

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

CIVIL CASE NO. 92 OF 2020

BANK OF AFRICA.....PLAINTIFF

VERSUS

BROADGAS PETROLEUM(TZ)LIMITED..... 1ST DEFENDANT

WYCLIFFE M. SHILAHO.....2ND DEFENDANT

SAIDI MUSSA MSWAKI.....3RD DEFENDANT

JUDGMENT

24th Nov 2022 & 24th February 2023

MKWIZU, J.:

The Plaintiff, Bank of Africa filed this action against the 1st Defendant for judgment and decree as follows:

- i. That the defendant be ordered to pay special damages to the tune of Tshs USD 218.017.34
- ii. That the defendants be ordered to pay interest at the compounded commercial rate of 30% per annum from the date of institution of this suit to the date of judgment
- iii. That the Defendants be ordered to pay interest to the decretal amount at Court's rate from the date of judgment to the date of payment in full
- iv. That the defendant be ordered to pay the costs of this suit
- v. Any other relief this Court deems fit and just to grant.

The facts of Plaintiff's cause of action disclosed in the plaint is that sometime on 27th August 2013 it offered the 1st Defendant an asset financing facility amounting to USD 460,000,000/= repayable within six (6) months period which the 1st Defendant accepted with the terms and conditions stipulated in the Facility letter. The facility was well secured but the 1st defendant failed to service the loan and could not rectify the breach even after a notice of default on her forcing the plaintiff to exercise her right of realization of the sum outstanding by auctioning the vehicles under specific debentures whose proceed, however, could not cover the secured amount. Hence this suit.

Summons to appear and answer the claim was issued but the Defendants could not be served by ordinary service as their whereabouts were not known. With the leave of this court, service by publication was effected through Mwananchi Newspaper dated 3rd May 2021 but still, the defendants could neither file defence nor appear hence an ex-parte hearing against all the Defendants.

In accordance with Order VIII Rule 22(1) of the Civil Procedure Code, the trial was conducted through a witness statement, and the plaintiff's counsel, Mr. Godwin Muganyizi did manage to file a statement of only one witness, Victor Lewanga, the plaintiff's principal officer, recovery department.

In his evidence, the plaintiff's witness narrated what is contained in the plaint. He was specific that a loan in the form of an Asset financing facility worth 460,000.00 USD with a life span of six months was granted to the 1st defendant by the plaintiff on 27/8/2013. It was secured by general debentures of the entire fixed and floating assets of the Company, specific

debentures over the newly acquired Scania trucks and trailer from SCANIA TANZANIA Limited, and the Director's personal guarantees of 2nd Defendants and 3rd defendants. He said the 1st defendant (borrower) defaulted the loan repayment. They, through a letter date 25/8/2014, contacted the 1st defendant notifying her of the default followed by a final demand notice dated 12/9/2014.

According to PW1, the demand letter awakened the 1st defendant who lodged in Court a Civil suit No. 245 of 2014 against the plaintiff and another person the matter which could not proceed to merit after failure by the plaintiff (now 1st defendant) to prosecute her claims.

Subsequently, Defendant's vehicles under specific debentures were auctioned fetching the amount 250,000.00 USD out of the outstanding amount leaving the sum of 218,017.34 USD of the loan unliquidated. The Facility letter dated 27/8/13 between the plaintiff and 1st Defendant; a Debenture document issued by the 1st defendant on 12/9/2013; a copy of the letter with reference Numbers BOA/ENT/DC/736/2014 dated 25/8/2014 addressed to the 1st defendant, Copy of Guarantee and Indemnity by individual Guarantors dated 28/8/2013, copy of the court order dated 8/7/2014 and statements of Account Nos 0204338005 and 02043380018-(USD Account) bearing the name of the 1st defendant were tendered in court as exhibits P1, P2, P3, P4, P5, and P6 respectively.

The plaint raises two main issues for determination:

1. Whether there exists an asset financing facility agreement between the plaintiff and 1st defendant
2. Whether the Defendants breached the terms of the asset financing Facilities granted by Plaintiff?

3. To what relief the parties are entitled to?

I have thoroughly gone through the evidence by PW1, and all the documentary evidence tendered in court. There is no doubt that the 1st defendant was granted the asset financing facilities by the plaintiff valued as exhibited by exhibit P1, P2, and P4 namely a facility letter of a total sum of USD 460,000.00 UDS dated 27th August 2013 signed by the parties on 28/ August 2013; Copy of Guarantee and Indemnity by individual Guarantors dated 28/8/2013 and Debenture document issued by the 1st defendant on 12/9/2013. The first issue is, therefore, answered in the positive.

I now turn to the critical issue of whether the defendants breached the terms of the granted facility or not. In his evidence, PW1. Victor Lewanga informed the court that the 1st defendant did not pay the loan resulting in auctioning of her vehicles under specific debentures which managed to raise only 250,000 .00 USD leaving behind 218.017.34 USD unliquidated which is the subject of this suit. This evidence is supported by two documents, a notice of default with reference Numbers BOA/ENT/DC/736/2014 dated 25/8/2014 (Exhibit P3) addressed to the 1st defendant and statements of Account Nos 0204338005 and 02043380018-(USD Account) bearing the name of the 1st defendant (exhibits P6) with a total outstanding amount of 218,017.34 USD.

Assessing the above evidence together with the Asset Financing Facility Letter (Exhibit P1) and the Personal Guarantee document (Exhibit P4), and in the absence of any other contradiction, the court is convinced that Defendants are in breach of the Assets Facility Agreement granted to

them. The second issue is as well affirmed. Thus, the plaintiff is awarded the specific damages of 218,017.34 USD prayed for in the plaint.

The last issue is to what relief is the Plaintiff entitled. It is common knowledge that Bank's income is generated from interest obtained from Banking transactions including loan transactions and therefore any delay in paying off the loan is a threat to the bank's financial performance. The plaintiff in our case, like other Bank institutions, mainly makes money from the interest they charge on loans which if not collected timely, the banks end up generating a loss. It is on that bases that the Plaintiff is also awarded interest at the rate of 20% on the specific damages awarded from the date of filing the suit to the date of the judgment and a 12% percent interest rate on the decretal amount from the date of judgment to the date of the full payment plus the costs of the suit.

It is so ordered.

Right of Appeal fully explained.

Dated at Dar es Salaam, this 24th day of February 2023.



E.Y. MKWIZU

JUDGE

24/02/2023

