IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF BUKOBA)

AT BUKOBA

CIVIL CASE NO. 04 OF 2019

TIB DEVELOPMENT BANK LIMITED.....PLAINTIFF

VERSUS

IRON (2011) COMPANY LTD..... 1ST DEFENDANT

EVODIA BIASHARA.....2ND DEFENDANT

LAURENT RUSHOKERA .....3RD DEFENDANT

DEODATUS RWEHUMBIZA .....4TH DEFENDANT

JUDGMENT

Date of Judgment: 21.07.2022

A.Y. MWENDA, J

The plaintiff's Bank advanced a credit facility to a tune of TZS 1,200,000,000/= to the defendants. By virtue of the credit facility letter signed by the plaintiff's officers and the 1st defendant's Directors, the facility was to expire within 12 months from the date of first utilization and was subjected to interest charges of 17.5% per annum. The said credit facility was secured by a debenture creating first ranking charge over all the fixed assets of the company/borrower; personal guarantee of Mr. ISSACK ROBERT NZIBIKIRE supported by first class mortgage over landed property on Plot No. 1, Block "F" RUGARAMA BUGENE (OMURUSHAKA) Urban

Area, KARAGWE District; Stock of Cherry coffee and clean coffee that would be financed by the Bank Under collateral management arrangement and, by personal guarantee of other shareholders i.e. EVODIA BIASHARA, LAURENT RUSHOKERA and DEODATUS RWEHUMBIZA. It is the plaintiff's claim that the defendants, jointly and severally faulted to repay the loan amount and the same has accrued interest, penalty and charges to a tune of TZS. 2,708,970,776 as at 8th April 2019.The plaintiff is therefore praying for the following orders against all defendants as follows:

1) Payment of the sum of TZS 2,708,970,776 as at 8th April 2019 being outstanding amount of structured trade finance for purchase of cherry coffee and overdraft facility for accrued interest until the date of the judgment;
2) Interest of the above (i) at the rate of 27% from the date of default to the date of judgment;
3) Interest on decretal amount at the rate of 9% from the date pf judgment until full and final payment;
4) Costs of the suit; and
5) Any other reliefs this Honorable Court may deem just to grant in favor of the plaintiff.

The 1st, 2nd and 3rd defendant faulted appearance and following a proof of service through substituted services, this Court ordered the hearing of this matter to proceed ex- parte as against them.

On his part, while responding to the Plaintiff's claims, the 4th defendant filed a written statement of defense and denied the plaintiff's claims. In addition, the 4th defendant denied signing a loan agreement and executing a guarantee agreement with the plaintiff.

Having considered the plaintiff's claims and the 4th defendant's defense, this Court, in consultations with Ms. TAUSI SUED, learned State Attorney for the plaintiff and Mr. GERAZE REUBEN, learned Counsel for the 4th defendant, framed the following as issues for determination:

1) Whether the Defendant's are jointly liable to pay the Plaintiff a sum of TZS 2,708,970,776/= as of 8th April 2019 being outstanding loan amount plus interests, penalties and other charges thereof.
2) Whether there are any other reliefs that the parties are entitled to.

At the hearing, the plaintiff was represented by Ms. TAUSI SWED, learned State Attorney while the 4th respondent was represented by Mr. GERAZE REUBEN. learned Advocate.

In pursuing its claim, the plaintiff's Bank called one witness namely EMMANUEL BUSHIRI, who testified as PW.1 and tendered a number of exhibits. In his testimony, PW.1 introduced himself as an employee of TIB Development Bank Ltd

as the Lake Zone Manager stationed at Mwanza Zone. He then testified that the 1st defendant is a client of TIB Ltd since July 2012 when he presented a loan application. He said the 2nd, 3rd and 4th Defendants are Directors of the 1st defendant who jointly applied for the said loan. He averred that the defendants are sued for breach of the contract (i.e. a credit facility agreement) for failure to repay the loan according to their agreement. He tendered a credit facility agreement between TIB and Iron (2011) Company Limited signed on 21/7/2012 as Exhibit P.1. He said the credit facility was TZS. 1,200,000,000/= only which was divided into two; firstly, a loan of TZS. 1,100,000,000/= which was for financing purchase of cherry coffee for processing into a clean coffee at the borrowers' factory at LUGARAMA Village, KARAGWE District and secondly, the loan of TZS. 100,000,000/= for working capital requirements such as marketing costs, procurement etc. This witness testified further that this agreement was signed by two Directors of the Iron (2011) Company Ltd namely DEODATUS RWEHUMBIZA (the 4th defendant) and ISSACK ROBERT NZIBIKIRE and that it was also signed by two other plaintiff's directors. This witness tendered the following, i.e. a debenture issued by iron company, Legal Mortgage issued by Iron (2011) Co. Ltd, Deed of assignment issued by Iron (2011) Co. Ltd, Personal Guarantee issued by one of Director namely ISSACK ROBERT NZIBIKIRE and a Guarantee issued by other Directors of the company who are EVODIA BIASHARA, LAURENT RUSHOKERA and DEODATUS RWEHUMBIZA (the 4th defendant) as exhibits P.2 collectively.

