IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)

AT DODOMA

LAND CASE NO. 12 OF 2020

NDUME NG'OKOMERO MASWALE
T/A NDUME GENERAL SUPPLY .....PLAINTIFF

VERSUS

EQUITY BANK TANZANIA LIMITED..... 1ST DEFENDANT

MBOGO AUCTION MART REAL AGENCY..... 2ND DEFENDANT

JUDGMENT

31/03/2022 & 28/06/2022

KAGOMBA, J

In this case, Ndume Ng'okomero Maswale who trades as Ndume General Supply (henceforth "the plaintiff"), is suing Equity Bank Tanzania Limited (henceforth "the 1st defendant" or "the Bank") and Mbogo Auction Mart Real Agency (henceforth "the 2nd defendant") for the following orders against both defendants jointly:

1. An order for permanent injunction to restrain the defendants, members or their officers, agents from entering, selling, auctioning and taking any action in the suit premises.

2. Declaration that the contracts between the plaintiff and the 1st defendant is void ab initio and unenforceable.

3. Specific damage of Tshs. 200,000,000/= for the loss incurred by the plaintiff for failure to conduct business.

4. General damages as assessed by the court for inconveniences, suffering and torture.

5. Costs of the suit, and

6. Any other reliefs the court may deem just and fit to grant.

According to the plaint filed in this court, the plaintiff resides in Dodoma and carries on business as a sole trader. It is the plaintiff's case that the plaintiff was a customer of Diamond Trust Bank (henceforth "DTB") up to 2015 when a manager of the 1st defendant advised him to be a customer of the 1st defendant with a promise that the 1st defendant would take over a loan that was given to the plaintiff by DTB. On 23rd September 2015 the plaintiff became a customer of the 1st defendant with account no 3009211258669 and on 24th November 2015 the plaintiff signed a letter of offer with the 1st defendant for a loan facility of Tshs. 150,000,000/= which was accordingly issued to him by the 1st defendant.

The plaintiff further states that the offered loan facility was for the purpose of taking over the outstanding loan balance at DTB which was Tshs. 67,000,000/= and Tshs, 86,900,000/= was for working capital, particularly for buying poly bag and tarpaulin bale from Linyi Xuda Import & Export Co. LTD. That, in the letter of offer (Exhibit P2) it was agreed that Tshs. 8,005,729/= would be recovered directly from the plaintiff's account in twenty-four (24) months equal installments.

However, contrary to the signed letter of offer, the 1st defendant deposited Tshs. 115,622,975/= into the plaintiff's account instead of disbursing TShs, 150,000,000/=. Further stated that, TShs. 119,416,557.27 was paid to DTB instead of the agreed amount of Tshs. 67,000,000/= without plaintiff's being informed reasons for the 1st defendant paying to DTB in excess of the agreed amount.

It is the plaintiff's case that on 13th January, 2016 the 1st defendant took him to one Muraad Al-Atas and the three signed a loan agreement whereby Al-Atas advanced the plaintiff Tshs. 37,000,000/= which was not part of the loan agreement between the plaintiff and the 1st defendant, without informing the plaintiff the basis of the said loan. But on 11th January, 2016, Tshs. 35,000,000/= was transferred to the plaintiff's account instead of the entire Tshs. 37,000,000/=. As the loan of TSh.37,000,000/= was to be paid in two weeks, on 9th April, 2016 Tshs, 39,000,000/= was transferred from his account to Al-Atas' account and Tshs.4,000,000/= was not accounted for.

From the above flow of events, the plaintiff claims that he was denied access to the money that was intended as working capital, which caused his business to stall. He also claims that the loan from Muraad Al-Atas with alleged interest of Tshs. 4,000,000/= per two weeks and the manner of its repayment confused him and caused him to fail to conduct his business properly leading to business loss.

The plaintiff further alleges that the 1st defendant started deducting money from his account while denying him access to copies of loan documents and all his complaints to the 1st defendant fell on deaf ears. He alleges further that when he received some consignments of goods for sale, the 2nd defendant on instructions from the 1st defendant was interfering by pressurizing him to sell the goods at any price so as to get the money to repay Muraad's loan, an act which he alleges to have contributed to his business loss.

On 25th July 2016, the 1st defendant issued a demand notice requiring the plaintiff to Tshs. 10,491,167/= as arears of loan and on 9th September 2016 the 2nd defendant issued a public notice on behalf of the 1st defendant advertising to auction his loan collaterals. He says that his collateral that is situated at Plot No. 22 Block "Q" Area E Dodoma is worth over Tshs. 124,000,000/= compared to his loan balance at Equity Bank.

The plaintiff also alleges that he requested for a further amount of Tshs. 100,000,000/= to return his business in the right track but the 1st defendant did not respond.

Therefore, the plaintiff claims from the 1st defendant the amount of Tshs. 150,000,000/= that was agreed between him and the 1st defendant as working capital; Tshs. 52,416,557/= being the difference between the loan outstanding at DTB which was paid by the 1st defendant without him being informed and without his consent. He also claims for Tshs. 200,000,000/= as general damages saying that the public notice made by 2nd defendant damaged his reputation. This is what makes up the plaintiff's case.

