IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL CASE NO. 86 OF 2019

BANK OF BARODA TANZANIA LIMITED..... PLAINTIFF

VERSUS

FARIDA SALUM ABED

T/A FARIDA GENERAL TRADERS.....1ST DEFENDANT

GEORGE JONAS TAMIGWE.....2ND DEFENDANT

AVELYN PATRICK NGOWI.....3RD DEFENDANT

JUDGMENT

Date of last order: 08/06/2022

Date of Judgment: 15/07/2022

E.E. KAKOLAKI J.

The plaintiff herein Bank of Baroda (T) Limited, by way of plaint instituted the instant suit against the above-named defendants praying this Court for the judgment and decree against them on the following:

(a) Payment of Tsh.260,080,673.73 (Tanzanian Shillings Two Hundred Sixty Million Eighty Thousand Six Hundred Seventy Three and Seventy Three Cents) being specific damage for breach of contract.

(b) Interest at the rate of 20% on item (a) above from 7th February 2019 till full and final payment.

(c) An order of foreclosure and sale of property located at Plot No. 911, Block ”A” Kipawa Area with a certificate of Title No. 86965 in Ilala Municipality which was mortgaged to the Plaintiff.

(d) Payment of general damages to the tune of TZS. 100,000,000/= with interest thereon at the prevailing commercial rates until payment in full.

(e) Cost of this suit.

(f) Interest on cost at the court rate of 7% per annum from the date of judgment till full and final payment.

(g) Any other reliefs this Honourable Court deems fit, proper and just to grant.

The brief facts of the case as gathered from the pleadings can be told as hereunder. On the 25/02/2015, the plaintiff and 1st defendant executed a loan agreement in the form of overdraft for Tanzanian Shillings Two Hundred Million Tshs. 200,000,000/- plus commissions accruing thereon and other charges thereon. In that course, the 2nd defendant agreed to mortgage his property registered under Certificate of Title No. 8665 on Plot No 911, Block ”A” Kipawa area Dar es Salaam, to secure payment of the plaintiff’s money advanced to the 1st defendant. It is further told that, the loan was also

secured by the personal guarantees of the 1st, 2nd and 3rd defendants as additional security. It appears that, the 1st defendant defaulted in repayment of the said overdraft facility as per agreed terms hence a total debt balance of Tzs.260,080,673.73 (Tanzanian Shillings Two Hundred Sixty Million Eighty Thousand Six Hundred Seventy Three and Seventy three cents). It is said, despite of several reminders and follow ups by the plaintiff for repayment of the outstanding balance, the defendants jointly and severally neglected or refused to pay the afore said sum of money, thus the plaintiff suffered and continued to suffer loss of business due to defendants' wrongful acts hence breach of contract. Due to that sequence of events, plaintiff has preferred this suit claiming for the mentioned above reliefs.

On the other hand, the 1st and 3rd defendants do not dispute the fact that, the 1st defendant benefited from the alleged loan facility duly advanced to her by the plaintiff but are insistent that, it was to the tune of 150,000,000 only. They however, dispute the fact that, 1st defendant is indebted to the plaintiff as she repaid the alleged debt in full and that, their personal guarantees were entered as additional security only to complement the mortgage by the 2nd defendant and not otherwise. On his side, the 2nd defendant admits to have secured the loan by the 1st defendant through

mortgage of his house but only to the tune of Tshs. 150,000,000=/. And that, he did not issue an additional security to the added loan of Tshs. 50,000,000/= if any was issued. And further that, there was an agreement between him and 1st defendant who by then with her husband (3rd defendant) had not yet completed processing their title deed that, upon completion 1st defendant, the 3rd defendant would substitute their title with his to secure the said bank loan, hence a prayer for an order of substitution of the his title with that of the 1st and 3rd defendants.

