

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

**AT DAR ES SALAAM**

**LAND CASE NO. 15 OF 2017**

**BLANKETS & TEXTILES MANUFACTURERS (1998) LTD...PLAINTIFF  
VERSUS**

**DCB COMMERCIAL BANK PLC.....DEFENDANT**

**JUDGEMENT**

**Last order date:** 21/04/2020

**Date of Judgement:** 09/07/2020

**MLYAMBINA, J.**

Over two decades now the position of law derived from *Section 132 of the Land Act, Cap 113 [RE. 2019]* has been that; *where there is an act of default by the borrower, the lender is entitled to exercise all powers conferred to him under the Land Act and Mortgage Deeds.* Such position can even be traced prior the promulgation of the Land Act. In the case of **Agency Cargo International v. Eurafrikan (T) Ltd, Civil Case No. 144 of 1998** (unreported). Honorable Nsekela, J. (as he then was) observed:

The object of security is to provide a source of satisfaction of the debt covered by it. The respondent to continue being in banking business must have funds to lend and which has to be repaid by its debtors ...it is only fair that banks and their

customers should enforce their respective obligations under the banking system.

In the instant case, the court is called upon to determine three legal issues:

- 1. Whether the Defendant entitled to auction suit properties to recover the outstanding amount.*
- 2. Whether the Plaintiff mortgaged the suit properties with anticipation of getting the loan facility of Tanzania Shillings One Billion Six Hundred Million Only (TZs 1, 6000,0000/=); and.*
- 3. To what relief (s) are the parties entitled to.*

The Plaintiff's claim against the Defendant in this suit is that, on 5<sup>th</sup> day of December, 2014 the Plaintiff approached the Defendant and requested for the loan at the tune of 1.6 billion as running capital of the factory for purpose of purchasing raw materials including clearing containers laying at Dar es Salaam port with raw materials. The Plaintiff alleged that, on the 13<sup>th</sup> April, 2015 the Plaintiff requested for overdraft of TZs 300 Million while waiting for the loan applied.

The Plaintiff alleged that there was no response from the Defendant until 22<sup>nd</sup> day of June, 2015 when the Defendant only

agreed to grant amount of TZs 300 million for clearing of the containers with raw materials.

It was further alleged by the Plaintiff that he collected the overdraft granted believing that the negotiation will continue on the issue of capital investment, taking into consideration that initially the Defendant persuaded the Plaintiff to open the bank account with the Defendant and promised that it will enjoy good products including loan for big investment.

The Plaintiff was of allegation that, when he applied for loan, he surrendered to the Defendant two Certificates of Titles. That is, Title No. 33494 Plot No. 199 Block "A" Mikocheni and Title No 137336 Plot No. 12 Block "A" Mkuranga, both valued 2. 5 billion. These Title deeds were then used as security to cover overdraft facility amounting to TZs 482,000,000/= granted to the Plaintiff. The Plaintiff went on to complain that, at the time the Defendant granted the overdraft facility, that is TZs 300 Million for clearing containers, the Tanzania Revenue Authority had sold containers on the ground that the Plaintiff delayed payment.

It was the complaint of the Plaintiff that he suffer loss due to the delay of the Defendant in approving the facility for clearing containers and for the Defendants' refusal to grant loan for capital

investment while holding the title deeds of the Plaintiff with big value which the Plaintiff could use them to secure loan from other banks.

The Plaintiff stated that, it has applied for loan from other banks, that is, Azania Bancorp on condition that part of the loan granted will be used to pay the Defendant the balance outstanding so that the Defendant release the Certificates of Title.

That the Plaintiff informed the Defendant the steps taken to resolve the issue of payment of the balance due but the Defendant threatened to sale the properties of the Plaintiff at any time.

In view of the Plaintiff, the act of the Defendant is unlawful and intends to cause irreparable loss to the Plaintiff taking into consideration of the value of the properties mortgaged and the amount granted by the Defendant.

Whereof, the Plaintiff claimed for judgement and decree against the Defendant for declaration that the act to sale the property of the Plaintiff is unlawful and attracts damages and for cost of the suit.

