

**IN THE HIGH COURT OF TANZANIA**

**AT MWANZA**

**CIVIL CASE NO. 17 OF 2017**

**NZIBIKIRE ROBERT ISACK ..... PLAINTIFF**

**VERSUS**

**ACCESS BANK TANZANIA LIMITED..... DEFENDANT**

**JUDGMENT OF THE COURT**

*15<sup>th</sup> April, & 9<sup>th</sup> June, 2020*

**ISMAIL, J.**

This is a judgment on a Counter-Claim filed by the Defendant in which several reliefs are prayed as follows:

- (i) Payment of outstanding loan amount of TZS 344,562,552/- being the outstanding principal, interest and penalty due to the defendant (plaintiff in the counter-claim);*
- (ii) Payment of interest in (i) above at the commercial rate of 25% p.a. from 30<sup>th</sup> July, 2015 to the date of judgment;*
- (iii) Payment of interest on the decretal sum at the court's rate from the date of judgment to the date of full of payment;*
- (iv) Upon failure to pay as stated in paragraph (i) above, for an order authorizing sale of the mortgaged properties in respect of the defendant's loan, and sale of 1357 bags of paddy;*

- (v) *Costs of the suit; and*
- (vi) *Any other and further relief (s) that this Honourable Court may deem fit and just to grant.*

This Counter-Claim is a reaction to the suit which was instituted by the Plaintiff, who alleges that an eviction notice which was issued against him by the defendant was marred by impropriety. He, therefore, prayed for assorted reliefs as follows: a declaration to the effect that no proper eviction notice was issued to the plaintiff; an order for vacant possession of the suit premises; and an order for repossession of the suit premises. The plaintiff prayed, as well, for payment of general damages to the tune of TZS. 10,000,000/-; and costs of the suit.

For a better appreciation of the matter, it is apposite that a brief background of the matter be stated. It rolls back to 4<sup>th</sup>, 9<sup>th</sup>, 16<sup>th</sup>, and 21<sup>st</sup> July, 2015, when the plaintiff and the defendant entered into several loan agreements through which the defendant issued loan facilities whose aggregate amount was TZS. 156,000,000/-. As a security for the said facilities, the plaintiff pledged his residential property standing on Plot No. 1324 Block A, North Buswelu area, Mwanza City, registered under the Certificate of Title No. 61390. These short term loan facilities had a tenor of between five and seven months. On what was alleged by the plaintiff as

theft of the agricultural produces that he purchased, he failed to service the facility. This was considered by the defendant as an act of reneging on his undertaking, and it triggered a recovery action which involved foreclosure of the mortgaged property by taking possession and occupation thereof. This action did not go well with the plaintiff, he instituted the suit in which assorted orders were prayed as enumerated hereinabove. The defendant did not take this lying down. Besides disputing the plaintiff's allegations and praying for their dismissal, it filed a counter-claim in which it moved this Court to order the plaintiff to fully liquidate the loan amount plus interest, penalty interest, costs, and other forms of interest as stated herein above.

On 9<sup>th</sup> September, 2019, Mr. Alfred Daniel, learned advocate who represented the plaintiff, prayed to withdraw the suit, citing the reason that the plaint which founded the suit had not conformed to the requirements of the law. While the Court was amenable to the prayer and granted it, such withdrawal did not affect the counter-claim which had not been contested by the plaintiff. In view thereof, the Court ordered that proof of the matter proceeds *ex-parte* on a date which was fixed by the Court.

At the commencement of the proceedings, three issues were drawn to guide the proceedings. These were:

- 1. Whether the Plaintiff was advanced any sums of money pursuant to the facility agreements allegedly signed by the parties.*
- 2. Whether the plaintiff has breached terms of the facility agreements entered between the parties.*
- 3. What reliefs are the parties entitled to?*

Disposal of this matter will follow the order in which the issues were framed. With respect to the first issue, the point for determination is whether there exists any evidence to the effect that the defendant lent any sums of money to the plaintiff. Through its sole witness, Mr. Vincent Happygod Minja, who featured as PW1, the defendant led in evidence of how the plaintiff accessed several loan facilities. These facilities were disbursed through loan agreements and their addenda which were collectively tendered and admitted as Exhibit PE1. PW1 testified that these loan agreements were guaranteed by a Muganyizi Yusuph, through Guarantee Agreements which were collectively tendered and admitted as Exhibit PE2. Testifying on how the said sums were disbursed, the said

witness stated that the first loan, amounting to TZS. 28,000,000/- was granted on 4<sup>th</sup> July, 2015, while the second, third and fourth tranches were for the sums of TZS. 33,000,000/-; TZS. 33,000,000/- and TZS. 16,000,000/-, disbursed on 9<sup>th</sup> July, 2015; 16<sup>th</sup> July, 2016; and 21<sup>st</sup> July, 2015, respectively. PW1 testified further that these facilities were collateralized by a house built on a land comprised in a Certificate of Title No. 51390 at Buswelu, Mwanza City, and that the defendant's charge on that property was duly registered. The said Certificate of Title and the Collateral Agreements were tendered and admitted as Exhibits PE 3 and PE 4, respectively.