The defendants filed a joint Written Statement of Defence (WSD) noting some of the matters stated by the plaintiff but mainly denying singularly and severally allegations of facts contained in the plaint. First and foremost, the defendants aver that it was the plaintiff who approached the 1st defendant requesting for a buy off of his loan from DTB as well as advancement of loan for purchase of polybag and tarpaulin bale. That, the outstanding balance of DTB loan as at close of business on 22nd November, 2015 had accrued to the tune of Tshs 115,411, 243/=, and that the balance plus interest had varied as of the date of settlement of the advanced facility.

The 1st defendant also avers that, it was the plaintiff who brought Muraad Al-Atas to the 1st defendant for guarantee of the loan arrangement and that the 1st defendant only acted as a guarantor. The 1st defendant finds it absurd on the part of the plaintiff to claim that he signed an agreement without information on its basis. The 1st defendant therefore asserts that if there was any transfer from the plaintiff's account, the same must have been authorized by the plaintiff himself.

That, the plaintiff mutually agreed with every term and condition contained in the Loan Agreements and signed the same together with Mortgage Deed and Guarantee and Indemnity of which after signing he retained his copies.

Regarding the demand notice, the 1st defendant finds necessary as the plaintiff arrogantly and willfully defaulted to abide by and comply with the payment plan agreed upon between himself and the 1st defendant. Hence, the plaintiff breached the very fundamental term of loan agreement which left no other option on the part of 1st defendant but commence loan recovery process.

The 1st defendant noted that the value of the mortgaged land property situated at Plot No. 22 Block "Q" Area E, Dodoma does not exceed Tshs. 124,000,000/= but avers however that the forced sale value of the same is pegged on Tshs. 93,000,000/=.

That, 1st defendant further averred that, the plaintiff's collaterals and/ or mortgage for the loan was Certificate of Title No. 13710 -- DLR, L.O No. 96253/ 15169 Plot No. 22, Block 'Q' Area 'E' Dodoma Municipality registered under the same name of Lawi Tumza Ngambuye and Certificate of Title No. 28590 – DLR, Land Office No. 96253/ 24737 Plot No. 1, Block 'D-Centre Kikuyu North Dodoma Municipality registered under the name Mathayo Ng'okorome respectively. That, both land owners guaranteed and signed to indemnify the 1st defendant in case of default on repaying the loan facility, as it turned out to be the case with the plaintiff.

The 1st defendant averred further that the outstanding amount payable to the 1st defendant by the plaintiff is Tshs. 198,451,215/= on which interests continue to accrue until payment is done in full.

After completion of the pleadings, the case was set for mediation which however failed and the matter proceeded to hearing, after the final pre-trial conference where the following issues were framed:

1. Whether the 1st defendant deposited Tshs. 115,622,975/= into the plaintiff's account instead of disbursing Tshs. 150,000,000/=.

2. Whether the plaintiff had an outstanding loan from DTB to the tune of Tshs. 115,411,243/= plus accrued interest.

3. Whether the plaintiff had no information on the basis of the loan agreement from one Muraad Al-Atas.

4. Whether the arrangement of the loan of Tshs. 37,000,000/= made by the 1st defendant on Muraad Al-Atas was lawful.

5. Whether the 1st defendant denied the plaintiff access to loan agreements and the loan which was granted as working capital whose copies he was entitled to get.

6. Whether the 1st defendant pressurized the plaintiff to sell goods at any price.

7. Whether the plaintiff's claim of Tshs. 150,000,000/= from 1st defendant is lawful.

8. Whether the plaintiff's claim of Tshs. 52,000,000/= from 1st defendant is lawful.

9. Whether the 1st defendant caused failure of plaintiff's business.

10. Whether the public notice issued by the 2nd defendant tarnished plaintiff's reputation.

11. Whether the 1st defendant was lawfully entitled to issue the public notice.

12. Whether the plaintiff breached the loan agreement between him and the 1st defendant, and

13. To what reliefs are the parties entitled.

On the date of hearing of the case, the plaintiff was represented by Mr. Francis Mantago Kesanta, learned advocate while Mr. Francis Stephen, learned advocate appeared for the defendant. Mr. Ndume Ng'okorome Maswale, the plaintiff, adduced his evidence as PW1.

After taking an oath, PW1 told the court that his business is to sell tarpaulins and bags for which he had registered his business name of Ndume General Supply.

PW1 further told the court that he knew the 1st defendant through its manager one Pendo, who was previously working with DTB where PW1 was a customer. He says, when he applied for a loan to clear his containers, the DTB Manager told him that the loan would take long time to be disbursed. That, Pendo who was the Assistant Manager told him that she was going to be appointed a manager at the 1st defendant thus invited him to join the 1st defendant where he could get a loan for the goodwill that existed. PW1 was convinced and thus joined the 1st defendant.

PW1 told the court that thereafter he was given a letter of offer for a loan, but he was given a copy after signing and not the original. He tendered a copy of the letter of offer for the loan dated 20/11/2015 bearing Ref. No. EBL/HO/DODOMA/3009211258669 (**Exhibit P2**).

PW1 continued to tell the court that the amount of loan was Tshs. 150,000,000/= and it was agreed between them that Tshs. 67,000,000/= was for taking over the DTB outstanding loan while Tshs. 86,900,000/= was to be disbursed to him for purpose of his business development.

PW1 told the court that despite of the said agreement, the 1st defendant took upon herself to pay DTB Tshs. 121,516,557.27 instead of Tshs. 67,000,000/=. He said he was not involved nor was he informed about the amount of money that was eventually paid to DTB. He was just told to wait for his disbursement.