He also stated that a debenture issued by Iron (2011) Co. Ltd involved all the company's assets. According to him this was signed on 21/7/2012 by 2 Directors of Iron (2011) Co. Ltd namely DEODATUS RWEHUMBIZA (the 4th defendant) and ISSACK ROBERT NZIBIKIRE and two other Directors from TIB LTD.

With regard to the second security which is legal mortgage of a property located at plot No. 1 Block F at LUGARAMA Village, KARAGWE District, PW.1 testified that it was signed by ISSACK ROBERT NZIBIKIRE and two other Directors from TIB Ltd.

As for the 3rd security which is a Deed of assignment PW.1 said this was signed on 2/8/2012 by two Directors from Iron (2011) Co. Ltd who are DEODATUS RWEHUMBIZA (the 4th defendant) and ISSACK NZIBIKIRE and by other two Directors from TIB LTD.

In respect of the 4th security which is a personal Guarantee, Pw.1 said this was issued and signed on 21/7/2012 by ISSACK ROBERT NZIBIKIRE and by other two Directors from TIB Ltd.

On the 5th security Pw1 said this is a guarantee issued by three Directors of Iron (2011) Co. Ltd namely EVODIA BIASHARA, LAURENT RUSHOKERA and DEODATUS RWEHUMBIZA and that it was signed on 21/7/2012. It was also signed by other two Directors from TIB Ltd.

The witness testified further in that having signed the said agreement, funds were disbursed to Iron (2011) Co. Ltd in September, 2012 timely but the company did

not repay the said loan within 12 months from the first draw date. Due to failure to repay the loan, in September 2013 TIB LTD granted extension of time to repay the debt for six months from September, 2013 to March, 2014 but on the due date the Iron (2011) Co. Ltd did not honor the promise to repay the same. Following that failure, Pw1 said, TIB LTD had to recall the facility. According to him this is a requirement to repay the whole amount immediately where the client is required to liquate the whole amount. PW.1 said even after the Bank have recalled the facility the respondents did not honor his duty and when the time frame to comply had already expired defendants responded by stating reasons for their failure to liquidate the loan. The witness tendered a notice of recalling a facility as exhibit P.3.

PW.1 concluded by stating that until now, the defendants are indebted TZS 2.7 Billion which is the outstanding amount plus interest. He then prayed for the following orders against the 1st defendant, that it breached the contract with TIB Ltd; be ordered to repay/liquidate the whole amount indebted to TIB Ltd; for TIB to exercise all the rights contained in the contract between TIB Ltd and Iron (2011) Co. Ltd; TIB Ltd to be awarded costs of pursuing his rights in this court and any other relief(s) which this court may deem just and fair to grant.

With regard to the 2nd, 3rd and 4th Defendants PW.1 concluded by praying that they be ordered to repay the whole amount as stated in the plaint plus interest

accruing until the date of judgment and TIB Ltd to be allowed to exercise all its rights from the contract.

When cross examined by Mr. GERAZE REUBEN, learned counsel for the 4th defendant, PW.1 said he became a Zonal Manager for TIB Ltd since 2018 and by the time he held that post this loan was already acquired. He said, being the custodian of all the Bank's documents he found records showing the defendants indebted to a tune of TZS 1.2 Billion which were disbursed by TIB. He said while granting the said loan all the procedures were followed including depositing securities. He said the intention to have the client sign the credit facility agreement and security is to bind him with terms and conditions where upon breach the securities are used to liquidate the facility. He said the plaintiff's Bank sued the defendants so as to compel them to repay the loan because the securities deposited are insufficient to repay the loan. He said the Bank knew that the securities are insufficient due to an increase of the interest beyond 125% of the loan facility fixed by BOT. He said by the time of disbursement, the value of the security was within the limit fixed by BOT but failure to repay in time has led to an accruing interest and penalties which led the loan to balloon out beyond 125% and according to him this is automatic due to penalties which are in terms and conditions of the contract.