It is worth stating also that, in his WSD the 2nd defendant raised a counter claim against his co-defendants, meaning 1st and 3rd defendants. The said counter claim could not survive as the 1st and 3rd defendants raised a preliminary objection on point of law to the effect that it, was time barred. However, before the said preliminary objection could be argued on merit this Court suo mottu raised an issue as to the propriety of the said counter claim for being preferred against the co-defendants only and in absence of the plaintiff contrary to the provisions of Order VIII Rule 9(1) of the Civil Procedure Code, [Cap. 33 R.E 2019]. Parties were therefore invited to address the Court on it in which the 2nd defendant's counsel conceded to, hence the same was struck out on 21/04/2022 for being incompetent.

As there was no dispute over the 1st defendant benefiting from the said loan facility which was secured by the 2nd defendant's title deed, the following issues were agreed by the parties and framed by the court for determination of this suit:

(i) Whether the first defendant defaulted in payment of the overdraft facility.

(ii) Whether the tittle deed No. 1155877 in the name of the 3rd defendant should be substituted with the tittle of 2nd defendant as agreed by the defendants to replace the mortgaged property by the 2nd defendant.

(iii) What reliefs are the parties entitled to

Throughout the hearing, the Plaintiff was represented by Mr. Sindiro Lyimo, whereas the 1st and 3rd defendants hired Mr. Merikiory Hurubano, while the 2nd defendant enjoyed the services of Mr. Godfrey Ambert, all learned advocates. In proving her case the plaintiff summoned one witness and relied on four (4) exhibits some of which were tendered collectively while the 1st and 3rd defendant who entered a joint defence paraded two witnessed equipped with one exhibit and the 2nd defendant finalized the defence by calling one witness and relied on three (3) exhibits.

Before I endeavor to deliberate on the raised issues, I find it so pertinent to picture hereunder both parties evidence in support and against the plaintiff's claims. As alluded to herein above, the plaintiff called one witness. This is one Mr. **Fred Kiwango**, (PW1), the monitoring and recovery manager in the plaintiff's bank loan section. Testifying under oath, PW1 apart from explaining his responsibilities under the section he works and he explained the difference between an overdraft facility and normal or conventional loan. He told this court that, in 2015, the 1st defendant took an overdraft facility from the plaintiff (bank) to the limit of Tshs. 150,000,000/- for one year from which both 2nd and 3rd defendants together with her, personally guaranteed the same while the 2nd defendant mortgaging his title deed as security for the said loan. He said, the said loan facility of Tshs. 150,000,000/= was reviewed and its limit extended to Tshs. 200,000,000/= in 2016 under the same security and guarantors. To support his version he tendered the facility letter of 2015 for Tshs. 150 Million (exhibit PE1) and facility letter for Tshs. 200 million of 2016, 2nd defendant's mortgage deed in respect of CT No. 86965, Plot No. 911 Block "A" and its Certificate of Title and joint personal guarantee deed by 1st, 2nd and 3rd defendants (exh.PE2 collectively). PW1 went on testifying that, the 1st defendant is indebted to the plaintiff a total

amount of Tsh. 260,080,383/- as of 26/05/2020 while her last deposit for loan repayment was made on 18/10/2016. He tendered exhibit PE3, 1st defendant's account Bank statement to that effect. This witness said, following the 1st defendant default on repayment of the said loan facility several reminders were made to him both orally, through phones and in writing through lawyers, the demand notice inclusive but that efforts proved futile. The reminder letters and demand notice were tendered and admitted as Exhibit PE4 collectively. Finally PW1 prayed the court for orders of sale of the security by the 2nd defendant and if incapable of satisfying the debt be allowed to fall on the personal properties as assigned by 1st, 2nd and 3rd defendants their guarantee deed, general damages to the tune of Tsh.100,0 00,000/- for the inconveniences caused, as well as the interests at the rate of 7% to the decreed amount until its satisfaction.