PW1 said that the bank statement for his account with the 1st defendant would show that the money was paid to DTB. However, the

objection against admission of his bank statement was successfully sustained, after this court found that it would contravene the law.

PW1 further told the court that the 1st defendant had no money to disburse, a reason why the 1st defendant went to borrow money for him from Muraad Al-Atas who was called to the Bank by the 1st defendant. That, he was told by the 1st defendant that Al-Atas could lend him money for cargo clearance but the plaintiff would have to refund the money with some profit to Al-Atas. He said he was thus given Tshs. 35,000,000/= but in the contract they wrote Tshs. 37,000,000/=, an amount that included Tshs. 2,000,000/= as profit. PW1 stated that after delaying repayment for two weeks, the bank added another Tshs. 2,000,000/= thereby increasing the Al-Atas debt to Tshs. 39,000,000/=. He said that he has a copy of the contract between him and Muraad Al-Atas but the original contract was misplaced.

PW1 further told the court that his business was affected because of how the loan was being disbursed to him, as some of the money was disbursed by Muraad Al-Atas. He said the loan from 1st defendant was to be repaid in two (2) years. He said since the business was not good, the 1st defendant brought the 2nd defendant to supervise the business so that the plaintiff would sell his goods even at loss to settle Al-Atas' loan. PW1 added that since 1st defendant took money from the business, the business stifled.

PW1 said, as a result of the said actions, he failed to remit money for servicing of the loan because the 1st defendant did not disburse the money as agreed. He said the said actions by the 1st defendant caused his clients to run away, and have affected him psychologically. He said he is not the same

as he was before, as all the time he thinks about debts and he cannot do business after having been rendered uncreditworthy.

To justify his claim for the payments demanded in the plaint, PW1 told the court that he used to be getting Tshs. 3,000,000/= to 3,500,000/= per month from his business and that his business was affected since 2015. He said six (6) years have elapsed since then which is equal to seventy-two months. He said he has therefore lost over Tshs. 200,000,000/=. He prayed the court to order the cancellation of the debt because the 1st defendant did contrary to their agreement in settling the DTB loan. He also prayed for damage of Tshs. 200,000,000/= for the loss incurred; he claimed for costs and for court to prohibit the sale of the loan collateral belonging to Lawi Tunza Ngambiye and Mathayo Ng'okorome. PW1 also prayed for cancellation of the loan.

When cross-examined by Mr. Stephen, PW1 conceded that he applied for the loan which had a maximum amount of loan shall be Tshs. 150,000,000/=. He however opposed the idea that the bank could give him less than Tshs. 150,000,000/=.

Regarding the claim that he was not given the original loan documents, PW1 conceded that he did not furnish the court with evidence of his follow up on loan documents from the Bank.

PW1 further maintained that the 1st defendant took it upon herself to pay DTB the amount of Tshs. 121,516,557.27 as the Bank officers were

doing everything themselves without involving him. He said, all that he could do was to complain orally to the Bank and eventually he filed this suit.

Regarding the loan from Muraad Al-Atas, PW1 maintained his claim that it was the Bank that connected him with Muraad Al-Atas, as he did not know him before and that it is the Bank that convinced him to borrow from him. He added that despite the fact that the Agreement for a loan from Al-Atas was different with the Loan Agreement in **Exhibit P2**, it is the 1st respondent who was supervising the Al-Atas loan too.

Regarding the coercion to sell his goods at low price, PW1 said that he had given proof that Mr. Mbogo of the 2nd defendant was sent by the Bank to compel him to do so to settle the loans.

On proof of losing customers, PW1 told the court that he has given such proof to the court, even if he did not mention the names of those customers.

Regarding allegation of psychological effects on him, PW1 stated that he has got both psychological and heart problems even if he is not a doctor and did not tender medical records in court to that effect.

Regarding his monthly business profits, PW1 reiterated that it was between Tshs. 3,000,000/= and Tshs. 3,500,000/=. He said DTB were doing evaluation of his business before and after giving him loans, and that he has records of his business profits before and after applying for the loan from 1st defendant but he did not submit the same to the court.

PW1 also conceded that his reason for praying the court to cancel the loan for breach of a loan agreement is based on the fact that the Bank has not given him money. He also said that his claim of Tshs. 200,000,000/= for damages is based on the breach of contract by the 1st defendant and the calculation of loss of profits from his business.

On re-examination, PW1 stated that he knows the amount of loss because he knows the value of the goods he bought and the price he was selling at. He explained that the profit was the difference between the purchase price and the selling price.

PW1 also stated that the suit in court is based on the breach of contract by 1st defendant on how to pay DTB debt. Regarding psychological torture, he said it is him who knows about it because he is the one who has been affected, and not the doctor.

After the above one-witness testimony, the plaintiff's case was closed and the defence case was opened, whereby Mr. Stephen called Willard Mbando, who testified as DW1 and was the only defence witness in this case.

Willard Mbando (DW1) after taking an oath, he told the Court that he works with the 1st defendant at Dodoma Branch as a Loan Supervisor/ Manager who supervises loans collection. He said that he started working with the 1st defendant in May 2018 and he knew the plaintiff since then upon being handed over loans' documents as the custodian.

