

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA SUB- REGISTRY)

AT MWANZA

LAND CASE NO. 17 OF 2019

ISAMILO LODGE LIMITED.....PLAINTIFF

VERSUS

1. TIB DEVELOPMENT BANK LTD.....1ST DEFENDANT

2. YONO AUCTION MART & CO. LTD.....2ND DEFENDANT

JUDGMENT

16th Aug. & 4th Nov., 2022

DYANSOBERA, J:.

Isamilo Lodge Limited and TIB Development Bank Limited, the main parties to this suit, are limited liability companies duly registered under the laws of the United Republic of Tanzania. The latter not only provides finance to investors in Tanzania but also makes sure that the projects for which the finances are secured are implemented as agreed and that the customers repay the loans. As will be apparent later in my judgment, parties entered into a commercial contract but their bank-customer relationship did not proceed as expected. This necessitated the TIB Development Bank Limited to issue notice terminating the contract which move led the Isamilo Lodge Limited to file before this court Land Case No. 17 of 2019 against the TIB D development Bank Limited.

While the proceedings were at the preliminary stages, TIB Development Bank Limited, prayed for and was granted leave to amend her written statement of defence whereby she raised and incorporated a counter claim against Isamilo Lodge Limited. The matter was referred to mediation but when mediation failed, parties continued to make endeavour to settle their differences out of court and in that respect, Isamilo Lodge Limited decided to withdraw her plaint so as to pave the way for effecting the said mediation. However, the out of court settlement on which parties had embarked was fruitless and, consequently, left the counter claim subsisting in court. The counter claim was tried to its finality hence this judgment.

In this judgment which is on the counter claim, for convenience and clarity, I will be referring Isamilo Lodge Limited, then plaintiff, as 'the defendant' while the TIB Development Bank Limited, then defendant, will be referred to as 'the plaintiff'.

The facts of this case are largely not disputed.

The defendant started a hotel business in Mwanza City in May, 2007 by constructing and completing 22 rooms and 6 pax conference rooms. It was pleaded on part of the defendant that due to favourable conditions prevailing at that time, she decided to expand the hotel by

In a bid of executing the intended expansion, the defendant borrowed some money from the National Bank of Commerce (NBC) Limited. Nonetheless, the hotel industry encountered some economic challenges causing some difficulties in financing the loan secured from NBC Bank Limited.

The defendant addressed these challenges to the plaintiff who provides long term loans for investment and the latter took heed of the defendant's concern. In consequence, the plaintiff, on 16th day of September, 2011, granted the defendant a Credit Facility through a letter offer dated 16. 9.2011 in the following manner. One, a term loan re-financing of TZS 2, 541, 000, 000.00 being the money for taking over the debt from the National Bank of Commerce Limited, an amount which the defendant owed the said NBC and the sum was paid directly to the NBC. Two, a term loan of TZS 544, 000, 000.00 being a term loan for construction of the project and three, an overdraft of TZS 100, 000, 000.00 being a working capital. The total amount granted to defendant by the plaintiff vide the said letter of offer was TZS 3, 185, 000, 000.00.

According to the terms, the loan was repayable in 96 monthly instalments as per the letter dated 16.9.2011. As to the securities, the defendant mortgaged her landed properties on Plots Nos. 402, 404 and 405 Block "D", Isamilo with CT No. 20263 LR Mwanza.

According to the terms, the loan was repayable in 96 monthly instalments as per the letter dated 16.9.2011. As to the securities, the defendant mortgaged her landed properties on Plots Nos. 402, 404 and 405 Block "D", Isamilo with CT No. 20263 LR Mwanza.

When the defendant's finances stretched thin, the former loan was restructured on 21st August, 2012. The plaintiff gave more credit to the defendant as follows. In the first place, the existing loan and interest were restructured to read TZS 3, 610, 000, 000.00 known as term loan restructuring and capitalization of interest, two, an additional term loan of TZS 472,000, 000.00 was granted to the defendant. The restructured loan was to be repaid within 108 equal monthly instalments after nine months' grace period from the time of restructuring.