When placed under cross examination by Mr. Harubanu for the 1st and 3rd defendants as to why they preferred this suit, PW1 said, court process was a must as the mortgaged property to the loan belongs to the 3rd party and not the borrower. And when referred to the bank statement exhibit PE 3 and asked as to whether it indicates the due amount as claimed, it was his clarification that, the same does not show the exact amount claimed as after

default, normally the account is marked as non-performing loan account and ceased, thus even the accruing debt interest is not shown until the account is activated.

When cross examined by Mr. Ambet, as to whether the 2nd defendant as guarantor was aware of the total advanced loan and claimed amount before the institution of this case, PW1 said though the total amount taken by the 1st defendant had reached Tsh.260,000,000/=, the only loan amount which the 2nd defendant was aware of was Tshs. 150,000,000/=. On re-examination by Mr. Lyimo, this witness reaffirmed that, the 2nd defendant guaranteed the facility to the tune of 150,000,000/= only and that, when doing so was a free agent as he acted without any force. He was insistent that, there was no any agreement between the 2nd defendant and the bank that, later on the mortgaged property (security) would be substituted. That mark the end of plaintiff's case.

On the other hand, and as already hinted above, defendants in disproving the plaintiffs' claims called 4 witnesses. The first witness was Farida Abeid Salum (DW1) and the 1st defendant, who is trading as Farida General Traders. This witness told this court, on how the plaintiff in 2016 extended to her a loan facility of Tsh.150,000,000/- though she had requested for

Tshs. 200 million. And that, she repaid the loan smoothly for six months before she went broke after ordering cargo from China hence unable to clear it at the airport, the situation that forced her to request for another extension of loan facility of Tsh. 50,000,000. According to her, the plaintiff issued her only Tsh. 33,000,000/- out of the requested Tshs. 50 Million while retaining Tshs. 17 million for repayment of debt interest. This witness went on saying that, since their title was still under process, her loan was secured by the title deed of Mr. George Jonas Tamigwe (the 2nd defendant) under consideration of 10% of the whole secured loan, the person who was introduced to her by brokers whom she had to advance him payment of 3,000,000 before the said mortgage deed could be executed. She echoed, together with her husband (DW2) had agreed with the 2nd defendant that, after obtaining their tittle would surrender it into possession of the 2nd defendant until final repayment of the loan. According to DW1, she is not indebted to the plaintiff as she repaid her loan to the fullest. To prove this fact, she tendered in Court her bank account statement (exhibit DE 1) showing zero balance. Consequently, the 1st defendant requested the Court to dismiss the claims against her.

When subjected to cross examination by Mr. Lyimo, DW1 confirmed to have requested an overdraft of Tshs. 200,000,000/= but her account was credited with 183,00,000/- only as Tshs. 17 million was charged as debt interest. And that, in servicing her loan she was depositing money both in cash and sometimes by cheque but she had no any document to prove the said transaction for not keeping the slips. She added that, lastly her loan was serviced on 28/02/2017 where she deposited Tsh.3,020,000/-. On whether she had ever received any demand letter or reminder from the plaintiff, DW1 denied to have received any. When referred to her signature in exhibit PE2 (Personal guarantee) she disowned it. When cross examined by Mr. Ambet, she insisted was not indebted to the plaintiff and requested the court to order the plaintiff to return the title deed to the 2nd defendant.

The next defence witness was one **Aveliyn Patrick Ngowi** (DW2) and the 1st defendant's husband, who in his testimony admitted issuance of the loan by the plaintiff to the 1st defendant and the fact that, the same was secured by the 2nd defendant landed property under the consideration of 10% of the whole loan amount, in which Tshs. 3 million was paid in advance. He confirmed and corroborated DW1's evidence over her mortgage agreement with the 2nd defendant saying that, since DW2's house had no title deed, he