DW1 told the court that the plaintiff came to the Bank as any other customer and filled in an application form for the loan. That, the Bank reviewed his application and approved the same. He added that upon approval, the plaintiff was given a letter of offer in November, 2015 and after accepting the terms and conditions therein, including the requirement to mortgage two houses located at Kikuyu and Area "E" owned by Mr. Lawi and Mr. Mathayo Ng'korome, who signed Land Form No. 41, personal guarantees and Mortgage Deeds, a letter of offer was accordingly issued to the plaintiff. DW1 was able to identify **Exhibit P2** as the said letter of Offer for the loan.

DW1 told the court that the amount of loan is Tshs. 150,000,000/= which was to be repaid by the plaintiff in 24 months by equal instalments of Tshs. 8,005,729/=. He said the loan is secured by the properties on plot No. 22 Area 'E' and Plot No. 1 Block 'D' Kikuyu Dodoma.

He said that the other terms of the loan are to inform the client that in case of default the Bank shall institute procedure to recover it. Also, the guarantors were to sign Land Forms, personal guarantee forms and mortgage deeds. DW1 tendered **Exhibits D1** and **D2** being personal guarantee and Mortgage of Right of Occupancy respectively in respect of Mathayo Ng'okorome; and also tendered Land Form No. 41 signed by Mathayo Ng'okorome (**Exhibit D3**).

Likewise, DW1 tendered the personal guarantee, Mortgage of Right of Occupancy and Land Form No. 41, in respect of Lawi Tumza Ngambiye, were admitted in evidence as **Exhibits D4, D5** and **D6** respectively. He testified that the mortgaging of the loan securities was duly registered.

DW1 told the court further that the Bank disbursed to the plaintiff's account Tshs. 150,000,000/= by following the loan agreement, while Tshs. 67,000,000/= out of the loan was paid to DTB because the client had a loan outstanding amount which had to be paid and the balance released to the client to facilitate his tarpaulin business.

DW1 told the court that he has evidence of the said disbursement to the plaintiff's account as well as to DTB. He told the court that he had been dealing with the plaintiff's account, hence he is familiar with what is happening. He said he was unable to produce the physical bank statement because it requires official request as a requirement of a duty of disclosure. He said he could print it if he had been duly authorized by the plaintiff.

DW1 told the court that after all the said processes, the plaintiff was supposed to start repaying the loan instalments. He added that the plaintiff managed to repaying only for the period of January to July 2016, where a total of Tshs. 52 million was paid. That, the plaintiff was to be paying the instalments of Tshs. 8 million but sometimes he was paying less than the agreed instalment and eventually he failed to comply, hence demand notices were issued. He said, it was after serving him with the demand notice that the plaintiff came to court to oppose the attachment and selling of the collaterals.

DW1 turned to Muraad Al-Atas loan. He said he knows Muraad Al-Atas as a good client of the Bank who was introduced to the Bank by the plaintiff. He said, the plaintiff and Al-Atas requested the Bank to witness their personal loan arrangement, which was not part of the loan agreement between the

plaintiff and the Bank. He denied the allegation that it was the Bank that directed the plaintiff to take loan from Al-Atas.

On the allegation of denying the plaintiff the loan documents, DW1 told the court that the plaintiff had never asked him for documents, as he would normally be given. He regarded the claim as a hopeless escape route from the impending loan repayment obligation. DW1 told the court that the loan outstanding on the plaintiff's account is in excess of Tshs. 170 million and it has an interest of 23% p.a, plus bank charges being the reason the loan outstanding balance had increased. He prayed the court to dismiss the suit and to condemn the plaintiff to pay costs of the case.

When DW1 was cross examined by the Mr. Kesanta, he first maintained that the amount paid to DTB was Tshs. 67,000,000/=. However, upon being shown the WSD, he changed his stance and conceded that the amount paid to DTB was Tshs. 115,411,243/=. He said the loan amount was Tshs. 150,000,000/= and that the plaintiff was to be paid Tshs. 86,900,000/= but the said amount was not paid to him. He replied that the total amount paid by the plaintiff in respect of loan settlement is Tshs. 52,000,000/=, without showing a breakdown of principal amount and interest.

When further quizzed by Mr. Kesanta, DW1 conceded that as per paragraph 7 of the WSD, it is DTB who told the 1st defendant that the outstanding loan amount in respect of the plaintiff was more than Tshs. 67,000,000/= and that is why the Bank paid DTB more than that amount. He also told the court that the plaintiff was informally told about the actual amount paid to DTB. He said the document the Bank wanted to be released

by the DTB were the certificates of occupancy so that they could be used to secure the loan the 1st defendant had approved for the plaintiff. He clearly stated that it was for this reason, the Bank had to pay the amount which was advised by DTB to be the outstanding loan as of that day.

The DW1 clarified that the duty of the Bank to ascertain the actual liability is based on the advice from his primary banker which was DTB. He said, as of the date the plaintiff signed the loan offer the Bank was already advised by DTB. He conceded that the purpose of the loan of Tshs. 86.7 million was to enable the plaintiff carry out his business. He said the duty to prove there was an increase in the outstanding loan amount is on DTB.

DW1 further stated in the Al-Atas' loan agreement the Bank was interchangeably the guarantors and a witness. He said he did not know it was allowed to do that in law. He conceded that he had not mentioned the date the Bank disbursed Tshs. 150,000,000/= loan to the plaintiff neither did he mention the account number in which the money was paid. He said however that the account number is shown in **Exhibit P2**, appearing as the reference number.

