granted the loan advance he requested. Thereafter, both the Defendant and the Plaintiff signed Loan Agreement of which the Defendant was granted the loan amounting to **Tshs. 43,600,000/=**. To authenticate the said testimony, PW1 tendered the Loan Agreement which was referred as FACILITY LETTER on favor of the Defendant Titled **RE: UNSECURED STAFF GENERAL LOAN OF TSHS. 43,000,000/=** duly signed by the **NMB Seniour Credit Risk Manager one Elizabeth Muba** and the Defendant herein; together with the **Standard Staff Loan Application Form** in favour of Andrew Keneth Shango the Defendant herein duly signed by NMB Official and the Defendant on **20th February 2015** Collectively, the two documents were admitted and marked as **Exhibit P1** forming part of this honorable Court's record.

Further, PW1 submitted that the Loan Agreement, required the Defendant to remit to the Plaintiff the sum of Tshs. 787,000/= per month over a period of **72 months from February, 2015**. PW1 further testified that, the Defendant had been honoring the contract while working under the Plaintiff's bank. However, on **24th October 2015**, the

Defendant herein offered his 24 hours resignation letter. The same was replied through the Employer's letter dated 2nd November 2015. Both letters were tendered and admitted for evidence as **Exhibit P3**. It was PW1's further submission that since the Defendant decided to resign, he opted not to honor the Loan Agreement. In support of this allegation, **PW1** tendered **Exhibit P2** which is **NMB Loan Statement**, in favour of the Defendant's account where the same has shown that the last date the Defendant remitted the agreeable amount was on **25th October, 2015**. Further, from that date until filing of this matter the Defendant has not remitted any amount despite the fact that the Plaintiff also reminded the Defendant to pay his arrears through the reply letter which has been tendered as part of **Exhibit P3** herein.

Submitting further, PW1 told the court that, *inter alia* the interest charged to the Defendant as Staff was **9%**. However, since under the Loan Agreement the Plaintiff has the right to change the interest rate from the staff one to commercial rate applicable at that time; that applied to the Defendant herein when he stopped being the NMB staff and especially after he defaulted remittance. The commercial rate stated was at **23%**.

It is from the above premises, and on the basis of the evidence tendered in Court, gathered from the testimony of

PW1, it is the PW1's assertion that the Defendant has breached the terms and conditions of the Loan Agreement. From the same it is the Plaintiff's witness prayer that the Defendant pay to the Plaintiff the total sum of **Tshs. 54,434,536.86/=** which is the total outstanding as at the time of filing this suit together with other reliefs pleaded in the Plaint.

In determining the case at hand, and to start with, as the matter before the case need evidence to determine, I do appreciate the parameters of the burden of proof initiated by the law of **Evidence Act Cap. 6 [R.E. 2002] in section 110 (1) and (2), 111, 112 and 113** which provides:

"110. (1) whoever desires any Court to give Judgment as to any legal rights or liability defendant on the existence of facts which he asserts must prove those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person;

111. The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side;

112. *The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person;*

113. *The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.*"

It follows therefore that it is a cherished principle of law that, generally in Civil cases, the burden of proof lies on the party who alleges anything in his favor.

I am familiar indeed that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in cases on balance of probabilities. The decisions by the Court of Appeal of Tanzania in which this principle of law has been enunciated are now legendary. See the case of ***ANTHONY M. MASANGA VS. PENINA (MAMA NGESI) AND OTHERS, Civil Appeal No. 118 of 2014 (Unreported).***

A synopsis by the learned Author Sarkar in **SARKAR ON EVIDENCE, 14TH EDITION 1993 at page 1339** persuasively commenting on Indian provision of the Law similar to ours on the burden of proof partly has the following:

".....that the initial onus is always on the Plaintiff and if he discharges that onus and makes out a case which entitled him to relief, the onus shifts on to the Defendant to prove those circumstances, if any which would disentitle the Plaintiff to the same (BASIRUDDIN VS. SAAEBULLA, 32 CW No. 160)."