From the testimony of PW1, and upon an unfleeting review of the exhibits submitted in Court, there can hardly be any doubt that the plaintiff was a recipient of the loan sums advanced through the cited facilities. This answers the first issue in the affirmative.

The next issue is intended to ascertain as to whether, subsequence to advancement of the loan facilities, the plaintiff has reneged on his undertakings and breached the covenants of the loan agreements.

As stated earlier on, the loan agreements had short tenors of five and seven months, counting from the day the same were executed by the

parties. Thus, counting from July, 2015, the latest these facilities would remain due from the plaintiff is 20<sup>th</sup> February, 2016. From the testimony of PW1, the plaintiff did not honour his loan obligations as stipulated in Exhibit PE1. As a result of such failure, PW1 contended, the outstanding sum has accrued interest and penalty interest the aggregate of which stood at TZS. 344,562,552/-, as at the time of filing the suit i.e. 20<sup>th</sup> July, 2017. This contention has been supported by Exhibit PE 5, the Loan Status documents. Exhibit PE 5 provides a tabular position of each of the facilities granted. These Loan Status documents point to the fact that the plaintiff's outstanding indebtedness has shot from a relatively paltry sum of TZS. 156, 000,000/- to a whopping TZS. 344,562,552/-. This is because the timelines which were set for liquidation of sums advanced were not conformed to. That the terms of the contract have not been fulfilled is a matter that has been acknowledged by the plaintiff himself, through his statement of claim (plaint) which has since been withdrawn. He stated in paragraphs 5 and 6 as follows:

"5. *That, sometimes in 2015, having collected rice from the farmers and stored the same in his warehouse, his warehouse was broken and the whole stock was stolen*

*therein, which rendered the plaintiff's failure to repay the loan properly and on time; and*

*6. That, as a result of failing to repay the loan properly and on time, the defendants unlawfully and without adhering to issuance of proper eviction notice and default payment notice has proceeded to evict the plaintiff from the mortgaged house."*

The totality of all this demonstrates the plaintiff's failure to fulfill his part of the bargain, and it constitutes an act which goes against the provisions of the Law of Contract Act, Cap. 345 R.E. 2002, which impose an obligation on the parties to the contract to perform their respective promises. Section 37 (1) provides as follows:

*"The parties to a contract must perform their respective promises, unless such performance is dispensed with or excused under the provisions of this Act or of any other law."*

This requirement on the parties to a contract was underscored in ***Exim Bank (Tanzania) Limited v. Dascar Limited & Another***, CAT-Civil Case No. 92 of 2009 (DSM-unreported), in which it was held at p. 5 as follows:

*"Section 37 (1) of the Law of Contract Act Cap 345 R.E. 2002 requires the parties to a contract to perform their respective*

*promises unless such promises are dispensed with or excused under the Act or any other law. According to Exhibit P1, the agreed period for repayment of the facility was six months, and this put the latest date as 25<sup>th</sup> January, 2003. The first respondent was therefore obliged to perform his promise within that period, unless there was consent from the appellant bank to extend the period."*

This provision of the law takes into account the fact that the primary duty of each contracting party is to either perform or offer to perform its promise. Such performance can only be effective if the same matches the contractual obligations, and that such obligations persist, and the party is not absolved from such responsibility for the longevity of the contract, unless dispensed with or excused.

On the evidence of the plaintiff's failure as acknowledged in the pleadings and PW1's testimony, I have no hesitation to state that the second issue is resolved in the affirmative.

The third issue requires this Court to pronounce itself on what reliefs should be granted to the parties.

