

**IN THE HIGH COURT OF TANZANIA  
(DAR ES SALAAM DISTRICT REGISTRY)  
AT DAR ES SALAAM  
LAND CASE NO. 11 OF 2018**

**STEPHEN KIBWANA.....PLAINTIFF**

***VERSUS***

**AFRICAN BANKING CORPORATION  
TANZANIA LIMITED.....DEFENDANT**

**JUDGMENT**

**Date of Last Order: 30/04/2021**

**Date of Judgment: 11/06/2021**

**E. B. LUVANDA, J.**

Stephen Kibwana, plaintiff to the main suit sued African Banking Corporation Tanzania Limited the defendant to the main suit, faulting the notice of default on the ground that the defendant is in breach of the of contract over excess charges, illegal interest charged and failure to avail/attach loan repayment schedule to the mortgage facility. By way of counter claim, the defendant (plaintiff to the counter claim) claims against the plaintiff (defendant to the counter claim) a sum of Tsh 454,752,516.62/= as unpaid principal sum and accrued interest and penalty to the loan agreement, term loan a sum of Tsh 350,000,000/= granted to the plaintiff.

The plaintiff was under the service of Mr. Heri Kayinga learned Counsel and the defendant was represented by Ms. Angel Paul learned Advocate, Ms. Bupe Kabeta and Mr. Lucas Elingaya learned Counsel.

Agreed issues are: one, whether there was a breach of the loan agreement between the parties; two, whether there was agreed alteration of the loan agreement between the parties; three, to what reliefs are the parties entitled to.

For the first issue, Mkunde Stephene Kibwana (PW1) was suggesting that the defendant is in breach of the loan agreement exhibit P2 (which was also tendered by the defendant as exhibit D1), in particular clause 4.1.2 on the ground that a loan repayment schedule was not attached to form part of the facility agreement as stipulated therein, and clause 6.3.1 where they were charged a different rate with a rate of 19% reflected in exhibit P2 or D1. At any rate, the argument by the plaintiff is an afterthought for all intent and purpose. The plaintiff after the first draw down/disbursement effected on 12<sup>th</sup> December, 2012 a sum of Tsh 140,000,000/=, started to repay the loan as from 30<sup>th</sup> January 2013. Throughout when he was effecting repayment the plaintiff did not complain that he was uncertain on an exact amount for monthly repayment for the reason that he was not availed a loan repayment schedule. Perhaps her argument could valid if may be she could had exhibited a letter that the defendant had queried him that he was paying below an amount stipulated in a loan repayment schedule. In absence of that and in view of the fact that the plaintiff was repaying his loan an exact amount he was under obligation to pay, his scapegoat cannot be entertained. Above all, nowhere in the said clause 4.1.2 of exhibit P2, provided that repayment shall commence after a loan

repayment schedule is availed to the plaintiff. Essentially, wordings of clause 4.1.2 are not coached on mandatory terms. Indeed, the proviso says the same will be forwarded to the borrower once the loan has been drawn. The clause is silent on the modality of forwarding.

Similarly, an argument that he was charged a different rate with the rate of 19% stipulated in exhibit P2, is unfounded. The plaintiff failed to depict how the said rate was charged over the agreed rate. The purported harmotization, (sic harmonization) schedule exhibit P3, as referred by PW2 did not suffice to substantiate the allegation for overcharging. I am saying it the purported harmotization schedule, because DW1 doubted if exhibit P3 is genuine on explanation that its font does not correspond with exhibit P4, also a front page of exhibit P3 was not stamped with a rubber stamp unlike exhibit P4. Be as it may, PW2 stated that his computation on the alleged harmotization schedule had a variation that is 5,697,000 instead of 5,672,000 reflected on the facility letter. But the alleged discrepancy stated by PW2 was only a sum of 25,000 which is equivalent to 0.44%, if the same is computed from an amount of 5,672,000. As such it was a peanut amount which had no significant effect of impacting anything. I therefore, subscribe to the proposition of DW1, that the facility was a term loan for a long term of twenty years, it means even the interest payable is huge and high due to balancing repayment. It was the contention of DW1 that it was expected for the customer to understand the nature of the product and they believe the customer understood it that 'is why' he took it. DW1 explained that the interest was 19% per annum and was not changed. In view of that, the plaintiff allegations are baseless.