In her Written Statement of Defence (WSD), the respondent admitted to the extent that the Plaintiff was granted an overdraft facility of TZs 300 million. The Defendant stated that the delay in

granting applied facility of TZs 1.6 billion was greatly attributed by the Plaintiff as did not fulfill in time the requested as admitted by the Plaintiff in his letter dated 13<sup>th</sup> April, 2015.

The Plaintiff's allegation of applying a loan at Azania Bank was noted by the Defendant to the extent that Azania Bank Ltd has asked and availed status report of the Plaintiff of which was responded accordingly.

It was averred by the Defendant that she is entitled to exercise remedies under crated mortgages upon default of the borrower, including sale of mortgaged properties.

The Defendant went further to raise a counter claim against the Defendant by praying Judgement and Decree as follows:

- a) The payment of TZs. 499,229, 121.01 inclusive of interest thereon at commercial rate of 22% per annum from the date it was due to the date of Judgement.
- b) Interest on the decretal sum at the courts rate from the date of Judgement until payment of the said amount in full, and /or.
- c) In the alternative an order to attach and sale mortgaged properties situated on Plot No. 12 block "A" Kizuga Area, Mkuranga District comprised in Certificate of Title No. 137336

in the name of Blankets and Textile Manufacture (1998) Ltd and Plot No. 199 Block "A" Mikocheni area comprised in Certificate of Title No. 33494 in the name of Joseph Thomas Kidumbuyo.

d) Cost of this suit.

According to the counter claims' Plaintiff, the claim against the Defendant is for payment of TZs. 499, 279, 121.01 being an amount due and owing to the Plaintiff from the Defendant on account of the term loan facility and overdraft facility granted. The Bank alleged that on 14<sup>th</sup> July, 2015 the Defendant was granted through Plaintiff's Anatoglou Branch Dar es Salaam an additional credit facility in the form of overdraft to the tune of TZs 300 million making a total exposure of TZs 482 Million. The said credit was granted to finance working capital to procure stocks of raw materials requirements. The facility was to expire on 31<sup>st</sup> July, 2016.

The counter claim Plaintiff pleaded that the said credit facility was to be repaid within twelve months with equal monthly installment with applicable interest rate of 22% per annum. The facility was to be charged a penalty at the rate of 5% per annum above the normal interest charged in event the repayment of monthly

installments was delayed beyond the monthly fixed dates. The overdraft facility granted its repayment period expired on 31<sup>st</sup> July, 2016 and following expiry of the facility the Defendant was issued with a default notice on 26<sup>th</sup> November, 2016. That is when, the whole loan became due and payable immediately.

The counter claim Plaintiffs did plead that, as a security to the said facilities, the Defendant created legal mortgages in favour of the Plaintiff over a property situated on Plot No. 12 Block "A" Kizuga Area, Mkuranga District comprised in Certificate of Title No. 137336 in the name of Blankets and Textile Manufacture (1998) Ltd and Plot No. 199 Block "A" Mikocheni Area comprised in Certificate of Title No. 33494 for securing full repayment of the credit facilities and discharge of all obligations and liabilities associated and incidental thereto.

The pleading reads further that, it was the terms of the credit facility agreement that the facility was to be fully repaid within the contracted period by the Defendant. However, contrary to the agreed terms, the Defendant failed, ignored and /or neglected to effect regular deposits and or channel through his account proceeds of financed business and /or to repay the said loan such

that as of 26<sup>th</sup> November, 2016 a total of TZs. 499,279,121.01 became overdue and payable to the Plaintiff from the Defendant.

Following the herein above alleged default by the Defendant, and in accordance with the requirements of the law regulating mortgages enforcement and/or recovery of loans under mortgage, on 7<sup>th</sup> September, 2016 the Plaintiff issued to the Defendant a default notice being Land Form No. 45 requiring the Defendants to rectify the default by paying the overdue amount in arrears and continue to adhere to the agreed terms and conditions of the credit facility thus making good to the account. The default notice was preceded by three demand notices issued on 9/7/2016, 21/7/2016 and 20/8/2016.

In response to the counter claim, the Defendant disputed the major claim of the Plaintiff. The Defendant stated the he applied for the amount of 1.6 billion as running capital of the factory believing on the promises of the Plaintiff that she will get the money for investment. The Plaintiff granted small amount of money and instructed the Defendant to furnish documents of title of the factory for verification but the Plaintiff delayed the process and at the end, the Plaintiff refused to grant the loan as promised, therefore put the Defendant in financial embarrassment.