PW. 1 also stated further that although he had never seen the 2nd and 3rd defendant. He also said the Bank made search at BRELA and knew that 2nd and

3rd defendant existed and that the 4th defendant was a Director of Iron (2011) Co. Ltd as he signed the 10 Million agreement and security.

After the plaintiff's closure to its case, the defense brought one witness (the 4th defendant) who testified as DW1. In his evidence, he introduced himself as a businessman who resides at KAYANGA in KARAGWE District. Although he acknowledge knowing other defendants, he declined having any business partnership with them. He also declined any involvement in the signing of the loan arrangements and the credit facility agreement (exhibit P.1) and added that he had never seen them and that he saw them at his first time before this court.

On the other hand, he claimed that he advanced a loan to the 1st, 2nd and 3rd Defendant amounting to TZS 520,000,000 which were injected in the construction of the coffee factory and purchase of grading machine for the 1st defendant's coffee factory. He however said there were not any document prepared in that regard. According to him this amount is yet to be repaid although he has not taken any legal steps against the 1st, 2nd and 3rd Defendants for defaulting repayment. He concluded his defense in that if the plaintiff is having any claim, then it was the 1st, 2nd and 3rd defendants who ought to be sued.

When cross examined by the learned state Attorney, DW.1 testified that while advancing the loan to the 1st, 2nd and 3rd defendant he used to write in a book but the said book is not in his possession as it is with the 3rd defendant. He also said

that despite noting that he is conned by the 1st, 2nd and 3rd defendants, he has not taken any legal actions against them.

At the conclusion of the trial, the learned counsels for the parties filed final submissions in support to their respective cases.

In her final submission, the learned state Attorney stated that in line of the evidence adduced and the contents of exhibits tendered, the plaintiff's Bank discharged its duty of proving its case against the defendants as required by Sections 110(1), (2) and 111 of the Evidence Act [Cap 6 R.E 2022]. She said the plaintiff's Bank proved that the Defendants, jointly and together breached the loan agreement and as such they are jointly liable for payment of a sum of TZS 2,708,970,776/= being outstanding amount structured trade finance for purchase of cherry coffee and overdraft facility for accrued interest until the date of judgment.

In regard to the second issue, the learned State Attorney submitted that since the Plaintiff proved that there was a wrongful act done by the Defendants for breach the loan agreement thereby committing wrongful acts and omissions leading to a failure to repay the outstanding loan, then the plaintiff deserves to be awarded damages.

In his final submission Mr. GERAZE REUBEN, learned Counsel for the 4th defendant begun with the 1st issue by stating that the claims against the 4th defendant is found on assumptions that he was also a personal guarantor and a director of the

1st Defendant. He said these allegations were not proved by the plaintiff at all as DW1 testified that he was neither a shareholder nor a Director of the 1st defendant. According to him ISSACK ROBERT NZIBIKIRE was mentioned by the 4th defendant as the director of the Company. He said the plaintiff ought to have conducted search and tendered the same in court. He added in that the 4th Defendant was sued wrongly as documents signed by a person purported to be him were forged.

On the other hand, the learned Counsel contended that the plaintiff failed to prove the amount pleaded as specific damages in this suit. He cited case of CHARLES CHRISTOPHER HUMPHREY RICHARD KOMBE t/a HUMPHREY BUILDING MATERIALS V. KINONDONI MUNICIPAL COUNCIL, civil Appeal No. 125 of 2016 CAT(Unreported) BOLAG V. HUTCHSON [1950] AC 515 to support this point.

On top of that the learned counsel submitted that if the amount claimed is to be awarded to the plaintiff, then the plaintiff should be directed to go and exercise the right of selling securities instead of claiming the same from the 4th defendant who was not involved in the loan transaction.

Submitting in regard to the second issue, Mr. GERAZE REUBEN stated that the plaintiff is not entitled to any relief whatsoever as the 4th defendant was not involved in the whole process. He said the 4th defendant was neither a shareholder nor a director of that company.