Later, there was signing of a tripartite agreement between the plaintiff, defendant and Icon Hotels and Resort Tanzania Limited to take over the management of the defendant's affairs.

It appears the whole contract was not executed as agreed by the parties. As the evidence in support of the pleadings will show, each party lays blames on the other for the breach of the contract.

On her part, the plaintiff has counter claimed against the defendant the following: -

- (a) A declaration that the defendant in the counter claim is in breach of the Credit Facility Agreement as amended
- (b) Payment of the outstanding loan with its interests and penalties as at the date of full liquidation of the loan.
- (c) General damages for breach of credit facility amounting to TZS 400, 000, 000.00, costs of the suit and any other reliefs.

The defendant has resisted the claims presented.

During the hearing of the counter claim, both parties were duly represented. While the plaintiff enjoyed the legal services of Ms Alice Mtulo and Ms. Subira Mwandambo, learned Senior State Attorneys assisted by Mr. Stanley Kalokola and Mr. Greener Aden, both learned State Attorneys, Mr. Deya Paul Outa, learned Counsel, stood for the defendant.

At the commencement of hearing this matter, upon the agreement by Counsel for the parties, the court framed and recorded the following questions for determination, namely: -

1. What were the terms of the Credit Facilities as amended?
2. Whether the defendant breached them.
3. If so, what are the outstanding loan, interest and penalties?
4. Whether the plaintiff suffered damages

5. To what reliefs are parties entitled.

In a bid to prove her case, the plaintiff called, as a witness, one Emmanuel Bushiri (PW 1), a Zonal Manager, working with TIB Development Bank, Lake Zone, Mwanza while the defendant had Dr. Raphael Chegen (DW 1) as her sole witness.

After the closure of the cases for the parties, learned Counsel for the parties filed their written final submissions. I have with circumspection considered them though with two reservations. One, that submissions are not evidence. In **the Registered Trustees of Archdiocese of Dar es Salaam v. the Chairman, Bunju Village Government and 11 others**, Civil Appeal No. 147 of 2006, the Court of Appeal confirmed this by observing the following: -

'...Submissions are not evidence. Submissions are generally meant to reflect the general features of party's case. They are elaborations or explanations on evidence already tendered. They are expected to contain arguments on applicable law. They are not intended to be a substitute for evidence'.

Two, that in pleadings, the general rule is that each framed issue must be definitely resolved and a judge is obliged to decide on each and every issue framed to resolve the dispute. This general rule has,

however, an exception in that the principle cannot apply to every situation regardless of the circumstances obtaining. The above principle applies where issues framed are independent from each other and not where the rest of the issues are dependent upon the determination of former framed issues.

The consideration of the Counsel's submissions and the issues proposed by learned Counsel for the defendant in his written submission will be dealt with in the light of the above explained scenarios.

Generally, in her final written submission, learned Senior State Attorney Subira Mwandambo argued that the testimony of PW 1 shows that the defendant was not serving the loan as per the repayment schedule as agreed in Article II, Section 2.01 (d) (i) and (ii) of Exhibit P 1 and that this triggered the defendant to constantly request the plaintiff's restructure the loan which resulted into execution of the Three Deeds of Valuation(exhibits P 9, P11 and P 13.) and that despite several variations made by the plaintiff, the defendant continued to breach the agreement by failure to repay the loan as reflected in the repayment schedule.

It was further argued by the learned Senior State Attorney that in justifying the extent of breach by the defendant in repayment of the

loan, PW 1 produced the short term and long-term Loan Statement, exhibits P 22 and P 23, respectively, showing that the defendant constantly breached the terms of the Credit Facility Agreement) and that according to PW 1, the defendant had serviced the loan to the tune of TZS 895, 000, 000.00 only.