In the matter under scrutiny, since it is the Plaintiff who is alleging that there was a legal contract between the bank and its ex-employee, the Defendant herein, and that it is upon default the Plaintiff is now suing the Defendant on the default of the loan advance, then the burden of proof lies on the Plaintiff.

The question before the court is whether the Plaintiff has successfully discharged her duty to prove the facts she alleges in her favor.

As stated earlier in this Judgment, the issues in respect of this matter reads:

- i. Whether there is Loan Agreement between the parties herein;***
- ii. If the first issue is answered in affirmative, whether the Defendant breached the said Loan Agreement; and***
- iii. To what reliefs are the parties entitled to.***

In resolving the first issue, I feel it is important to restate portions of the evidence presented to court, portions which are not disputed.

First, that the Defendant herein was an employee to the Plaintiff since 23rd February 2005. **Second**, that on 20th February, 2015 the Defendant herein upon application was granted the staff loan advance to the tune of **Tshs. 43,600,000/=** upon signing the Loan Agreement with an agreement to serve the loan in **72** months in equal instalments of **Tshs. 787,000/=** monthly. **Fourth**, that on 24th October 2015, the said Defendant tendered a 24 hours resignation letter to his Employer, the Plaintiff herein. **Third**, that in respect of this case, the Defendant herein has been found in vain hence this **Exparte** proof case.

Now, having carefully considered the testimony of PW1 and three sets of documentary evidence adduced during the trial, the gist of questions remain as **first**, whether the Plaintiff

has proved her case to the standard required that is on balance of probability; and **second**, whether the Plaintiff is entitled to be awarded the relief appended in the Plaint on the facts established on evidence.

In determining the matter at hand, let me straight tackle the first issue to the effect:

“Whether there is Loan Agreement between the parties herein.”

On the basis of the testimony of **MS. MWAJABU MUSIRIKALE ABEDI (PW1)** in Court, and the evidence adduced in the *Exparte* proof proceedings via **Exhibit P1** being the Facility Letter / Loan Agreement between the parties herein and the Standard Staff Form Application in order to establish the Plaintiff’s claim in controversy between the Parties herein; I have taken a close look at the said documents and noted some following fundamental matters to the same as narrated herein below:

It is from the record of this court and especially in referring to **Exh. P1** in the Standard Staff Loan Application Form, it is indeed that the Defendant herein one **ANDREW KENETH SHANGO** whose record indicates that his date of employment with the Plaintiff was **23rd February 2005** and confirmed on **23rd November 2005**, sometimes in **February**

2015 applied for the loan advance worth **Tshs. 43,600,000/=** to his Employer NMB Bank PLC. The said application was duly approved by Plaintiffs' officers.

Further to that, **Exhibit P1** also indicates that, after the approval, on **12th February 2015**, the Plaintiff and the Defendant entered into a **Loan Agreement** where the Defendant through the Facility Letter was advanced the loan amounted **43,600,000/= (Tshs. Forty Three Million Six Hundred Thousand only)**, unsecured staff general loan, the purpose being personal use; for the term of **72 months** for the Defendant to pay the total of **Tshs. 786,788/=** montly.

Third, among other things, the Loan Agreement contains the terms and conditions thereto. And duly signed by the Defendant on one side and on the other side the Plaintiff's Senior Credit Risk Officer one Ms. Elizabeth Muba.

From the above facts, I would like first to refer to the meaning of **Agreement / Contract** in legal perspective according to the Laws of the Land. The law is very clear on the provisions of **Sections 10, 11 and 12** of the **Law of Contract Cap. 345 [R. E. 2002]** which clearly defines what Agreements / Contracts are and persons competent to contract.

Section 10 defines and constitutes that Agreements are Contracts. The same states:

"10. All agreement are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void:

Provided that nothing herein contained shall affect any law in force, and not hereby expressly repealed or disappplied, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents."