I begin my analysis on this issue by first restating what is otherwise the obvious. This is to the effect that this being a civil case, the burden of



proving that the defendant is in breach of the loan agreements, lies with the defendant, the plaintiff in the counter-claim. Like in all civil cases, the standard of proof is on the balance of probabilities, consistent with sections 110 through to 113 of the Evidence Act, Cap 6 R.E. 2002. The position in our jurisdiction borrowed the position that obtains in the Indian Evidence Act, 1872, which has been commented on by some of the renowned authors in the field. These include Sarkar on Sarkar's Laws of Evidence, 18<sup>th</sup> Edn., ***M.C. Sarkar, S.C. Sarkar and P.C. Sarkar***, published by *Lexis Nexis*. Part of the relevant commentaries is found at page 1896 from which the following passage was distilled:

***"... the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof It is ancient rule founded on consideration of good sense and should not be departed from without strong reason .... Until such burden is discharged the other party is not required to be called upon to prove his case. The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party..."***  
[Emphasis added].

The views by the learned authors bed well with Lord Denning's legendary reasoning in ***Miller v. Minister of Pensions*** [1937] 2 All. ER 372, cited with approval in the recent decision of the Court of Appeal of Tanzania in ***Paulina Samson Ndawavya v. Theresia Thomas Madaha***, CAT-Civil Appeal No. 45 of 2017 (Mwanza-unreported), in which the following passage was quoted:

*"If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to a determinate conclusion one way or the other, then the man must be given the benefit of the doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches of the same degree of cogency as is required to discharge a burden in a civil case. That degree is well settled. It must carry reasonable degree of probability, but not so high as required in a criminal case. If the evidence is such that the tribunal can say – We think it more probable than not, the burden is discharged, but, if the probabilities are equal, it is not ...."*

It comes out clearly that the testimony of PW1 on which the defendant's case hinges has given a convincing and credible account of

facts that vindicates the defendant's claims of breach of contract by the plaintiff. This testimony, together with the documentary testimony tendered and admitted, leave no doubt that the scale tilts in the defendant's favour. My view is guided by a canon of justice as emphasized in ***Hemed Said v. Mohamed Mbilu*** [1984] TLR 113 to the effect that ***"the person whose evidence is heavier than that of the other is the one who must win."*** Going through the testimony of PW1 and Exhibit PE 5, it gives me the impression that, though the defendant's claim is to the tune of TZS. 344,562,552/-, this sum has not been wholly justified. The testimony adduced has left a shortfall of the sum of TZS. 69,069,000.20, which is not substantiated. In the absence of any evidence in support of accrual of the shortfall, awarding it will militate against the cardinal principle of evidence to the effect that only established claims should be considered meritoriously.

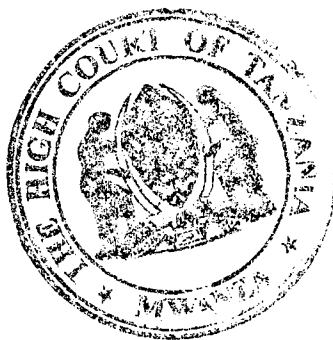
Consequently, the counter-claim succeeds and the following reliefs are granted against the plaintiff:

- (i) Payment of the sum of TZS. 275,493,552/- being the sum due constituting the outstanding principal loan amount plus interest and other charges to the date of filing the suit;

- (ii) As part of the recovery measure, the defendant is justified to call on the charge created by the mortgage agreement and cause a foreclosure of the mortgaged property to cater for payment, in part or in whole, of the decretal sum as awarded in (i) above;
- (iii) Payment of interest on the outstanding sum at the current commercial rate from the date of filing the counter-claim to the date of the judgment.
- (iv) Interest on the decretal sum at the courts rate from the date of judgment to the date of full payment.
- (v) Costs of the counter-claim.

It is ordered accordingly.

DATED at **MWANZA** this 9<sup>th</sup> day of June, 2020.



  
**M.K. ISMAIL**

**JUDGE**

**Date:** 09/06/2020

**Coram:** Hon. M. K. Ismail, J

**Plaintiff:** Absent

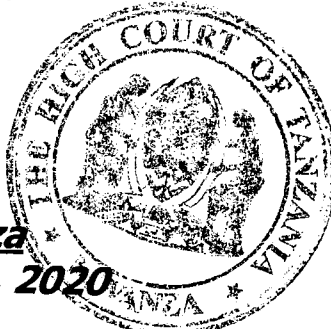
**Defendant:** Mr. Sylivester Mulokozi, Advocate

**B/C:** B. France

**Court:**

Judgment on a counter – claim delivered in chamber in the presence of Mr. Sylivester Mulokozi, learned Counsel for the defendant and in the absence of the plaintiff, and in the presence of Ms. Beatrice B/C this 09<sup>th</sup> June, 2020.

At Mwanza  
09<sup>th</sup> June, 2020



*M. K. Ismail*  
JUDGE