The defendant, on her part, submitted that the appointment of Hotel Management was done by the plaintiff and that she suffered loss as the result of poor management by Icon Hotels and Resort Tanzania Limited. Responding on this argument, the learned Senior State Attorney submitted that PW 1 in his testimony and during cross examination, failed to point out as to which instrument or under which clause of the 3rd Deed of Variation, the plaintiff was mandated to appoint and hire a Hotel Management Company as alleged. Rebutting these allegations, the plaintiff, through PW 1 testified that under the 3rd Deed of Variation, it was the mandate of the defendant to appoint a Hotel Management Company to run the hotel and that PW 1 further testified that the obligation to pay the appointed Hotel Management Company was with the Borrower, the defendant. The court was referred to Clause 2.0 (d) in exhibit P 13. It was also argued on part of the plaintiff that the defendant who was duty bound to procure a company which is

competent and reputable, procured a company which was incompetent, signed a contract with it and ended up terminating that contract.

Having considered these competing arguments, I find that there were conditions precedent in that the facility would be restructured after the fulfilment of conditions set out in the Operational Restructuring & Additional Financing- Letter of Offer (exhibit P 12) that is, one, engagement of a reputable Hotel Management Company to run/manage the operations of the hotel and two, the signing of agreement between Isamilo Lodge Limited and the Hotel Management Company clearly establishing the roles of each party, and acknowledgement of existing debt (i.e., outstanding credit exposure with the bank) and committing repayment as per agreed schedule. There is ample evidence that exhibit P 13 that is the Third Deed of Variation was prepared by the plaintiff at Dar es Salaam and in which the conditions precedent set out under exhibit P 12 were repeated. In such circumstances, the complaints raised by the defendant had factual basis. Indeed, PW 1 admitted in his evidence that failure by the defendant to fulfill those conditions would disentitle her getting the money she was seeking.

Now on the framed issues. As far as the first issue is concerned, that is what terms of the Credit Facilities Agreement as amended were, it in evidence as revealed in the testimonies of PW 1 and DW 1 as well

as the documentary exhibits, including the Credit Facility Agreement (exhibit P 1) which comprised of three facilities as follows: the first facility which was a term-loan refinancing of TZS 2,541,000,000/= was aimed at buying the debt with National Bank of Commerce. The second facility was term loan- construction of TZS 544,000,000/= for financing completion of phase II of the defendant's project, the third facility was an overdraft of TZS 100,000,000.00 to finance working capital requirements of the company. While the first and second facilities were repayable in 96 monthly instalments, with the first instalment falling due after one year grace period, the third credit facility of overdraft was to expire after 365 days by which date the full amount shall have been repaid unless approval to renew the facility will have been granted by the plaintiff. There were conditions both special and general and events of default and the securities outlined under Section 4.02. Indeed, the terms and conditions of the Credit Facility Agreement were well detailed in exhibit P. 2 dated 7th November, 2011.

Furthermore, parties had also agreed that failure to honour the terms of Credit Facility Agreement including the defendant's failure to pay the loan instalment at agreed amount and time would amount to breach of contract.

In court, the witness produced the Credit Facilities Letter Offer dated 16.9.2011 (exhibit P1). (A certified copy thereof was filed). The defendant was given 14 days within which to accept. She accepted it and the Credit Facility Agreement was executed and duly signed by the parties on 7th day of November, 2011 (exhibit P. 2).

Thereafter, the process of making perfection of securities which were with NBC and getting the actual amount the defendant owed the NBC was undertaken through a letter of communication whereby, in December, 2011 the NBC replied by a letter of confirmation of outstanding balance dated 6.12.2011 (exhibit P3) showing the outstanding amount by the defendant to be 3.3bn/- The loan balance from the NBC and which the plaintiff paid was TZS 2, 876,000,000/- and the defendant was duly informed the NBC had discharged the securities of the landed property located at Plots Nos. 402, 404 and 405 Block "D" Isamilo Area, Mwanza City. The mortgage of a right of occupancy dated 7.11. 2011 was admitted in court (exhibit P. 4). The securities were debenture of assets which were available and those to be created in the future. According to PW 1, a registration of legal mortgage with the land office was made and the legal mortgage was signed on 7.11.2011. It is exhibit P. 4. The securities were debenture of assets which were available and those to be created in future. The

debenture was admitted in evidence as exhibit P 7 after heated arguments on its admissibility but with reservation that its evidential value would be considered when evaluating the whole evidence in its totality.