On being re-examined by Mr. Stephen, DW2 was shown paragraph 7 and 9 of the WSD, which was advising on the outstanding balance as of 22/11/2015, whereupon DW1 denied the allegation that the plaintiff was not advised on the amount outstanding in his loan account with DTB. DW1 said after being so advised, the plaintiff did not complain as he knew the outstanding loan balance was the correct amount.

DW1 further told the court that it was a basic practice that the advice from DTB was on the outstanding amount as of that date. He said the loan was approved in November, 2015 and in December, 2015 the Bank disbursed the fund. He reiterated that the Bank's witnessing of the Al-Atas loan was done out of genuine goodwill to the Bank's clients. This marked the end of the defence evidence.

To recap on the plaintiff's claims; he sues the defendants for undisbursed loan amount of Tshs. 150,000,000/= as agreed in the signed letter of offer. He complains about overpayment of DTB loan which was specified to be Tshs. 67,000,000/= and coercion in selling of its goods at low price and proceeds thereof collected to pay a loan from Muraad Al-Atas at a high interest as well as the Bank loan, all these culminating into his business loss that affected his repayment of the loan to the 1st defendant thereby exposing the loan collaterals to the risk of auction. That, all these hustles resulted to his psychological torture and health problems, hence a claim of general damages of Tshs 200,000,000/=, among other claims. It is from such claims thirteen (13) issues were framed to guide the determination of this case.

Generally, Section 110(1) of the Evidence Act, [Cap 6 R.E. 2019] imposes a duty on the plaintiff to prove his case. This being a civil matter, the burden of proof is calibrated to the balance of probabilities.

With regard to the first issue as to whether the 1st defendant deposited Tshs. 115,622,975/= into the plaintiff's account instead of disbursing Tshs. 150,000,000/=, the plaintiff has not substantiated this claim. He sought to

tender a bank statement but the same was rejected following a ruling that the admission of copies of the bank statement would contravene the law.

However, Mr. Willard Mbando (DW1) asserted that the loan amount disbursed to the plaintiff's account was Tshs. 150,000,000/=. He said out of the disbursed loan amount, Tshs. 67,000,000/= was paid to DTB to settle the plaintiff outstanding loan. He later changed stance and confirmed the plaintiff's claim that the amount so paid to DTB was actually Tshs. 115,411,243/= as pleaded in the WSD and not the agreed Tshs 67,000,000/=. The testimony of DW1 by and a large confirms the plaintiff's allegation that the amount disbursed is not what was agreed upon. I shall revert to this testimony in due course. Suffice it to say at this juncture that the plaintiff has not been able to prove the first issue in the affirmative.

The second issue is whether the plaintiff had an outstanding loan from DTB to the tune of Tshs. 115,411,243/= plus accrued interest. The plaintiff has maintained that the outstanding debt with DTB was Tshs. 67,000,000/= and that he was not advised on the paid amount of Tshs. 115,411,243/=. The defence has told the court that they relied on the advice given to them by DTB as of the date of the advice.

The advice received by the 1st defendant from DTB dated 23rd November, 2015 much as it states the total outstanding loan balance of Tshs. 115,411,243/= has a major shortfall. It was neither communicated to, nor agreed by the plaintiff. The fact of the matter is that it was a communication between the two banks only. The plaintiff was not copied. It is therefore my view that since the loan amount is contested by the plaintiff, there is a

possibility that the same was erroneously calculated or recorded. For this reason, the defence evidence has fell short of proving this issue. That said, the second issue is answered in the negative.

The third issue is whether the plaintiff had no information on the basis of the loan agreement from one Muraad Al-Atas. PW1 confirms that he took a loan of Tshs. 37,000,000/= with interest of Tshs. 2,000,000/= from Muraad Al-Atas whereby the actual amount disbursed was Tshs. 35,000,000/= with Tshs. 2,000,000/= chopped off upfront as interest.

He also confirmed to have defaulted repayment of the said loan by two weeks, whereby another Tshs 2,000,000/= was debited to his account.. He also appears to have allowed the proceeds of sale of his goods to be used for settlement of the Al-Atas loan, albeit reluctantly. Evidence by PW1 shows that what he was not happy about is the amount of interest and penalty as well as the forceful manner of loan recovery through Mr. Mbogo.

From PW1's testimony, this court is of settled view that the plaintiff had information on the basis of the loan from Muraad Al-Atas. Since the said agreement was not tendered as evidence, the court cannot confirm the existence and or contents of that agreement. However, the plaintiffs' knowledge has been sufficiently proved as stated above. Therefore, the third issue is answered in the negative.

The fourth issue is whether the arrangement of the loan of Tshs. 37,000,000/= made by the 1st defendant on Muraad Al-Atas was lawful. I

find this to be a serious issue as may impeach the reputation of the 1st defendant. Such an impeachment should, if necessary, be done fairly.

The evidence adduced by PW1 and DW1 did not directly touch on the aspect of legality of the Al-Atas loan. However, when DW1 was asked about the legality of the said loan he responded that the Bank did not know if it was against the law to be involved in such an arrangement. DW1 also added that the Bank took it as an act of goodwill to its customers.