I have keenly considered the testimonies by the plaintiff's and 4th defendant's witnesses as well as the final submissions by the counsels for both parties. As it is

stated above, the 4th defendant did not admit any of the plaintiff's bank's claim. Since the plaintiff's claims against the defendants are not admitted, it is thus pertinent to remind ourselves on the principle regarding the duty and standard of proof in civil suits. It is trite law that he who alleges must prove. This principle finds its roots in Section 110 and 111 of the Evidence Act, [Cap 6 R.E. 2019].While discussing this principle, the Court of Appeal in the case of BALERIA KARANGIRANGI versus ASTERIA NYALAMBWA, civil appeal no. 237 of 2017(unreported) held inter alia that;

> *"At this juncture, we think it is pertinent to state the principle governing proof of case in civil suit. The general rule is that he who alleges must prove. The rule finds a backing from sections 110 and 111 of the Evidence Act, [Cap 6 R.E 2002] which among the other things state;*
>
> *110. Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove that those facts exist.*
>
> *111...." [emphasis added]*

Regarding the standard of proof, this court in the case of STANBIC BANK (T) LTD V. RADI SERVICES LTD, COMMERCIAL CASE NO. 72 OF 2014, while citing the case of WOLFGANG DOURADO V. TITO DA COSTA, ZNZ, and CIVIL APPEAL NO. 102 CA, (Unreported) held inter alia that;

"Whoever alleges a fact, unless it is unequivocally admitted by the adversary has to prove it, albeit on the balance of probabilities."

Guided by the above principles, it is clear that in the present suit, the burden of proof on the claims as raised in the plaint lies on the plaintiff's Bank.

The above being the legal position my duty is now to provide answers to the issue framed by the parties and agreed by the court. With regard to the 1st issue as to Whether the Defendants are jointly liable to pay the Plaintiff a sum of TZS 2,708,970,776/= as of 8th April 2019 being outstanding loan amount plus interests, penalties and other charges thereof this court noted the following. From the PW1's testimony, the plaintiff made available to the defendant the credit facility of an aggregate amount of TZS 1,200,000,000/=. Until now, the said amount was not repaid in time by the defendants despite the plaintiff's efforts to recall the same and issuance of 60 days statutory notice of default. In support to this fact PW.1 tendered various documents which were collectively admitted and marked as exhibit P1. In the said documents this court came across a guarantee agreement which was signed by the 2nd, 3rd and 4th defendants dated 21st July 2012. Clause 1 of the said agreement reads as follows;

"The Guarantors hereby agree and undertake jointly and severally with the Bank that whenever the Company shall make default in the payment of any Monies to be paid by

the Company pursuant to the provisions of the agreement Whether in respect of loan/advances/overdraft or interest or otherwise, Or whether in respect of any other charges failing to be paid to the Bank by the Company, the Guarantors shall forthwith pay such monies to the Bank."

In Guarantee agreements the relationship of the parties is governed by Section 79 of the Law of Contract Act, [Cap 345 R.E. 2019]. Section 79 of the Act describes the relationship of the parties to the said agreement as follows;

"A "contract of Guarantee" is a contract to perform the promise, or discharge the liability, of the third person in case of his default and the person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor" and the person to whom the guarantee is given is called the "creditor"; and guarantee may be either oral or written."

In regard to liability of the surety, Section 80 of the Act, reads as follows;

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

In the case of EXIM BANK (TANZANIA) LTD V. DASCAR LIMITED & ANOTHER, civil Appeal No. 92 of 2009, (CA), the Court while discussing the liability of the Guarantor under Section 80 of the Law of Contract Act, [Cap 345 R.E. 2019] stated as follows, that;

> *"Surety's liability is coextensive with that of the principal debtor unless it is otherwise provided by the contract. Coextensive means the same limit or extent. That means the surety becomes liable to pay the entire amount. The liability is immediate; it does not defer until the creditor exhausts his remedies against the principal debtor.... Once the 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 loan facility."*

In the present suit, since the 1st, 2nd and 3rd Defendants signed the Guarantee Agreement, they acquired the status of a surety and since the 1st Defendant (the principal debtor) defaulted repayment of the loan, then all the defendants are jointly and together liable to pay the outstanding amount as claimed by the Plaintiff.