(DW2) would process it and deposit it with the 2nd defendant as an assurance for repayment of the said loan by the 1st defendant until full payment of the loan, the terms of agreement which he fulfilled. This witness informed the Court on how the 2nd defendant tried unsuccessful to replace his title with DW2's title in the plaintiff's bank, as the loan issued was not connected anyhow to the value of his (DW2) house. He said, when he requested back his tittle deed from the 2nd defendant, he (the 2nd defendant) informed him that the same had gone lost, as a result he reported the said loss at police and reprocessed the new title in which his son used it to secure his loan from NMB, before the house was auctioned by NMB following default in repayment of the said loan. DW2 rested his testimony by requesting the court to dismiss the suit against him as he has never received any complaints from the plaintiff concerning default in repayment of loan by the 1st defendant.

When cross examined by Mr. Lyimo, DW2 confessed to have signed a loan agreement willingly but without reading the same, hence he did not know its purpose. According to him, he signed the documents to identify DW1 to the bank and not as a guarantor. On being referred to the said documents he identified his signature in the personal guarantee documents and demand letters. On further cross examination as to whether 1st defendant was

indebted to the plaintiff or not, DW1 said there are some exhibits proving 1st defendant was repaying her loan but he does not know the amount. On whether the 2nd defendant was involved when he reported loss of his tittle to the police, he confessed to have not involved him. On futher cross examination by Mr. Ambert, DW2 said, he does not remember whether repayment of the plaintiff's loan by 1st defendant had completed when his son secured another loan from NMB using his title deed. He maintained that, 1st defendant is not indebted to the plaintiff's bank, thus the mortgaged tittle should be released.

The other defence witness was Mr. George Jonas Tamigwe and 2nd defendant, (DW3), a retiring officer from army (TPDF). This witness testified on how the 1st and 3rd defendants approached him after being introduced to him by his neighbours, and how himself together with his wife (DW4) agreed to secure the 1st defendant's loan for Tshs. 150,000,000 by using their matrimonial property, under consideration of 10% of the whole loaned amount. He said, since the 1st and 2nd defendant house had no title, it was agreed that DW3 would ensure his title deed is obtained and replace it in the bank with his, though his attempt to replace the same in bank by letter after being obtained proved futile. To prove that fact, he produced the agreement

between him and 1st defendant to mortgage his house, DW2's title deed with CT No. 630714 in Plot No. 363 Block "D" Tabata Area in Ilala Municipality and the letter to the bank seeking to replace his title with DW2's title as exhibits DE2, DE3 and DE4 respectively. His further evidence was that, the 1st and 3rd defendant did not pay him the whole agreed 10% of the loaned money nor did they replace the tittle deed in the bank as agreed, as out of Tshs. 15,000,000/- he was entitled to, received only Tshs. 7,000,000. He said, the loan facility by 1st defendant's facility was secured by his title to limitation of Tshs. 150 million only. So, he prayed the Court to declare that he is not responsible for the additional loan of Tsh. 50,000,000 advanced to Farida because, he was not involved in that transaction nor secured it. Further to that he prayed for order of replacement of the 2nd defendant's title with his title in the plaintiff's bank as collateral. And lastly that, in case of sale order, the same be directed to the 1st and 3rd defendant's house and not his house, costs of this case be provided for and any other relief as the court deem fit to grant.

Under cross examination by Mr. Lyimo, DW3 conceded to have guaranteed 1st Defendant's loan together with 2nd defendant for Tsh.150,000,000/- and that, he signed the documents freely and knowingly. The last defence

witness was Tulinagwe Yusuf Mwankutwa and the 3rd defendant's wife (DW4). In essence her evidence was a replica of that of DW3. This was the end of the defence case.

In the end, the learned advocates for the parties prayed for leave to file their final submissions, save for counsel for the 2nd defendant who was not interested. Both parties adhered to the filing schedule. I had time to read their final submissions in support of their respective stances. I truly commend them for their hardworking and insightful inputs on this suit that has made this judgment a success. In the course of determining this suit, I will be referring to them.