More important in a letter dated 14/3/2017 exhibit D3 which the plaintiff wrote to the defendant requesting for freezing of interest or arrears and payment restructuring, he did not plead on the alleged none availment of a loan repayment schedule or excess or change of interest rate as a reason for default. Rather the plaintiff pleaded hardship suffered by construction industry due to change of government policies which affected the

consultancy industry in the construction industry. The same argument was repeated in a letter dated 4/4/2017 exhibit D6; which was drafted by the plaintiff lawyer in response to the notice of default exhibit D5. Nowhere the plaintiff complained on none availment of a loan repayment schedule, as a reason for default.

In both exhibit D3 and D6, the plaintiff was pleading for defendant's pity and consideration to have the matter settled amicably, meaning that by implication the plaintiff was conceding to be in default.

In view of that, the first issue is ruled in affirmative for a counter claim, that the plaintiff was in breach of the loan agreement.

Issue number two, whether there was agreed alteration of the loan agreement between the parties. According to the testimony tendered by PW1 and DW1 nowhere suggest that parties at any time agreed to alter terms of the loan agreement. Even a request by the plaintiff for freezing of interest/arrears and payment restructuring made via exhibit D3 and reiterated in exhibit D6, was not responded by the defendant. Indeed, DW1 on cross examination stated that, nowhere the management said had agreed to a request for freezing interest.

Therefore, the second issue is answered in the negative that there was no addendum as to the alteration of the loan agreement between the parties.

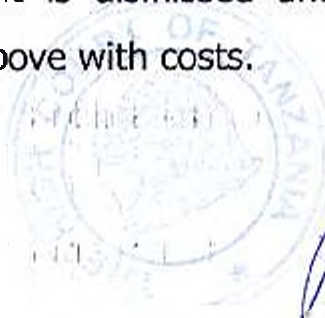
That said the plaintiff's claim succumb.

Finally, to what reliefs are the parties entitled. Having ruled that the plaintiff's claim dies a natural death, it means there is no any relief which is available to the plaintiff. On the other hand, it was the defendant evidence

in particular DW1 that the current outstanding balance according to exhibit P4 is Tsh 454,752,516.62 which its breakdown includes unpaid principal amount Tsh 345,535,983.16, unpaid interest Tsh. 88,391,864.75, overdue interest 3,729,075.70 and penalty interest 17,095,593.01, making a total sum of Tsh 454,752,516.62 they claim from the plaintiff. According to DW1, the plaintiff had borrowed Tsh 350,000,000/=, credited Tsh 271,594,739 in his saving account which serviced an interest a sum of 267,131,723.13 then a remained sum reduced the debt/principal sum at a tune of Tsh 4,464,016/= only. This suggest that the plaintiff did not discharge his obligation to repay the loan as per the terms agreed in the loan agreement exhibit P2 or D1. Therefore, the defendant is entitled to recover the same from the plaintiff.

The plaintiff is therefore held liable to pay the defendant a sum of Tsh 454,752,516.62 or in continued default, the plaintiff property pledged to secure the loan to wit property described under certificate of title No. 120034, plot No. 1063, Block "L", Mbezi Area Dar es Salaam to be auctioned for purpose of liquidating the outstanding sum depicted herein.

A main suit is dismissed and a counter claim succeeds to the extent depicted above with costs.



E/B. Luvanda  
**Judge**  
11.6.2021

11.6.2021

Coram: E.B. Luvanda, J

For the plaintiff: Mr. Heri Kainga Advocate

For the defendant: Mr. Mohamed Yusufu Advocate

B/C: Bahati

**Court:** Judgment delivered at chamber court.



E.B. Luvanda  
**Judge**  
11.6.2021