In his defense, DW1 (the 4th defendant) stated that he was not involved in the loan arrangement between the Plaintiff, 1st, 2nd and 3rd Defendants. Also, in his submissions, Mr. GERAZE REUBEN submitted that the 4th Defendant was impleaded in this suit on assumption that he was a guarantor and director to the 1st Defendant (A company) while he was not, and according to him the (DW.1's) signatures in Exhibit P.1 were forged. I have keenly considered this defense and came to a conclusion that the same is nothing but an afterthought. This is so because PW.1 while testifying before this court said the officers from Plaintiff's Bank conducted search and were satisfied that the 4th respondent was one of the 1st Defendant's Directors. Two, even if the 4th Defendant was not one of the directors of the 1st Defendant (the Company) the fact that he signed the Guarantee Agreement is sufficient to connect him with the loan transactions and by virtue of sections 79 and 80 of the law of contract Act, he acquired the status of a guarantor. With regard to allegations that DW.1's signature in Exhibit P1 were forged, this court is of the view that it is also an afterthought. This is so because if what he alleges was true, then he was expected to take legal steps including reporting to the relevant authorities so that the perpetrators would be traced and dealt with accordingly. From when he was served with the plaint which is May 2019, a considerable time has passed enough to enable him to report the purported forgery of his signature. Failure to report the said forgery entails his claim is nothing but an afterthought.

Also DW.1 testified that he advanced a loan to the 1st, 2nd and 3rd Defendants to a tune of TZS 520,000,000/= with a view of constructing the factory building and a purchase of grading machine. He said, that the said loan is not repaid until today but he has not taken any legal steps against his debtors. This court have considered this defence and is in view that if what he alleges is true then that alone is an indication that he entered into this transaction in his capacity as the 1st defendant's Guarantor and signatory of exhibit P.1. No wonder sometimes before the trial of this suit commenced, i.e. on 05/05/2022, the 4th defendants counsel informed the court that his client, (the 4th defendant) was praying for more time to discuss with the plaintiff on the possibility of reaching an out of court settlement. From the foregoing analysis, this court is satisfied that the first issue is answered in affirmative.

In the final submissions by the learned State Attorney for the Plaintiff, she discussed another issue which also the learned counsel for the 4th Defendant responded thereto. The said issue is whether the plaintiff has suffered damage as a result of the Defendants' acts or omissions and if so to what extent. With due respect to the learned State Attorney, the pleading are silent on the said issue. On 28/07/2021 only two issues were framed by the parties and agreed by the court and this issue is not one of them. Again, neither in the plaint nor in PW.1's testimony was the claim for damages ever raised. It is trite principle that the court may not award something which was never pleaded by the parties. In the case of

SARRCHEM INTERNATIONAL TANZANIA LIMITED VS. WANDE PRINTING AND PACKAGING CO. LTD, COMMERCIAL CASE NO. 31 OF 2020, this court (commercial Division) while citing the case of YARA TANZANIA LIMITED VS. CHARLES ALOYCE MSEMWA t/a MSEMWA JUNIOR AGROVET AND ANOTHER (unreported) held;

> *"It is cardinal principle of the law of Civil Procedure founded upon prudence that parties are bond by their pleading."*

As it was rightly submitted by Mr. Geraze Ruben in his final submissions, since the issue of award of damages was never raised by the plaintiff in his pleadings and in evidence, then that remain to be an afterthought.

In regard to the second and the last issue as to whether there are any other reliefs that the parties are entitled to this court finds that since I have entered judgment against all the defendants severally and jointly, I hereby order;

1) That the 1st defendant as a borrower and 2nd ,3rd and 4th Defendants as guarantors are severally and jointly ordered to pay the plaintiff the sum of TZS 2,708,970,776/= only as at 8th April 2019 outstanding amount of structured trade finance for purchase of cherry coffee and overdraft facility for accrued interest.
2) That the defendants are jointly and severally ordered to pay the plaintiff's Bank an interest of 27% on the claim amount from the date of instituting a suit to the date of judgment.

3) That all defendants are jointly and severally ordered to pay the plaintiff's Bank an interest of 9% on the decretal sum/amount from the date of judgment to the date the decretal sum will be paid

4) That by the order of this court, the plaintiff is at liberty to exercise its mortgage and debenture rights as per the terms of debenture and mortgage instruments.

5) The defendants are severally and jointly ordered to pay the plaintiff's Bank the costs of pursuing the suit.

Finally the court decides that, the plaintiff suit succeeds as explained above. Right of appeal is fully explained to the parties.

It is so ordered.

A.Y. Mwenda

Judge

21.07.2022

Judgment delivered in chamber under the seal of this court in the presence of Ms. Tausi Swedi learned State Attorney for the Plaintiff and in the absence of the Defendants.

A.Y. Mwenda

Judge

21.07.2022