IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 37 OF 2020

EQUITY BANK TANZANIA LTD ---------- **APPELLANT**

VERSUS

JOHNELLY TZ COMPANY LIMITED ---------- **RESPONDENT**

Date of Last Order: 08/06/2021

Date of Judgment: 22/07/2021

JUDGMENT

L. M. MLACHA, J.

This appeal originates from Civil Case No. 208 of 2018 of the District Court of Kinondoni at Kinondoni. The case was filed by the respondent, JOHNELLY TZ COMPANY LIMITED against the appellant, EQUITY BANK TANZANIA LIMITED. It was a case for breach of contract. The respondent prayed for a declaration that the appellant had breached the Credit Facility Contract entered between them for a Bank Guarantee in favour of ORXY Tanzania Limited by seizing their Tanker Trailer worthy TZS. 70,000,000/= which was not given as security for the loan, payment of Tshs. 80,000,000/= being

specific damages for the loss suffered by the plaintiff owing to the defendant's acts of breach of contract, payment of Tshs. 13, 000,000/= unlawfully paid by the defendant to the Auctioneer from the plaintiff's Account, payment of general damaged and costs.

After a full hearing, the court entered judgment in favour of the respondent at Tshs. 60,000,000/= being compensation for costs incurred for hiring and transporting using a new tanker trailer. They were also ordered to pay Tshs. 13,000,000/= which was debited from the respondent's Account to pay the auctioneer. Aggrieved, they have now come to this court armed with the following grounds: -

1. *That, the Trial Magistrate erred in law and fact for holding that the appellant was in breach of the loan agreement by seizing the Motor Vehicle with Registration No. T 531 DKE in her attempt to recover the loan balance;*
2. *That, the Trial Magistrate erred in law and fact for not giving weight to the evidence and exhibits tendered by defence witness (DW-1) thereby arriving at erroneous and unjust decision;*
3. *That, the Trial Magistrate erred in law and fact in disregarding clear agreed terms of the facility letters by holding that the appellant was not necessitated to invoke the security used to*

secure the third loan facility to recover the arrears emanating from the second loan facility;

4. *That the Trial Magistrate erred in law and fact by disregarding the fact that the respondent was in default of the loan agreement.*
5. *That the Trial Magistrate erred in law and fact for holding that the appellant acted unlawfully by debiting from the respondent's account auctioneers fees to the sum of Tshs. 13,000,000/=.*
6. *That the Trial Magistrate erred in law and fact by awarding the respondent Tshs. 60,000,000 as specific damages which amount was not proven and is exorbitant.*

The appellant was represented by Mr. Stephen Axwesso while the respondent had the services of Mr. Elia Ryoba, both learned Advocates.

Submitting on grounds one and three, counsel for the appellant said that the appellant was justified in attaching the truck on the strength of Clause 7 (c) of the Loan Facility Agreement which gave them mandate to combine the securities. He was not in agreement with the reasoning of the trial magistrate who said that the appellant was required to exhaust the security offered for the second loan before moving to the third loan agreement. He had the view that the magistrate failed to consider the clear terms of the agreement as

reflected in Clause 7 (c). He also failed to see that the respondent took the loan and defaulted in paying. He went on to say that the bank needed to recover the money so as to continue with its activities as said in **Franconia Investment Ltd v. TIB**, Civil Case No. 66 of 2015 (High Court, Muruke, J.). He made similar reference to the decision of this court in **Mohamed Iqbal Haji and 3 Others v. Zedem Investment Ltd and 2 Others**, H/C Misc. Land Application No. 5 of 2020 (Kalunde, J.) and **CRDB Bank Ltd v. Isaack B. Mwamasika and 2 Others**, CAT Civil Appeal No. 139 of 2017.

Counsel proceeded to submit that the trial magistrate failed to analysis the evidence which was laid before him. He said that if he had done so, he could find that Clause 5 (2) (h) of the Facility Agreement, Exhibit PE1, recognized that default in the third facility constituted a default in this facility. He proceeded to say that the magistrate decided the case as if there was no default.

Submitting in ground two, counsel for the appellant said that DW1 Ms. Stella Deusdedit testified in clear terms but her evidence was not considered. She said clearly that the attachment was made in terms of Clause 7 (c) of the Agreement and that prior to the attachment there were different notices issued to them. He was also informed of the consequences. Counsel referred

the court to section 37 (1) of the Law of Contract Act which demand parties to fulfill their obligations under the contract.