The third security was personal guarantee from the three Directors of Isamilo Lodge Limited and those of the plaintiff. The guarantee dated 7.11.2011 was admitted as exhibit P. 5.

After the procedures were completed and after issuing all the three facilities, defendant, on 20.2.2012, wrote to the plaintiff a letter acknowledging acceptance of money and thanking the plaintiff for paying the NBC and at the same time, the defendant requested for additional loan of TZS. 472,000,000/= The letter titled Re-Isamilo Lodge Ltd project Mwanza letter dated 20.2.2012 was admitted in evidence as exhibit P6. For clarity, exhibit P6 was in respect of thanksgivings on re-financing the loan with NBC and on the loan of Tshs. 544, 000, 000.00. The defendant then asked for additional loan of 472m/ on which the plaintiff worked and processed it for approval, when were in the process, the defendant made an application to restructure the facility. In August, 2012 the plaintiff gave the defendant offer letter to restructure the loan. The defendant was served with the offer from the plaintiff dated 21.8.2012 with two loan facilities; loan restructuring of

the previous loan amounting to 3.610 bn/- and additional loan of 472m/- ,000,000/= with the same securities of debenture, 1st legal mortgaged of those plot numbers – 402, 404 and 405 Block “D” located at Isamilo area, Mwanza City. The Crediting facility – letter of offer dated 21.8.2012 exhibit P 8.

After the defendant accepted the offer, the First Deed of variation was signed on 13.9.2012 (Exhibit P.9).

In 2013 the defendant again requested to restructure the existing facilities and to extend grace period and made a third request of additional loan amounting to 472,000,000/= so as to review the overdraft facility. The plaintiff accepted the request and gave the plaintiff an offer letter dated of 21.3.2013 with three facilities (Credit Facility letter of offer dated 21st March, 2012 exhibit P.10).

Thereafter, a second Deed of Variation was executed and signed on 5th April, 2013 on the three facilities, that is a restructure of 3.4. bn/- , additional loan 472m/- and renew of overdraft facility – 100m (exhibit P.11).

In 2016 the defendant requested to capitalise interest and to restructure a long term loans which had reached Tshs. 7.6 bn/- and requested an additional loan of 220m/- to install network, lifts and some

furniture. Besides, there had to be employed a professional Hotel management to run hotel operations professionally. The plaintiff undertook the procedures and in July the plaintiff gave the defendant an offer to restructure the outstanding loan of 7.6bn/- by giving her additional loan of 220m/- and accepting the procurement of professional hotel management company to run the hotel business. The offer was accepted.

In court, Operational Restructuring & Additional Financing – letter of offer date 13th July, 2016 was produced and admitted as exhibit P.12.

After the defendant accepted the plaintiff's offer, a Third Deed of Variation was executed and signed on 4.8.2016 (exhibit P 13)

There was an additional loan of 220,000,000/= but PW 1 was candid that the defendant was given TZS 154,000,000/= only. An explanation for this is that when issuing 154m/ - the plaintiff verified and found that only 41% had been accounted for and therefore, the defendant failed to proceed issuing other money.

In February, 2017 the defendant informed the plaintiff that she was terminating the contract with Icon Hotels and Resort Tanzania Limited through the letter addressed to Icon Hotels and Resort Tanzania Limited but copied to the plaintiff. The Re-Management services

agreement contract dated February, 2021 was admitted and marked as exhibit P14 and the defendant, through Re-termination of management service contract dated 20.2.2017 Exhibit P.15, informed the plaintiff that she was terminating that contract.

The plaintiff, through her witness affirmed that the consolidated loan of 7.6bn/- was for 93 years that is ending June, 2026 and the short-term loan 220m/- for which she was given 154 m/- was for twelve months and expired since September, 2017.

With respect to the current status of these loans in terms of payment, it was argued on part of the plaintiff that there was no service as per the agreed schedule meaning that the plaintiff defaulted.

Soon after the default by the defendant the plaintiff, in April, 2017, recalled the loan facilities and that by the time, the debt stood at 8.6 bn/- and in May, 2017 the plaintiff issued a 60 days' statutory default notice dated 24th day of May, 2017 (Id.1).