Whether the arrangement was lawful or not, I think the provisions of the Banking and Financial Institutions Act, (Cap 342) and Regulations made thereunder can help in determining this issue. The court has in mind Regulation 36 of the Banking and Financial Institutions (Corporate Governance) Regulations, 2021 (GN. No. 767 published on 29/10/2021) on banks' insider transactions, which provides:

> *'36. The Boards shall establish, implement and regularly review policies that guide transactions with insiders and their related parties and ensure that-*
>
> *(a) such transactions are conducted on arm's length terms, and*
>
> *(b) corporate or business resources of the bank or financial institution are not misappropriated'.*

Two opposing perspectives can be drawn from the evidence adduced in court on this aspect. It is the plaintiff' evidence that after the Bank had failed to give him the loan, he was introduced by the Bank to Muraad Al-Atas

to lend him money. The Bank's perspective is that it is the plaintiff who introduced Murrad Al- Atas to the Bank. If the plaintiff's perspective is to be held as more credible, and I think there are reasons to hold it so, it would follow that there are officers of the Bank, being insiders who are related to some outsiders, went out of their professional limits to act as brokers for customers in need of loans. The mischief here, however little it may look, is the use of resources of the Bank to facilitate an otherwise private arrangement. The court is inclined to believe the plaintiff's perspective for a reason to be demonstrated..

According to PW1, the amount of loan from Muraad Al-Atas was Tshs. 37,000,000/= out of which Tshs.2,000,000/= was chopped off upfront as interest. PW1 further stated that when he defaulted repayment of Al-Atas loan, Tshs. 2,000,000/= was debited to his account to raise his debt to Al-Atas to Tshs. 39,000,000/=. This evidence was not controverted by the defence, hence acceptance. (See **Emmanuel Saguda @ Sulukuka V. R,** Criminal Appeal No. 422 'B' of 2013 CAT at Tabora (unreported)). From the evidence adduced, the debiting of the plaintiff's account was done by the Bank. The question is, for want interest would a bank go out of its way to enforce customers' private arrangement?

For proper determination of this issue, it is imperative to clarify that the cited Regulation 36 above, obliges Boards in banks and financial institutions to put in place appropriate polices to curb such malpractices. If the Board of the 1st defendant has already put such policy in place, it can be said that those who facilitated the loan in such an unprofessional manner

might have committed a malpractice. This however is far from confirming that there is a breach the law.

However, there is more to it. The loan of Tshs. 35,000,000/= was given to the plaintiff with interest. There is no dispute that the plaintiff paid Tshs. 2,000,000/= as interest upfront and upon a 2-weeks delay, his account was debited with another Tshs. 2,000,000/=, hence Tshs 4,000,000/= imposed on the loan, in whatever name, but profited the said lender.

In **Gasto Sabas Nyogo v. Bombo Johnson Nyamweru**, PC Civil Appeal No. 13 of 2020, a decision of this court at Kigoma, my learned brother Hon. Matuma, J held a similar transaction between an un-licensed lender and his borrower to be unlawful for contravening section 3(1)(a) of the Business Licensing Act, Cap 208 R.E 2002 which prohibits any person to carry on business without having a valid business license. Of particular interest in the cited judgement is the reasoning put forth by Hon. Matuma, J from page 3 to 4 of the typed judgment, where he said:

> *'Nobody can dispute that the agreement between the parties herein on the loan was in the nature of business transaction. That is because it was in the capital of Tshs. 1,500,000/= invested into lending with an expected profit of Tshs. 300,000/= per month. In other three months it raised into millions of monies as herein above stated. Therefore, it was a business transaction'.*

In the above cited case, another decision of this court by Hon. Mackanja, J (as he then was) in **David Charles V. Seni Manumbu**, (HC)

Civil Appeal No. 31 2006 was referred to with approval where the learned judge was quoted to decide, thus;

> *"As it has come to pass that, and since the loan was advanced and was received in contravention of the law, it cannot be enforced".*

I am inclined to subscribe to the position taken by my learned brothers in the two cited cases, especially with the circumstances surrounding the said Al-Atas loan. However, since the transaction was principally between Muraad Al-Atas as the lender and the plaintiff as the borrower, I feel restrained to determine this matter without hearing Muraad Al-Atas, lest I slip into condemning him unheard. Therefore, this is how far I could go to determine the third issue.

The fourth issue for determination is whether the 1st defendant denied the plaintiff access to loan agreements and the loan which was granted as working capital whose copies he was entitled to get. Evidence adduced by the PW1 is to the effect that he was denied copies of the loan agreements. DW1 loathed this issue. He said under normal course of things, the customer would be availed with copies of the loan agreement if he wanted it. he saw no reason for the bank to deny him access to such documents. I agree with DW1 as I also don't see any good reason for the Bank to deny the plaintiff copies of agreements between them. Besides, the issue is trivial and has not been proved by the plaintiff.

The fifth issue is whether the 1st defendant pressurized the plaintiff to sell goods at any price. Again, apart from what was stated by the plaintiff in his testimony, there was no any proof of this allegation. As such the issue is answered in the negative.

The sixth issue is whether the plaintiff's claim of Tshs. 150,000,000/= from 1st defendant is lawful. The plaintiff claims to be paid Tshs. 150,000,000/= which is the amount of loan that was agreed by the parties as per loan agreement -**Exhibit P2**. According to the loan agreement, it's not the entire loan that was to be disbursed to the plaintiff. Out of Tshs. 150,000,000/= total loan, Tshs. 67,000,000/= was for settlement of the DTB loan and Tshs 86,900,000/= was for working capital. There is no dispute that the DTB loan was settled by the Bank. The parties are at issue on the amount paid to DTB and whether it was right to pay such an amount without involving the plaintiff. Therefore, since the DTB loan was plaintiff's loan and has already been paid by the Bank, it shall not be lawful for the plaintiff to be paid again the entire amount of Tshs. 150,000,000/= because doing so will exceed the agreed loan amount. I therefore find the claim of Tshs. 150,000,000/= unfounded in the loan agreement and in the law.