Submitting in ground 4, counsel for the appellant said that Clause 11 of the Loan Facility Agreement say that failure to pay the loan amounts to a default. He went on to say that the trial magistrate did not take into account the fact that the respondent was duty bound to pay the loan. He referred the court to a passage from the case of **Joachim vs Swiss Bank Corporation** [1921] 3 KB 110 which was quoted with approval by this court in **Katarama Electrical Services Co. Ltd v. TIB Development Bank Ltd**, Land Case No. 41 of 2015 which said that the debtor is duty bound to find the creditor and pay him when the debt is due. He went on to say that the magistrate ought to have taken into account the default when he was making the decision.

In ground 5, it was submitted that the respondent knew the costs of auctions and that he was supposed to pay them. They are reflected in Clause (2) of the Loan Agreement, he said. It was thus reasonable to deduct the costs from the respondent's account taking into account the provisions of clauses 11,12 and 13.

In ground 6, counsel submitted that the trial magistrate erred in awarding 100,000 as special damages. He argued that there was no breach to the facility agreement as submitted in ground one. He said that the attachment was made in terms of the facility agreement and therefore the respondent was not entitled to any damages. He went on to submit that there was no proof of specific damages. That, para 3 (a) and 3 (b) of the Amended Plaint has confusing information. That, whereas para 13 (a) talks of damages to the tune of Tshs. 80,000,000/= para 13 (b) talks of six months period. He called this an inconsistency which was overlooked by the trial magistrate. Counsel submitted that no agreement was tendered to prove that the respondent hired a truck at Tshs. 60,000,000/= to act in the place of the attached truck. He said that the invoice which was produced, exhibit PE2 was not sufficient to prove the claim. He refereed the court to **Reliance Insurance Co. Ltd and 2 Others v. Festo Mgomapayo,** Civil Appeal No. 23 of 2019 for reference to the point that specific damages must be pleaded specifically and proved strictly. He argued the court to allow the appeal with costs.

Submitting in reply, Mr. Eliya Ryoba said that the appellant guaranteed a third party called ORYX (T) Ltd for purchase of oil on credit. The track tanker T 531 BKE was offered as security in the agreement dated 28/08/2017. He

referred the court to S. 78 of the Law of Contract Act on the meaning of a guarantee. Having said so, he moved to reply to ground one and three saying that the decision of the lower court was proper. He supported the decision arguing that the appellant was in breach of the Loan Agreement and had to pay. He referred the court to **International Commercial Bank (T) Ltd v. Yusufu Mulla and Another**, Commercial Case No. 108 of 2018 adding that there was no breach of contract on their side. He proceeded to say that the respondent did not fail to pay the loan under the contract but the appellant attached the truck which was offered as security.

Submitting on grounds 2 and 4, counsel for the respondent said that page 4 of the trial court judgment highlighted undisputed facts. He then proceeded to give details showing that there was no breach of the contract on their side. He said that all the cited cases are distinguishable because they did not relate to a guarantee contract which was at issue in this case.

Submitting on ground five, counsel for respondent said that so long as there was no breach of contract, it was wrong to deduct auctioneer's costs from the appellant's account. He proceeded to submit on ground six saying that there was proof of the claims that the respondent hired another truck. He made reference to the EFD receipt which was tendered in evidence. He went

on to say that the claim for specific proof is a new claim brought at this stage contrary to procedure.

Submitting in rejoinder, counsel for the appellant said that, exhibit "PE1' explains the relationship between the appellant and the respondent. It speaks of the purpose of the facility, to be a guarantee in favour of ORYX for credit purchase of fuel. He invited the court to take note of that.

I had time to study the records closely. I have also considered the counsel submissions on the grounds of appeal. I plan to discuss all the grounds of appeal together for I think the whole case revolve of three areas only; one, whether there was a breach of contract on the part of the appellant; two, if there was a breach, whether the respondent suffered damages as a result of the breach and three, whether there was a good analysis of evidence on the part of the trial magistrate. My discussion will revolve on these areas.

There is no dispute that the respondent's trailer truck which was offered as security in the third Loan Agreement was attached in response to a default in the second Loan Agreement. The appellant says that they had legal basis making reference to Clause 7 (c) of the Credit Facility Agreement. The respondent does not accept this argument. He sees the whole process as a breach of the agreement. They also say that they have suffered damages

which must be paid. The appellant is not in agreement and adds that there was no proof to damages suffered. The magistrate found that there was breach and awarded damages as pointed out above.

I have read the three Credit Facility Agreements. They are all similar in context. They are standard form contracts. The first one is dated 10/12/2016. It is a Business Loan Facility of Tshs. 80,000,000. It was executed between the appellant Bank and the Directors of the respondent. The purpose of the loan was stock financing of petrol business. It carried 3 securities; one, first Legal Charge over the landed property with CT No. 57915 – LR Mwanza, L.O No. 569092, Plot No. 20 & 28 Block "G" Matela Nyanguge area in Magu District; two, Directors Personal Guarantee and Indemnity to and three; such other security that the financier shall from time to time require to secure the Borrower obligations.