After going through the pleadings, testimonies of the witnesses and final or closing submission by the parties, I wish to point from the outset that, there are some issues which are no longer disputed by the parties. First, it is not disputed that, the first defendant entered into loan agreement with the plaintiff categorized as an overdraft facility in terms and conditions evidenced in exhibit PE1. Second that, the said loan was secured by the 2nd defendant landed property with CT No 869665 (exh. PE2 collectively). Third that, the 2nd defendant's liability to the secured loan is limited to Tsh.150,000,000/- only and not Tshs. 200,000,000 as claimed by the plaintiff. Four that, both

1st, 2nd and 3rd jointly and together personally guaranteed the said loan to the tune of Tshs. 150,000,000/- as specified in personal guarantee document (exhibit PE2 collectively).

On that note, I now turn to determine the merit and demerit of this suit by addressing the framed issues. To start with the first issue as to whether the first defendant defaulted in payment of the overdraft facility, the plaintiff claims up to 26/05/2020 the outstanding loan balance had hiked to Tsh 260,080,673.73, while the defendants are disputing its existence, putting it that, the 1st defendant settled her loan to its fullest, hence no breach of loan agreement.

As a matter of principle, like any other civil case, the onus of proof lies to the party who alleges existence of certain fact in which he invites the Court bank on to pronounce judgment in his favour, and failure to do so means that, the alleged fact does not exist or did not happen at all. This principle is dictated under section 110 of Tanzania Evidence Act, [Cap 6 R; E 2019] for clarity the section provides that,

> *S. 110. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of a facts which he asserts must prove that those facts exist.*

This sound principle of law was also stated by the Court of Appeal in the case of **Abdul Karim Haji Vs. Raymond Nchimbi Alois and Another**, Civil Appeal No. 99 of 2004 (CAT-unreported) when applying the provision of section 110 of the Evidence Act, where it had this to say:

> *"…it is an elementary principle that he who alleges is the one responsible to prove his allegations."*

The above principle was expounded by the Court of Appeal in the case of **Bareha Karangirangi Vs. Asterai Nyalwambwa**, Civil Appeal No 237 of 2017 (Unreported) when cited with approval the case of **In Re B** [2008] UKHL 35, where Lord Hoffman stated as thus:

> *"If a legal rule requires a fact to be proved (a fact in issue), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates in a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge lt. a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned to and the fact is treated as having happened.*

In the instant case the plaintiff relied on exhibit PE3, the 1st defendant's bank statement, to prove that the said overdraft facility is not paid hence breach of the loan agreements (exh. PE1 and PE2 collectively). In his submission Mr. Lyimo says, what is seen in exh. DE1 as written off debt of Tshs. 209,064,265.09 is an interpretation of the non-performing overdraft facility in compliance with Regulation 8(1), 9 and 11(1) and (2) of the Banking and Financial Institutions (management of Risk Assets) Regulation, 2014 G.N. No. 287 of 22/08/2014 (the 2014 Regulations), requiring banks to charge the bad debt off the books, but that does not mean that the bank is barred from claiming the same. He fortified his stance by citing the case of **National Bank of Commerce Limited Vs. Stephen Kyando t/a Asky Intertrade,** Civil Appeal No 162 of 2019 (CAT-unreported) and prayed the Court to find the defendants breached the loan agreements. On the other hand the 1st and 3rd defendants vide the submission by Mr. Hurubano, relying on another bank statement of 1st defendant (exhibit DE1) showing the debt was written off argues that, the 1st defendant is not indebted to the plaintiff as the balance reads Tshs. 00.00. And that, no any demand notices have ever been served to them to indicate that the 1st defendant is indebted to the plaintiff. Similarly the 2nd defendant in his defence believes so that, the