The seventh issue is whether the plaintiff's claim of Tshs. 52,000,000/= from 1st defendant is lawful. PW1 did not adduce evidence as to why he deserves to be paid this amount of money. It is DW1 who stated that Tshs. 52,000,000/=is the total amount paid by the plaintiff in respect of loan settlement. As such, the plaintiff claims to be refunded all the money he had paid to service the loan agreement that went sour. I propose to determine this issue together with the eighth issue, as to whether the 1st

defendant caused failure of plaintiff's business. In my considered view, the latter is the most critical issue in this dispute.

The evidence adduced in court shows clearly that when the parties met to establish banker-customer relationship, the plaintiff was in business. He was banking with DTB where he was given a loan facility. As it is common among businessmen, the plaintiff wanted to grow his business. Thus, he applied for a loan and the 1st respondent, after considering the application did approve a loan of Tshs. 150,000,000/= as per **Exhibit P2**. The said Exhibit constitutes, for all intents and purposes, the loan agreement between the 1st defendant and the plaintiff. The position of the law is very clear that parties are bound by their agreement. In **Simon Kichele Chacha v. Aveline M. Kilawe** (Civil Appeal 160 of 2018) [2021] TZCA 43 (26 February 2021), the Court of Appeal stated on 8 of its typed Judgement thus;

> *'It is settled law that parties are bound by the agreements they freely entered into and this is the cardinal principle of the law of contract.'*

It is therefore the considered view of this court that this dispute should be decided in accordance with what the parties agreed in Exhibit P2. It is apparent that the plaintiff and the 1st defendant agreed on some fundamental terms and conditions of the loan. The first fundamental term is the purpose of the loan, for which clause 1 of Exhibit P2, it states:

> *'1. Purpose*
>
> *The facility has been granted as to be utilized for*

(a) *'TZS 67,000,000.00 take over outstanding loan balance at DTB.*

(b) *TZS 86,000,000.00 for purchase of polybag and Tarpaulin bale from LINYI XUDA IMPORT & EXPORT CO. LIMITED'.*

The other fundamental terms include the amount of the facility and its repayment, where again the parties agreed that '*the maximum amount that will be available for draw down under the proposed facility shall not exceed the aggregate of Tshs. 150,000,000/-*'. The third clause provides for interest and commissions, etc.

From the above terms and conditions, subject to the plaintiff providing all the securities for the loan, the bank was obliged to, firstly, ensure that the amount of Tshs. 150,000,000/= is available for plaintiff's draw down to meet the agreed purpose of the loan. The court strongly holds that, based on the terms of the loan agreement, particularly clause 1, it was legitimate for the plaintiff to plan his business ahead with legitimate anticipation that he had at his disposal finances for purchase of the polybags and Tarpaulin of up to Tshs. 86,000,000/=. These terms were unequivocal but only subject to fulfillment by the plaintiff of his obligation under the loan agreement.

That said, it is a firm view of this court that any change of the agreed terms of the loan agreement mandatorily needed, firstly, a prior consent of both parties and secondly, written amendment or variation of the Loan Agreement. This is because a written agreement cannot in law be amended or varied by oral terms and conditions.

The plaintiff claimed that he was not involved in varying the amount of money paid for DTB loan. The testimony of DW1 has confirmed that the increase of the DTB loan amount was done by 1st defendant on advice of the DTB. There is no dispute from the evidence on record that the 1st defendant neither sought nor obtained prior written consent of the plaintiff before increasing the DTB loan from the agreed Tshs. 67,000,000/= to Tshs. 115,411,243. It is the court's firm view that in so doing the 1st defendant committed a fundamental breach of the loan agreement.

Likewise, it is not in dispute that the agreed Tshs. 86,900,000/= for purchase of polybag and tarpaulin bale was not disbursed at all to the plaintiff. Again, there is no prior written advice to the plaintiff as to why the approved amount would not be disbursed. To say the least, this was not only a fundamental breach that caused failure of the plaintiff's business by curtailing his legitimate expectation of financing, but also a show of diminished professionalism and breach of fiduciary duty too.

For the above reasons, the court holds the 1st defendant responsible for the collapse of the plaintiff's business. It also for the same reasons I hold the 1st respondent responsible for claims in the remaining issues, which I am going to determine as follows:

On whether the public notice issued by the 2nd defendant tarnished plaintiff's reputation, I answer it in the affirmative. Having been responsible for fundamental breach of the loan agreement, the 1st defendant had no audacity of instructing the 2nd defendant to publish the public notice (Annexure NM8). The public notice mentioned the plaintiff and announced

in kiswahili that '*TUTAUZA DHAMANA YA MDAIWA WA BENKI* and goes on to mention the defaulting Debtor as '*NDUME NG'OKOROME MASWALE*'.

There is no dispute that the plaintiff was doing international business, and had good reputation even among banks as evidenced by the fact that the 1st defendant found him creditworthy and approved a loan for him. It is not disputed that the plaintiff was doing his business in Dodoma where the public notice was made. Under the circumstances, the act of naming the plaintiff who has defaulted in the said public notice, in my considered view tarnished the good reputation of the plaintiff in the eyes of the right-thinking members of the business community, his customers and public at large.