After the plaintiff had served the defendant with default notice, the defendant, on 19th July, 2019, submitted restructuring proposal titled 'Re: Isamilo Lodge Request for Loan Restructuring' (exhibit P. 16) asking for consideration of restructuring the existing loan outstanding

amount for twenty (20) years and waiver of some penalties and interests.

The defendant was requesting for consideration of restructuring the existing outstanding loan and detailed on total exposure of over 11m/- termination of Icon contract as well as looking for strategic investors for USD 5,000,000 of which USD 3,000,000 would be used to liquidate part of the loan with the plaintiff and the remaining USD 2,000,000 would be invested in a new venture – Isamilo Serengeti Lodge. There was also a request for the reduction of interest rate from 17% p.a. to 14% p.a. and the waiving of all accrued interests and penalties.

The plaintiff declined that proposal and informed the defendant to pay the whole loan. The plaintiff further informed her that she, the plaintiff, had already appointed a debt collector one Yono Auction Mart so as to sell the securities. Seeing this, the defendant decided to institute the Land Case in September, 2019 against the plaintiff and Yono Auction Mart.

It was not disputed that when the case was proceeding there were negotiations by the parties to have the matter settled. However, in June, 2020 the defendant took to the plaintiff a loan restructuring proposal

through a letter titled, Re-Application for Loan Restructuring I.N.O. Isamilo Lodge Limited dated 23.6.2020 (Exhibit P. 17)

On 10th September, 2020 the plaintiff gave an offer letter to the defendant. It is a Letter of Offer to Amend Credit Facility Agreement (exhibit 18). The letter was for restructuring a term loan of 12,680,447,173. It also gave waiver and right off penalties of 22,849,377/=. There was also waiver and right off of the accrued interests of 1,877,487,606.85. The plaintiff went on reducing interest rate to twelve percent 12% p.a. from 17% p.a. and there was a grace period of twelve (12) months. The defendant replied by a counter offer in time. The Letter of Offer to Amend Credit Facility Agreement (exhibit P.19).

The defendant declined the counter offer through a Letter of Offer to amend Credit Facility Agreement letter dated 30th October, 2020 (exhibit P.20). after declining the counter offer, the plaintiff informed the defendant the outstanding loan balance as of 21.10.2020 to be 12,834,071,557/= and told him that the amount would be more as there were accrued interest and penalties. The defendant was required to review her proposal and warned her to repay the loan otherwise, recovery measures would ensue that is through actioning the securities.

Respecting the second issue, it was submitted for the plaintiff that it was proved through PW 1's oral testimony and exhibits P 22 and P 23 that the defendant breached the Credit Facility Agreement and its variations for failure to repay the loan in accordance with the schedule to repayment. Indeed, the evidence is abundant that the defendant has not repaid the loan. According to PW 1, defendant was poorly performing in repayment of the loan, she failed to comply with the terms and conditions of the loan and the payment was unsteady.

Refuting these allegations, the defendant on her part and through DW 1, was confident that it is the plaintiff who breached the contract. According to

DW 1, the plaintiff was delaying in disbursing the requested funds and was issuing the amount which was less than the amount the defendant had requested. This non-observance of the agreement necessitated the defendant to look for other alternatives. DW 1 asserted that the delay in disbursing the money led to cost variation and an increase in costs for construction.

The defendant further complained that the money which was to be paid to the National Bank of Commerce was TZS 2, 541, 000, 000/= but the plaintiff without consent of and notice to the defendant paid TZS

2, 876, 838, 781.14 an amount which was in excess by TZS 335, 838, 781.14. This, PW 1 admitted in his evidence when during cross examination. He confessed that it was agreed by both parties that the plaintiff shall pay the outstanding liability of the borrower with the NBC of not exceeding TZS 2, 541, 000, 000.00 in exchange for the securities under custody of the NBC and that any further outstanding liability shall be the responsibility of Board. PW 1 further admitted that when paying the excess amount there was no deed of variation and that there is nowhere indicated that TZS 335, 838, 781.14 was taken from 544m/- and that the same applies to 66m/- out of 220m/-. PW 1 did not mince words that out of the requested amount of 544m/-, the plaintiff paid 208, 161, 218.26 and that this amount could not perform the function designed for 544m/-. This confirms the defendant's complaint that the plaintiff was issuing the amount less than that requested which factor crippled her projections in the project for which the loan had been asked.