1st defendant owes the plaintiff zero balance out of the advanced overdraft facility. I had time to peruse and scrutinize the two documents (exh.PE3 and exh.DE1), and fully satisfied that, they bear the same contents. Both reveals that, the 1st defendant lastly serviced her loan on 18/10/2016 where she deposited 130,000.00, the only different is on printing dates as Exh. PE3's transactions ended on 27th Feb 2017 before the debt was written off, while that of exh. DE1 ended on 01 July, 2019, indicating that her loan was written off and the last column reflecting the debt of zero balance. By that entry 1st defendant claims she is relieved from liquidating her debt. Now the sub issue here is whether the act of writing off a debt from the debt entries amounts to discharging the debtor from the duty of clearing her debt as submitted by Mr. Hurubano and so believed by the 2nd defendant. The answer to that sub issue in my firm view is no. I agree with Mr. Lyimo that, it the requirement of the law that, a bad debt after some specified time under the referred Regulations, 2014 G.N. No. 287 of 22/08/2014, must be charged off or written off from the financial statements. And that is so after the non-performing loan has remained under such category for four consecutive quarters of the year as per Regulation 9 of the 2014 Regulation. This position was made clear in the case of **National Bank of Commerce Vs. The**

Commissioner General Tanzania Revenue Authority, Civil Appeal No. 52 of 2018 (CAT-unreported) cited in **Stephen Kyando t/a Asky Intertrade** (supra) where the Court of Appeal had this to say:

> *"According to the BOT Regulations, once a loan is classified as a loss, it has to be taken out in the period which it appears as uncollectable. In other words, that does loss has either to be charged off or written from the financial statements of the bank…"*

The meaning and effect of writing off the debt was discussed at length by the Court of Appeal in the case of **Stephen Kyando t/a Asky Intertrade** (supra) when faced with the situation akin to present one, while considering the provisions of Regulations 8(1),9, and 11 (1) and (2) of the 2014 Regulation and came to a finding that, writing off a bad debt has the purpose of maintaining financial stability safety and soundness of the financial system in order to reduce the risk of loss to depositors. The Court stated thus:

> *We hinted above the writing off bad debt in the lenders books, is not the option of a given bank or financial institution, it is a regulatory requirement of the financial sector regulator in a quest to maintain the stability, safety and soundness of the financial system in order to reduce the risk of loss to depositors.*

As to the effect of writing off the loan, the Court of Appeal went on to state at page 19 that:

> *Further, we have painstakingly studied the entire 2014 Regulations and the BFIA,* ***but have not been able to trace a regulation or provision providing that a defaulting borrower, whose debt has been classified as loss like the respondent in this appeal, should benefit from the regulatory aspect of writing off his own non-performing asset****. Thus, we agree with Mr,Ngogo,* ***that the act of the appellant writing off the respondent's debt did not relieve or discharge the respondent from the obligation of liquidating his debt*** *and the appellant retained a legal right to enforce recovery of the written off debt from the defaulting respondent. Holding otherwise, which we cannot do, would be tantamount to condoning financial indiscipline by unscrupulous and dishonest borrowers who could deliberately, default in settlement of their financial liabilities with their lenders waiting for their debts to be classified into categories qualifying for writing them off, so that they can go scot-free without repaying the borrowed monies.* (Emphasis supplied).

In find the above principle of the law applicable to the facts of the present case. It is apparent to me as rightly submitted by Mr. Lyimo that, the writing off of the 1st defendant's loan did not mean that, her liability to repay the

loan was discharged, thus she is still indebted to the plaintiff. That aside, *1st defendant,* testified before this court that, she was repaying the loan by cheque and sometimes by cash deposit. However, no document was tendered by her to exhibit that allegation as the assertion in not even reflected in both exhibits PE3 and DE1. It is noted by this Court from the two exhibits also that, the amount due as to the date of filing this case is Tshs. 209,064,265.09 and not Tsh.260,080,673.73 as claimed by PW1 and averred in the plaint. As the law stands it is indeed the 1st defendant's obligation to prove with certainty that, the said loan was paid in full instead of merely asserting that, her debt was written off hence she no longer owed any amount by the plaintiff. Basing on the position of the law as stated in **Stephen Kyando t/a Asky Intertrade** that, the written off debt does not relieve the borrower from discharging her duties of repaying the debt, and the fact that, the 1st defendant has failed to exhibit repayment of the said debt of Tshs. 209,064,265.09, I hold she defaulted in repayment of the said overdraft facility. The first issue is therefore answered in affirmative.