On whether the 1st defendant was lawfully entitled to issue the public notice, I think she was not. As the court has held the 1st defendant responsible for fundamental breach of the loan agreement, there is no way she could have the audacity to point an accusing finger at the plaintiff. With simple invocation of the tenets of professionalism, the 1st defendant would obviously find where the fault begun. If it was not possible to proceed with disbursement of the loan to the plaintiff, it was not a must for the 1st defendant to go out of her way unilaterally. Such a breach of the loan agreement at the very early stage of relationship with a new customer dispossessed the 1st defendant a right to issue the public notice for lack of clean hands.

On whether the plaintiff breached the loan agreement between him and the 1st defendant, the answer is obviously no, for reason we have

repeatedly stated. To the contrary, it is the 1st defendant who committed fundamental breach of the contract.

Regarding the reliefs the parties are entitled to, I have reviewed the wish-list of the plaintiff. First and foremost, he prays for an order of permanent injunction to restrain the defendants, members of their offices, and agents from entering, selling, auctioning and taking any action in the suit premises. Since I have held that the 1st defendant committed fundamental breach of the loan agreement, and caused failure of the plaintiff's business, it follows naturally that the 1st defendant cannot benefit from the sale of the collaterals mortgaged to secure the loan. Doing so, will be tantamount to benefiting the Bank from its own wrong-doing. As such, this prayer has merit.

Accordingly, the court hereby grants an order for permanent injunction to restrain the defendants, members of the offices and their agents from entering, selling, auctioning and taking any adverse action in the suit premises, namely; property held under Certificate of Title No. 13710 – DLR, L.O No. 96253/ 15169 situated on Plot No. 22, Block 'Q' Area 'E' Dodoma Municipality registered under the name of Lawi Tumza Ngambuye and property held under the Certificate of Title No. 28590 – DLR, Land Office No. 96253/ 24737 Plot No. 1, Block 'D-Centre Kikuyu North Dodoma Municipality registered under the name Mathayo Ng'okorome.

The plaintiff further prays for declaration that the contracts between the plaintiff and the 1st defendant is *void ab initio* and unenforceable. The contract that has been pleaded in this matter is the loan agreement, Exhibit

P2. This agreement was entered freely by the parties who are competent to contract, for a lawful object and lawful purpose. There is no allegation of fraud or misrepresentation by either party towards the signing of the same. As such, the loan agreement was a lawful agreement. For this reason, I decline the call to declare it *void ab initio.* However, after the 1st defendant had committed fundamental breach of the same, as held herein, I find merit in the prayer for declaring the said loan agreement unenforceable, as I hereby do.

The plaintiff also claims for specific damage to the tune of Tshs. 200,000,000/= for the loss incurred by him for failure to conduct business. He told the court in his testimony that he was getting an income of Tsh. 3,000,000/= to Tshs. 3,500,000/= per month from his business. He said the business was affected since 2015 and he lost that income for six (6) years since then, equal to 72 months. This being the basis for his claim.

Its trite law that specific damages have to be specifically proved. **(see Stanbic Bank Tanzania Limited vs Abercrombie & Kent (T) Limited** (Civil Appeal 21 of 2001) [2006] TZCA 7 (03 August 2006). Also **Alfred Fundi vs Geled Mango & Others** (Civil Appeal 49 of 2017) [2019] TZCA 50 (05 April 2019)). In the case at hand, the plaintiff did not prove his monthly income nor the period he lost such income. He should have stated when exactly he started to be affected by who and how. In a nutshell, the plaintiff alleged but did not prove. For lack of specific proof, I have no legal basis to award him the specific damages.

Finally, I turn to the prayer for general damages, which the plaintiff requests the court to assess and grant for the inconveniences, sufferings and torture caused to him by the defendants, as well as costs. When adducing his testimony, the plaintiff claimed that from the acts of the defendants he has endured psychological torture, health problem and reputational loss. When cross-examined he conceded that he had not submitted any medical report to prove his psychological torture or heath problem. He however, said that it is him who knows his psychological torture better than a doctor.

The court agrees with the plaintiff that, under the circumstances of this case, psychological torture is irresistible. The plaintiff had a succumbing business to think about, as well as demand notices and other protracted loan issues to attend to and above all, the risk of loss of collaterals mortgaged to the bank as security for the loan. For all these unfathomable pains caused to the plaintiff, the court awards the general damages to the tune of Shillings Seventy Million only. (Tshs.70,000,000/=).

The plaintiff prayed to be paid Tshs. 150,000,000/= as the amount of loan agreed to be disbursed to him for working capital. As I stated earlier, this claim is unfounded in law and for that reason the same is rejected.

With regard to the claim of Tshs. 52,416,557/= pleaded under paragraph 22 of the plaint, being the difference between the loan outstanding at DTB and the amount paid by the 1st defendant for settlement of the DTB loan, again it has no legal basis now that the court has declared the loan agreement unenforceable. The claim is accordingly rejected.

Having determined all the issues as above, the plaintiff' case succeeds to the extent shown herein. Defendants to bears costs of the case.

Ordered accordingly.

Dated at **Dodoma** this 30th day of **June, 2022**

ABDI S. KAGOMBA

JUDGE