In his evidence, PW 1 was emphatic that since the defendant breached the terms of Credit Facility Agreement then the plaintiff is entitled to exercise the powers of sale of the mortgaged properties.

I think PW 1 was strange to the reality. In my view, the right of a party to terminate the contract is exercised by notice to the other party.

This is what the plaintiff did as evidenced by default notice (exhibit P 21). Indeed, exhibit P 21 which is a notice of default made under section 127 of the Land Act No. 4 of 1999 is clear on this aspect. The termination of the contract releases both parties to the contract from their obligations to effect and receive future performance. This, PW 1 admitted in his evidence when he said that after the notice the contract terminates.

It is true that if one refuses to perform the contract or part of the contract, then the other party can hold the contract to be terminated. However, it should be noted and emphasized that non-performance exists where a reasonable person would conclude from the conduct of the breaching party that there is no intention of carrying out the contractual obligations.

Did the plaintiff prove that the defendant's conduct signified lack of intention of carrying out the contractual obligations? I think not.

There was nothing in evidence indicating that strict deadlines had been included in the contract between the plaintiff and the defendant. The executions of variations and restructuring explains this. For that reason, the late repayment and the delays could not, in the circumstances of this case, be held to be repudiatory breach of the

contract, particularly where it was clearly demonstrated in evidence that the plaintiff was delaying in the disbursement of the money and was issuing an amount less than that which was being requested and no sufficient explanation was forthcoming from the plaintiff.

In essence, not every failure to perform amounts to breach of contract. This explains why a breach of contract lies in the failure, without lawful excuse, to perform a contractual obligation.

In the instant case, the evidence was abundant that the defendant did not fail in payment but delayed and DW 1 explained away the delay. As the evidence and the submissions made by the learned Counsel show, the defendant proved some reasonable excuses for non-performance. To be sincere, there was frustrating delay on part of the plaintiff in a way that was so fundamental that it undermined the very purpose which the parties had in mind in entering into the contract. Besides, the plaintiff's conduct was tantamount to depriving the defendant substantially of the benefit that she intended to achieve from performance. With the available evidence, it is not correct to assume that the defendant's delay in payment amounted to breach of the contract.

Assuming without deciding that the defendant breached the contract, still the plaintiff has failed to prove on preponderance of probabilities that the breach was either intentional or negligent which rendered performance under the contract radically different from that envisaged at formation. For instance, it was not established that the defendant evinced, through the default, a lack of commitment to fulfill the agreed contractual obligations. Indeed, the defendant was clear and candid in exhibits P 16 on the project undergoing difficulty and tough times which contributed to the dragging in the completion and affected the entire business projections and original assumptions. Furthermore, the defendant complained in the same exhibit P 16 at p. 2 that: -

'Due to accumulated interest and penalties, in November, 2016 the total loan exposure was over Tshs. 7.5 billion which was twice as much as the principal amount. This made the project to lose track of loan servicing as planned. Likewise, the assumptions and parameters totally changed from the initial cash flow projections. Hence the company has not been able to service the grown loan exposure to that extent as it would require additional cash flows outside the project to do so. Besides all these, the bank has been pressing for servicing the loan exposure which is currently

reported to be over TZS 11 billion due to application of interest despite our numerous requests for loan restructuring including waving of interest and penalties for the loan amount to be substantially reduced to the initial projected loan amount'.

The plaintiff acknowledged the defendant's plight as evidenced in exhibit P 18. Aside that, the plaintiff has admitted through a letter of offer to amend Credit Facility Agreement between TIB Development Bank and Isamilo Lodge Limited dated 30th October, 2020 (exhibit P. 20) that the defendant was facing challenges of hotel business brought about by COVID 19 pandemic. The fact that the plaintiff was approving restructuring of the defendant's existing facilities and granting the defendant's requests for additional loans despite the defendant's default, the plaintiff's extension of grace periods, her embarking on negotiations even after the case had been filed in court and her appreciation that the defendant was paying the debt clearly indicates that any reasonable person would conclude from the defendant's conduct that there was intention, on her part, of carrying out the contractual obligations.