It was averred by the Defendant that the Plaintiff misled the Defendant and relying on the promises made by the Plaintiff the Defendant agreed to mortgage its properties which have big valued compared to the amount advanced.

In lieu of the above facts, the first issue to ponder is; *whether the Plaintiff mortgaged the suit properties with anticipation of getting the loan facility of TZs 1.6. Billion.* It is in evidence and it was not objected by the Defendant that the Plaintiff applied for a bank overdraft facility of TZs 1.6 Billion. PW1 Joseph Thomas Kidumbuyo who owns the Plaintiff's company by 91% tendered the letter dated 5<sup>th</sup> December, 2014 with ref KBTM/BMD/02/14 on application for a Bank overdraft facility of TZs 1.6. Billion to finance operations of Blankets and Textile Manufacturers (1998) Ltd at Mkuranga. The said letter was admitted as exhibit P1

PW1 told the court that his application was accepted but with a condition of getting a Title Deed. He mortgaged the Title Deed of his Plot at Mikocheni. He applied for 150 million while waiting the Title of the factory. Thus, they never applied for another loan. After the Mkuranga Title was out, they took it to the Defendant. The later promised to process the loan of TZs 1.6 Billion. That was in the year 2015.

PW1 further told the court that the Defendant issued 300 million loan to the Plaintiff to cover insurance, raw materials and electric installation to some spinning machines.

The evidence of PW1 was shared by PW2 one Mufundenge Samson Mwakalonge. PW2 told the court that, when he joined the Plaintiff, he found the Plaintiff's management had applied for the loan of TZs 1.6Billion. He also found a letter in which the management applied for an overdraft of TZs 300 million on emergency basis.

The letter dated 13<sup>th</sup> April, 2015 from the Plaintiff to the Defendant requesting for urgent overdraft of TZs 300 million was admitted as exhibit P2.

DW1 one Mr. Godwin Moses Ngulu Defendant's Credit Manager testified *inter alia* that applications for overdraft facility are approved upon certain conditions being met. One of such condition is existence of sufficient collaterals followed by issuance of Offer Letter. DW1 went on to testify that, when the Plaintiff was applying for the TZs 1.6 Billion facility, the only security was the Mikocheni property which was a collateral to an existing overdraft facility of TZs 273 Million only.

As correctly put by the Defendant in her final written submission, there was no binding promise between the parties on the issuance

of the applied TZs 1.6 Billion for lack of the Letter Offer. In terms of *Section 4 (2) (a) of the Law of Contract, Cap 345* the Plaintiff could assert expectation of an overdraft facility of TZs 1.6 Billion only if the Defendant had issued an Offer Letter to create a binding promise.

Though it has been admitted that the Plaintiff applied for an overdraft facility of TZs 1.6 billion as early as on 5<sup>th</sup> December, 2014 the application is defeated by four reasons. **One**, there is no Letter Offer to that effect. **Two**, the Plaintiff admitted that there was a delay to submit the factory area Title Deed. There is also no dispute that the forced sale value of the property at Mikocheni was TZs 273 Million only. As such, the Defendant could not grant the applied TZs. 1. 6 billion basing on a single insufficient collateral. **Three**, the Plaintiff secured on overdraft facility of TZs 482 Million (Exhibit D4) by August, 2015 which was a one-year loan due in 2016. There is a default on that loan. **Four**, there is no proof in record as to whether the Plaintiff justified the use of the applied TZs 1.6 billion facility.

In the light of the foregoing, it follows true that the Plaintiff mortgaged the suit properties with anticipation of getting the loan facility of TZs 1.6 billion but he failed to meet the condition timely. As a result, the overdraft facility of TZs 1.6 billion was not granted.

As regards the issue; *whether the Defendant is entitled to auction the suit properties to recover the outstanding amount*, the Plaintiff has not disputed on the following: **First**, that he secured an overdraft facility from the Defendant at the tune of TZs 482,000,000/=. **Second**, that up to 21<sup>st</sup> March, 2019 the unpaid loan stood at TZs 499, 279, 121.01. **Third**, that the Mikocheni collateral is worth around TZs 273 million forced market value. **Fourth**, that both the property at Mikocheni and at Mkuranga were mortgaged to the Defendants.