Further to that, **section 11 (1) and (2)** of the **Act (Supra)**, provides for the persons competent to contract and the remedy to the Agreement which has been contracted by incompetent party, the same states:

***11. (1)** Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.*

***(2)** An agreement by a person who is not hereby declared to be competent to contract is void."*

Further, **section 12 (Supra)** refers to what is a sound mind for the purposes of contracting. The same provides:

12. (1) *a person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational Judgment as to its effect upon his interests.*

(2) *A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.*

(3) *A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.*

From the above definition of the term **Agreement/Contract**, in my view, essential ingredients to the same which must be in place in order to make an Agreement valid includes: **free consent, competency or capacity to contract** and lastly **lawful consideration or object**.

Going back to the evidence adduced by PW1 at the trial, and particularly from the contents of **Exh. P1**, it is clear that the Defendant herein as he was the Plaintiff's employee by then, **by his free will and with sound mind** exercised his right by applying for a loan advance by filing in the Standard

Staff Form requesting the advance from his Employer, the Plaintiff herein. This can be evidenced by him placing his personal particulars to the said form and by signing the said form.

As a result of the approval of the said loan application to the tune of **Tshs. 43,600,000/=** the binding contract was entered between the Plaintiff and the Defendant herein. As it was still the Defendant who was engaged in the said Loan Agreement, I can confidently say that the Defendant herein by his **free consent**, he was **competent** and he had a **full capacity to contract** to obtain a **lawful consideration** from the Plaintiff, that is **Tsh. 43,600,000/=** under the terms and conditions as seen in the said contract, the Loan Agreement, **Exh. P1** of which was also duly signed by both parties herein.

Since Exhibit P1 was termed as a Loan Agreement between the Parties herein, at this juncture, I would like to focus now on the essential elements of a **Valid Contract**. Briefly and foremost, it has to be noted that, **Validity** of any contract is dependent upon not only on its form and content but also on factors attributed to the parties. If validity made, an agreement must meet the basic legal requirements of the rights and obligations created thereunder are to be enforced. A

contract is enforceable by either party if it satisfied all the fundamental elements to the contract such as:

The **first** element is **Offer and Acceptance**. A contractual relationship is initiated by one party extending an offer to the other to accept his proposition either according to the terms of the offer or on such other terms as the parties may eventually agree. Ultimately, for the agreement to be binding, there must be an **offer** and a corresponding **acceptance**. It is the said offer can now be termed as **Proposal** that, if accepted by another according to the terms, will create a binding Agreement.

The **second** essential element is **Consideration**. To bind the other party, he / she must pay the agreed price in return for the promise or undertaking by that other to discharge the obligations imposed on him by the contract. The price, need not be pecuniary in nature as long as it confers some value or benefit to the offeror.

The **third** essential element to the contract is **Intention to create Legal Relations**. In this regard, parties will only be bound in contract if their transaction was intended to create legal binding relations. It must be borne in mind that, intension is the core of every contract. The mutual intension of the parties to be bound in contract may be expressed in their oral or written agreement.

The above are the basic elements to be followed by other elements to the contracts of which in the matter at hand for great extent, do reflect. The same are **Contractual Capacity** and **Consensus Ad Idem**.

From the above legal definition of Proposal to the contract and essential elements of the Contract, this Court finds and is satisfied that through **Exhibit P1 there was a valid contract** between the Parties herein. Taking into consideration of the above explanation, the said contract (**Exh. P1**) had undergone all stages of the Contract to its finality to make it binding. In this regard and from my above observation, it is my firm view that, **there was a Legality to the Contract** between the Parties herein. Further, as referring to the ingredients of a legal contract under the law of the Land, **Law of Contract Cap. 345 [R. E. 2002]**, all the ingredients of a legal contract as seen herein **has been fulfilled**; as there was an offer and acceptance of consideration which here is the loan advanced. In the event therefore, the issue as to whether there is a Loan Agreement between the parties herein, this honorable court is satisfied by the evidence adduced by Plaintiff's sole witness and subsequently, the first issue is answered **POSITIVELY**.