The second agreement is dated 29/03/2017. It is entitled Business Loan Facility of Tshs. 130,000,000. It is between the same parties. The purpose of the Loan was three-fold; Tshs. 74,693,343 to pay off outstanding Loan Balance in Loan A/C 3007511377501, Tshs. 30,800,000 as final payments (50) for purchase of Fuel Tanker Semi-Trailer (42,000 LT) from DAFE Turkey and Tshs. 19,200,000 Import Duty and VAT. The security offered for this

Loan Facility was; one, up stamping or Deed of Variation over the existing First Legal charge over landed property with CT No. 579115 – LR Mwanza, L.O No. 569092, Plot No. 20 & 28, Block "G" located at Matela – Nyanguge Area in Magu District, two; Supplementary Directors Personal Guarantee and Indemnity and three, such other security that the financier shall from time to time require to secure the borrower's obligations.

The third agreement is dated 28/08/2017. It is entitled Bank Guarantee for Tshs. 70,000. The purpose of the Loan Facility is recorded as Bank Guarantee in favour of ORYX Tanzania Ltd for credit purpose of fuel. Security offered; one, First Legal charge over landed property with CT No. 579115 – LR Mwanza, L.O No. 569092, Plot No. 20 & 28, Block "G" located at Matela – Nyanguge Area in Magu District; two joint registration and chartel mortgage over motor vehicle Scania Tractor with registration No. T7 756 DKE and Tanker Trailer with registration No. T 531 and three Directors personal guarantee.

As seen above, there was a breach in the second contract which is not disputed. There was no breach in the third contract. But the appellant moved to attach the truck which is the subject of the third contract to secure their interests in the second loan. They have brought a defence that the step is

legal and justifies by clause 7 (c) of the contract. As said above the contracts have similarities. All have this clause.

Clause 7 is headed "**Other conditions**". Clause 7 (c) which is an area of controversy in this appeal reads;

> *"(c) The Lender reserves the **right to combine accounts**, the right **to consolidate all securities** held for any account to constitute security for all accounts so held'. (Emphasis added)*

It talks of the right to combine accounts and the right to consolidate securities. It is a term of the contract. Both parties agreed and signed. Whether it was applied correctly or not is the issue at hand.

In my endeavor to resolve this controversy, I assigned my legal assistant to make a research. She brought me a number of literatures but I am impressed by the following quotation from Q. C. Ross Cranston in his book entitled **Principles of Banking Law, 2nd Edition,** Published by Oxford University Press, UK ISBN: 9780199253319, October 2002, page 133. It is written:

> *"Central to the bank-customer relationship is contract. The bank-customer relationship is rarely reduced to the one document, however, but instead comprises a variety of written forms, supplemented*

by terms implied by law. Often, a standard-form contract will govern specific aspects of the bank-customer relationship, whether it be the account, payment, borrowing, security (including guarantees), and securities and derivatives dealing. ***The banking contracts is slightly different from other legal contracts based on the unique relationship between the customer and the bank in payments, rescheduling, and so forth."*** *(Emphasis added)*

The writer has tried to point out four key elements. **One**, that the Bank-Customer relationship is based on contract. **Two**, that the contract is rarely reduced into one document. It can be bult by several documents executed over a period of time. **Three**, that the contract is usual done through standard form contracts which govern specific situations. And **four**, that the contract is slightly different from other contracts because of the unique relationship between the customer and the bank. I am interested in the second and fourth elements. That, the contract may be built in several documents because of the unique nature of the relationships something which makes the contract slightly different from other contracts.

Coming to our case, it is obvious that parties executed the contracts with their free will. Clause 7(c) was in each contract. They signed signifying

consent. The clause allowed the bank to cross from one contract to another. It allowed the bank to combine securities. They exercised those rights when the situation arose to safeguard their interests. That being the case, all aspects measured carefully, I have the opinion that, given the unique nature of the Bank-Customer relationship and on the strength of the contracts which were dully executed, there was nothing wrong in what was done by the appellant bank. There was no breach of contract so to say.

This discussion makes the discussion on the second area useless. It has also resolved the discussion on the third element for it is clear that the magistrate, with respect, failed to understand the nature of the relationships between the parties. He took the case as a case of an ordinary contract something which was erroneous.

I will in the end, allow the appeal with an order vacating and setting aside the decision of the lower court. I order so. Costs to follow the event.

L.M. Mlacha

JUDGE

22/07/2021