It is clear from the provisions of *Section 132 of the Land Act Cap 113 [R.E. 2019]* that where there is an act of default by the borrower, the lender is entitled to exercise all powers conferred to him under the Land Act and mortgage deeds. DW1 tendered a mortgage of a Right of Occupancy to secure an overdraft facility of 150,000,000/= for a Plot No. 199 Block "A" Mikocheni area and Plot No. 12 Block "A" Kiguza Area Mkuranga to secure a loan facility of 300 million from the existing overdraft facility of 182 million which were admitted as exhibit D3. Clause 7.1 thereof, vests on the Defendant *inter alia*, power of sale of the mortgaged properties upon occurrence of default event. In the cited case of **Christopher Chale v. Ban of Africa**, Misc. Civil Application 635 of 2017 quoted

with approval the ruling of Honorable Nsekela, J (as he then was) in **Agency Cargo International v. Eurafrikan (T) Ltd** (*supra*)

In the case of **Bank of Africa Tanzania Ltd v. Rose Miyago Assea**, *Commercial Case No. 138 of 2017* high court of Tanzania at Dar es Salaam (unreported) my Brethren Mruma, J ruled at page 7:

*...only the property mortgaged are liable for realization of the amount secured under the mortgage agreement and facility letter concerned.*

In view of the afore position of the law, I agree that the Defendant is entitled to realize overdraft facility advanced to the Plaintiff from the sale of the collaterals securing the loan.

There is the question of statutory notice, I understand that a statutory notice is important because of its role. It is a warning to a mortgagor that he may lose his property in the event the debt is not paid. It therefore, follows, that an accurate and faithful statement of the debt to be paid must form part of the notice.

In this case, PW1 told the court that he did not remember if he received the 60 days default notice. DW2 on his side testified that the Defendant issued a default statutory notice (exhibit D6) requiring the Plaintiff to settle the sum under the overdraft facility

and accrued interests within 60days but in vein. Having considered the evidences, I noted that the 60 days statutory notice requiring the Plaintiff to repay the outstanding sum of TZs 499, 279, 121.01 was issued on 7<sup>th</sup> September, 2016 and received by the Plaintiff on 26<sup>th</sup> September, 2016.

I have noted further that the Plaintiff raised on alarm on corruption to the Defendant's officials prior securing the loan. However, there was no proof to the same effect. It is a cardinal principle of law that when a criminal offence allegation is brought in a civil case the standard of proof is higher than that is required in normal civil case.

In the case of **Omari Yusufu v. Rahma Ahmed Abdulkadr** 1987 TLR 169 it was held:

*...when the question whether someone has committed a crime is raised in civil proceedings that allegation need be established on a higher degree of probability that that which is required in ordinary Civil Cases.*

In the end, I find the Plaintiff's suit has not been proved. It is dismissed with costs accordingly. The counter claim stands proved and granted with the following final orders:

1. The Defendant in the counter claim is ordered to repay the outstanding debt of TZs 499,279,121.01 inclusive of interest

thereon at the commercial rate of 22% per annum from the date it was due to this date of judgement, that is, on 9<sup>th</sup> July, 2020.

2. The Defendant in the counter claim to pay the afore decretal sum at the court's rate of 7% from this date of judgement until payment in full.
3. In the alternative to the above two orders, the Plaintiff in the counter claim is at liberty to attach and auction the mortgaged properties situated on Plot No. 12 block A Kizuga Area, Mkuranga District comprised in certificate of title no. 137336 in the name of Blankets and Textile Manufacture 91998) Ltd and in event of non-realization of the whole debt as ordered under order 1 and 2 herein above, attach and Auction Plot No. 199 Block "A" Mikocheni area comprised in Certificate of Title No. 33494 in the name of Joseph Thomas Kidumbuyo.
4. The Defendant in the counter claim to pay costs.



**Y. J. MLYAMBINA**

**JUDGE**

**09/7/2020**

Judgement pronounced and dated 9<sup>th</sup> July, 2020 in the presence of Counsel Yuda Thadei for the Plaintiff and Dennis Lyimo for the Defendant. Right of appeal explained.



**Y. J. MLYAMBINA**

**JUDGE**

**09/7/2020**