As the answer to the first issue is answered positively, now the **second issue is, whether the Defendant breached the said Loan Agreement**. From the record of

this court and particularly from the Loan Agreement, it is stated that the loan advanced to the Defendant. Referring to Exh. P1 the Loan Agreement, the said loan was advanced to the Defendant on 12th February 2015. Further, the tenure of the said loan as per **clause 6.0** of the said Agreement is **72 months** from the date of acceptance of the Loan; and that there was no grace period to that effect.

Further, the Defendant herein was to remit the said loan in **72** installments of **Tshs. 786,788/=** monthly. For the **72 months** out of the said tenure, it was expected that 72 months would have run from **12th February 2015**, and lapse after **six years** that is on **12th February 2021**. From the record of this matter, the case at hand was instituted **on 14th November 2017**. Further, it is in record that the Defendant's 24 hours resignation letter was tabled on 24th October 2015, **8 months** after he has been advanced with his Employer the staff loan at **9% interest**. It has also been revealed by the Plaintiff's witness PW1 that, as from that date, to the date of institution of this case and above all, up to the time when PW1 was testifying before the court, the Defendant has failed to service his loan as agreed in the Loan Agreement. Further, the Employer has tried to find him in vain, hence they don't know his whereabouts.

Coming back to the Parties' Loan Agreement, of which both have signed, it is paramount that I refer to clauses **6.0** and **7.0** respectively of the Loan Agreement on tenure and Repayment of the Loan of which they deserve to be quoted:

"6.0 TENURE:

Seventy two (72) months from the date of acceptance of the Letter of Offer hereof, (renewable upon request by the borrower). There shall be no grace period.

7.0 REPAYMENT OF THE LOAN:

The staff general credit facility amount shall be fully repaid through seventy two (72) months instalments of Tshs. 786,788/= as shown in the attached Loan Repayment Schedule herewith referred to as Annex 1, furthermore, should the Bank interest rate change then, the monthly instalments shall change to reflect on the change of interest rate.

From the above terms and the evidence adduced before this honourable court especially from **Exh. P**; the bank statement, the Defendant herein by not remitting his monthly instalments from October 2015, as per terms and conditions of

the Loan Agreement, **it is apparent that he has breached the terms and conditions to the said Loan Agreement.** In the event therefore **the second issue is answered POSITIVELY.**

Before I determine the last issue on reliefs, I would like to say something about the interest rate that was offered to the Defendant as the same emerged during the PW1's testimony. It was the PW1's assertion that the Defendant was offered the staff loan at **9%** interest. However, after his resignation as he was not anymore a staff and above all after his non servicing of the loan, the bank decided to change the interest from **9%** to **23%**, the commercial rate. On the validity of this act, let me refer to clause **4.0** of the Parties' Loan Agreement, as quoted herein below:

"4.0 INTEREST ON LOAN:

The credit facility shall be charged interest rate of Nine (9) per cent per annum, accruing dally on the outstanding balance and charged monthly. The Banbk reserves the right to change the rate of the interest, which will not be unreasonably changed, with prior consultation with the borrower. The above stated interest rate shall apply to this loan as long as the borrower is staff of the NMB Plc.

Hence, should the borrower's employment with the Bank be terminated for any reason(s) whatsoever, then the Bank shall have the right to change the interest rate to a commercial rate that shall be applicable at the time."

On the matter of interest as seen in **clause 4.0** of the Loan Agreement, I have to state that, as well said by PW1, one of the condition to attain a lower interest at the rate of **9%** was one being a staff. However, since the Defendant herein ended his employment by tabling the 24 hours resignation letter to his Employer, the Plaintiff herein, it was by his own choice, his employment came to an end and from that time, he disqualified himself from attaining the **9% interest rate** to his loan. On the other side, there was a room for consultation before the change of the interest rate as well stated in the above clause. However, as testified, after resignation, the Defendant herein was nowhere to be found. Under those circumstances and especially under the wording of clause 4.0 of the Loan Agreement, it was fair for the Employer to proceed to change the interest rate to commercial rate as he had no any other alternative. Further to that, there was a completely breach of terms to the said Loan Agreement as the Defendant decided not to remit a single cent of the advanced staff loan to his Employer as agreed.