Next for determination is the issue as to whether the title deed No. 1155877 in the name of the 3rd defendant should be substituted with the title deed of the 2nd defendant with CT No. 86965 as allegedly agreed by the defendants.

I think this issue need not detain me much as from the outset, I am inclined to answer it in negative. The reasons I am holding so are not far-fetched. Firstly, a glance of an eye to exhibit DE3, does not reveal or mention any express term between the parties that, there will be substitution of the said titles. Secondly, looking at Exhibit PE1, a letter of loan facility, there is no an express term also to the effect that, there will be substitution of collaterals. Thirdly, the value of the loan facility was determined by the value of the mortgaged property by the 2nd defendant and not the 3rd defendant as rightly submitted by Mr. Hurubano in his submission. Fourthly, as rightly submitted by Mr. Lyimo, the Certificate of Tittle with No. 155877 belonging to the 2nd defendant, was not one of the securities preferred to secure the overdraft facility by the 1st defendant therefore, any attempt to replace it with the 2nd defendant's CT No. 86965, will be in violation of the loan agreement. And lastly all parties in their final submissions save for the 2nd defendant who filed none are at one that, the collaterals cannot be replaced unless there is express consent by the party concerned. Thus, for the reasons stated above the issue is answered in negative.

Lastly is the issue as to what reliefs are the parties entitled to. The plaintiff is praying this court to order all defendants to pay her Tsh.260,080,673.73

as an outstanding amount or order the sale of mortgaged property and the personal guarantees in case the mortgaged property does not satisfy the outstanding debt, general damages, interest and cost of the suit. Starting by the specific damages, the principle of law is that, the same should be pleaded, particularized and proved. The principle is well articulated in the case of **Masolele General Agencies Vs. African Inland Church Tanzania** [1994] TLR 192 CAT held that;

> *"Once a claim for a specific item is made, that claim must be strictly proved, else there would be no difference between a specific claim and a general one; the Trial Judge rightly dismissed the claim for loss of profit because it was not proved."*

In the present case, the plaintiff pleaded and testified that, the first defendant was the borrower and the rest were guarantors. As guarantors, they ought to have discharged their obligations as soon as they were notified of the default in repayment of loaned money as evidenced by (exhibit PE4 collectively), including statutory notice of default under section 127 (1) and (2) of the Land Act Cap 113 R.E 2019, sent to the 2nd defendant on 13th June 2017. It is also trite that, the rationale behind the idea of guarantee is that, the guarantor or surety undertakes to be answerable to the creditor in the

event the principal debtor fails to pay the debt by making good the same. This principle of law is reflected in section 80 of the Law of Contract Act, [Cap 345 R.E 2019] which provides that:

> *"The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract."*

This principle was well elaborated in the case of **Exim Bank (T) Limited Vs. Dascar Limited and Another,** Civil Appeal No 92 of 2009 (CAT-Unreported), where the Court of Appeal cited with approval the case of Supreme Court of India in **Bank of India Ltd Vs. Damodar Prasad,** IR 1969 SC279, in which it was held that:

> *"Under this Act, save as provided in a contract the liability of the surety is co extensive with that of the principal debtor… this meant that the surety thus becomes liable to pay the entire amount. This liability is immediate. It is not deferred until the creditor exhausts his remedies against the principal debtor."*

The Court of Appeal further stated that:

> *"Once a principal debtor defaults in the payment of the loan, the surety steps into or is placed into equal footing with that of the principal debtor. So, unless the principal debtor sooner discharges the liability, the guarantor is as liable as the*

principal debtor to the creditor and to the same extent under the terms of the overdraft facility (Exh P1)."