The second issue is answered in the negative.

On the third issue, that is what the outstanding loan, interest and penalties are, it is my finding that the balance as at 30.11.2018 when the default notice was issued to the defendant hence terminating the contract and releasing the parties of their obligations and which default notice triggered the institution of the suit by the defendant and the subsequent counter claim by the plaintiff was TZS 10,765,779,393. This is in accordance with the plaintiff's pleading at paragraph 7 of her counter claim. Besides, the evidence of PW 1 which was in harmony with the pleadings in the counter claim was supported by exhibit P 21, the document the plaintiff produced through PW 1. In fact, it was the testimony of PW 1 that,

'The plaintiff issued a default notice dated 3^d day of December, 2018 (Exhibit P.21) through which the defendant was informed that the balance was TZS 10,765,779,393 as at 30.11.2018. The plaintiff was further directed to pay the whole amount after sixty days otherwise, the bank would exercise the right to sue, sell the mortgaged property, appoint the receiver, lease the property or enter into possession. The defendant decided to institute this case'.

The plaintiff's claim of TZS 12, 930, 533, 380 as of 18th November, 2020 and other subsequent amounts, cannot be sustained as they are

amounts alleged to have accrued after the matter was instituted in this court and parties had already discharged their obligations.

It is my finding that the actual outstanding loan, interest and penalties at the time of institution of the matter in this court is, according to the pleadings and evidence, TZS 10,765,779,393.

Respecting the fourth issue, it was submitted on part of the plaintiff that the plaintiff pleaded specifically under paragraph 9 of the counter claim what damages she suffered. According to the evidence of PW 1, the defendant's failure to pay in time occasioned the following adverse consequences, namely, incurring interest she pays on borrowing from outside and inside financial institutions, payment of TRA cooperate interest tax for the outstanding interest which is 30% of the income either realized or booked in suspense, failure to lend money to other development projects as the money is still unpaid, the rising of non- performing ratio and this may lead to revocation of business license by the Bank of Tanzania and failure to get interest which causes loss of income to the plaintiff.

However, since the second issue has been answered in the negative, the recoverability of any loss cannot arise as the damages are compensable only where there is a breach of contract. A case in point

is that of **Hadley v. Baxendale**, 1854 EWHC Exc. 70 whereby Courts of Exchequer made the following observation: -

'Where two parties have entered into a contract which one of them has broken, the damages which the other party should be entitled to receive in respect of such breach of contract should either be deemed to have arisen naturally, fairly and reasonably, i.e. according to the usual cause of things, from such breach of contract itself, or as might reasonably have been deemed to have arisen in the contemplation of the contract'.

This means that the damage has to be assessed on the basis of the natural and probable consequences of the breach. I have held that there was no breach of contract on part of the defendant. No damages are, therefore, recoverable and awardable.

With regard to the fifth issue, that is the reliefs to which the parties are entitled, the plaintiff in her counter claim sought a declaration that the defendant is in breach of the Credit Facility Agreement as amended, payment of the outstanding loan with its interests and penalties as at the date of full liquidation, general damages for breach of credit facility amounting to 400m/- and costs of the suit.

22, 849, 377. The recovery to be pursued in the manner the parties (plaintiff and defendant) will determine and agree.

3. The payment of general damages for breach of credit facility amounting to TZS 400,000,000.00 is **DISALLOWED**.

4. Each party to bear their own costs.

Order accordingly.



W.P. Dyansobera

Judge

4.11.2022

This Judgment is delivered at Mwanza under my hand and the Seal of this court on this 4th day of November, 2022 in the presence of Ms Subira Mwandambo, learned Senior State Attorney and Sabina Yongo, learned State Attorney for the plaintiff and Mr. Lugano Moses, learned Counsel, for the defendant.

Rights of appeal to the Court of Appeal explained.

W.P. Dyansobera

Judge