From the above explanation, this court states that, the act of the Plaintiff to change the interest rate of **9% to 23% commercial** interest rate was an obvious act as even in the event where the Employer could have wanted to discuss the matter with the Defendant before its action, the Defendant was not available. Above all, by the Defendant's resignation, **he lacked the important qualification** of getting the 9% interest as he was no longer the Plaintiff's employee as well stated in **clause 4.0** of the Loan Agreement. In the event therefore, and from the above explanation, it was just for the Plaintiff to execute the terms and conditions of the Agreement as intended as the same is a lawful Agreement duly signed by both parties by their free wills while understanding the terms therein.

At this juncture, let me determine the third and last issue as **to what reliefs are the parties entitled to.**

The Law of Evidence Act Cap. 6 [R. E. 2002] as seen earlier under section 110 (1) provides that whoever desires a court to give Judgment in his favor, he/she must prove that those facts exists.

The above provision place the burden of proof to whoever desires the court to give Judgment as to any legal right or liability dependent on existence of facts which he/she

ascertains. The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him/her.

The Plaintiff has a duty to prove his case even if the matter proceeds *Exparte*. This position seen in a case of ***ROSELEEN KOMBE VS. ATTORNEY GENERAL (2003) TLR 347*** where the court held that:

"Even where the Defendant files no written statement of defence at all or does not appear, let alone where he file an evasive or general denial, the Plaintiff still has to prove his case for the relief sought, even if Exparte".

Thus since the Plaintiff have proved his case by tendering the Facility Letter / Loan Agreement and the Staff Loan Application Form (**Exhibit P1**), the Defendant's bank statement (**Exhibit P2**) and the Defendant's resignation letter and its reply as (**Exhibit P3**) to prove that the Defendant was provided with the loan advance and defaulted payments as stipulated in the Loan Agreement, this court finds that the Plaintiff is entitled to some remedies a prayed in the Plaint.

The Plaintiff prayed for the following reliefs:

- (i) Payment of **Tshs. 54,432,536.86** being the principle balance and interest of the loan granted to the Defendant.
- (ii) Payment of commercial interest at **23%** per annum of the above sum from the date of filing this suit to the date of Judgment.
- (iii) Court interest at **12%** per annum from the date of judgment until the granted amount will be paid in full.
- (iv)** General damages not less than **Tshs. 50,000,000/=**.
- (v) Cost of this suit.
- (vi) Any other reliefs this honorable court deems fit to grant.

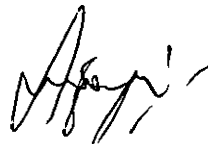
In the end result therefore, the Plaintiff is hereby granted:

- (i) Payment of **Tshs. 54,432,536.86** being the principle balance and interest of the loan granted to the Defendant;
- (ii) Payment of commercial interest at **23%** per annum of the above sum from the date of filing this suit to the date of Judgment;

- (iii) Court interest at **12%** per annum from the date of judgment until the granted amount will be paid in full;
- (iv) General damages to the tune of Tshs. **25,000,000/=** to be paid to the Plaintiff by the Defendant; and
- (v) **Cost** of this suit to be borne by the Defendant.

Order accordingly.

Right of Appeal Explained.



L. E. MGONYA
JUDGE
29/05/2020

Court: Judgment delivered before Hon. C. M. Kisongo, Deputy Registrar in chambers in the presence of Mr. Masunga, State Attorney holding brief for Mr. Emmanuel Nguva, Advocate for the Plaintiff and Ms. Janet RMA, this 29th day of May, 2020.



L. E. MGONYA
JUDGE
29/05/2020