Guided with the above authority and principle of law, it is apparent to me that, the 2nd and 3rd defendants being guarantors of the 1st defendant and the 1st defendant herself under personal guarantee (exh.PE2 collectively), ought to have discharged their duty by paying the outstanding loan. Nevertheless it is worth noting that, at all material time 2nd defendant disputed to have secured Tsh. 50,000,000-, advanced to the 1st defendant vide mortgage deed of 29th April, 2016 (exh. PE2 collectively) without his consent following variation of terms of the first loan facility and its mortgage deed (exh. PE2 collectively) signed on 27/02/2015. His negation of such knowledge was confirmed by PW1 when admitted that, 2nd defendant as guarantor was not aware of the variation of the loan terms for an increase of Tsh.50,000,000 hence responsible to the limit of 150,000,000 only. Since the unpaid loan is secured by the 2nd defendant's title deed to the tune of Tshs. 150 Million and by personal guarantees of all defendants, I hold the 2nd defendant is responsible to the extent of Tshs. 150 Million only in which the outstanding amount before variation plus interest was Tshs. 152,572,565.89, save for the 1st and 3rd defendants who are responsible for the whole outstanding amount of Tshs. 209,064,265.09.

With regard to general damages, as the law stands the same is awarded at the discretion of the court which must be judiciously exercised. Its purpose no doubt is to put the plaintiff in the same position as far as money can do as if his rights has been observed. As it can be gleaned from the evidence adduced in court, the last date in which the 1st Defendant serviced her loan was 18/10/2016 which is more than 5 years now. This can be evidenced by both exhibits PE3 and DE1. Further to that, despite several follow ups made by the plaintiff to both 1st defendant as a borrower and the 2nd defendant as a mortgagor as evidenced by Exhibit PE 4 collectively, defendants ignored her. As regard to the 2nd defendant it is also clear that, being guarantor was duty bound to make sure that the loaned amount is paid timely but failed to do so. Thus, in consideration of inconveniences caused to the plaintiff associated with defendants' failure to repay the claimed loaned amount, the award of Tsh.50,000,000/- as general damages would be adequate under the circumstances.

That said and done, this court makes a finding that the plaintiff has proved his case to the required standard as demonstrated above, consequently this court enters judgment in favour of the plaintiff. Defendants are hereby ordered to jointly and severally pay the plaintiff the following:

(i) Tsh. 209,064,265.09 being the specific damage for breach of contract, out of which the 2nd defendant's liability is limited to Tshs. 152,572,565.89.

(ii) In realization of the amount in (i) above the property located at Plot No. 911, Block "A" Kipawa Area with Certificate No. 86965 in Ilala Municipality be attached and sold and if the debt amount is not satisfied the defendants' personal properties be attached and sold to that effect.

(iii) General damages to the tune of Tshs. 50,000,000/=

(iv) Interest at the rate of 20% on item (i) above from 7th February 2019 till full and final payment.

(v) Interest on the decretal amount at the rate of 7% per annum from the date of judgement to the date of payment in full.

(vi) Costs of the suit.

It is so ordered

DATED at Dar es Salaam this 15th day of July, 2022.

E. E. KAKOLAKI

JUDGE

15/07/2022.

The Judgment has been delivered at Dar es Salaam today 15th day of July, 2022 in the presence of Mr. Sindiro Lyimo, advocate for the Plaintiffs, Mr. Godfrey Ambet, advocate for the 2nd Defendant, 3rd Defendant in person and Ms. Asha Livanga, Court clerk and in the absence of the 1st Defendant.

Right of Appeal explained.

E. E. KAKOLAKI
JUDGE
15/07/2022.