IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM DITRICT REGISTRY

AT DAR ES SALAAAM

CIVIL CASE NO 151 OF 2017

(Original Jurisdiction)

NIC BANK TANZANIA LIMITED .....PLAINTIFF

VERSUS

SUMRY BUS SERVICES LIMITED ..... 1ST DEFENDANT

HAMOUD MOHAMED SUMRY.....2ND DEFENDANT

SALUM MOHAMED SUMRY.....3RD DEFENDANT

AMOUR MOHAMED SUMRY.....4TH DEFENDANT

JUDGMENT

13th June & 31st July 2023
F. H. Mahimbali, J.

The plaintiff NIC Bank Tanzania Limited is suing the four defendants jointly and severally for the payment of TZS: 1,605,477,991.94. It has been alleged by the plaintiff that in July 2011 she sanctioned a credit facility by way of a term loan in favour of the 1st Defendant to the tune of TZS:

1,000,000,000/= for purposes of facilitating purchase of 4 units of brand new buses. The credit facility was repayable in 36 months.

As security of the said credit facility, the 1st defendant created a charge by way debenture on its fixed and floating assets in favour of the plaintiff (Exhibit P2). The 2nd, 3rd and 4th defendants in their capacities as directors of the 1st defendant executed in favour of the plaintiff a joint a joint and several guarantees and indemnity and bound themselves to be and remain until such time credit and facility is discharged. The third security was joint registration name with the defendant over the buses financed by the plaintiff.

The credit facility expired long ago and the defendants failed to service the same so that as of 11th August 2014 the amount of TZS: 721,882,769.05 was outstanding, comprising of principle and interest. The defendants failed to service the loan so that the said outstanding balance continued to accrue interest so that with contractual penal rate of 28% per annum. Thus, the basis of the current suit.

The defendants on the other hand through their joint WSD are essentially not in dispute that they took loan facility from the plaintiff in favour of the said business, however they dispute the outstanding sum as

inaccurate and highly orchestrated and that it is the plaintiff who breached the terms of the contract as per nature of their contract after she had impounded the 1st defendant's vehicles and sold them at a far below forced sale value and that even the attachment was done in a so barbaric manner with passengers on board thus led to the frustration of the said business which was the basis of the said loan facility.

As bearing of the said case, six issues were considered for the court's determination:

1. Whether the 1st Defendant is indebted to the plaintiff in the sum of of Ths. 1, 605, 477, 991.92 as of 1st July 2017.
2. Whether the 2nd, 3rd and 4th Defendants extended guarantee to the plaintiff.
3. Whether the first defendant was under receivership as of the date of filing this suit.
4. Whether the plaintiff was supposed to submit his claim to the receiver.
5. Whether the plaintiff breached its duty of care against the 1st Defendant.
6. What are the reliefs parties entitled to.

During the hearing of the case, the plaintiff through PW1 (Mr. Hassan Rashid Singaro) testified to the effect that he was an employee with the plaintiff bank (1995 to 2019) as recovery officer. Prior to that he worked as credit officer. That in his duties as credit and recovery officer at different times, came to know the 1st Defendant' s company. That in their banking transaction, the 1st defendant and the plaintiff on 26th July 2011, signed credit facility with the plaintiff of 1,000,000,000/= repayable in 36 months of equal installment (Exhibit P1). The said credit facility was for purchase of four new buses. As securities for then said loan facility, there were debentures, floating assets, four buses (exhibit P2), debentures and certificate of registration. Further securities were joint and several guarantee and indemnity dated 19th August 2011 (Exhibit P3). Joint registration of the buses (vehicles) (Exhibit p3) with registration number: T.777 BE, T.777 BVD, T.777 BWL and T.222 BWM.

PW1 testified further that upon execution of the credit facility and its securities, the 1st defendant defaulted repayment installments as agreed, which compelled the restructuring of the payment period and grace period. Despite of all these efforts, the 1st defendant failed to service the loan (See exhibit – P6), hence the plaintiff exercised her the right to attach and sale

the said two vehicles (buses) which are T.222BWM and T.277 BWL (P6 exhibit). The two vehicles were then sold at a total price of 105,000,000/=. Thus the basis of the current suit claiming the remaining balance as per credit facility.

So, in essence, this suit concerns repayment of the defaulted payable amount to the Bank which together with interest and penalty which stands at **TZS: 1,605,477,991.94.** That was all about the plaintiff's case which was only established via PW1.

On defense, save for the defendants' WSD, there was nothing testified before the court in respect of this case following the default appearance of any of the defendants' witnesses on the date set of hearing. Thus, pursuant to **order XVII, Rule 3 of the CPC** upon digest the prayer by the plaintiff's counsel though resisted by Mr. Mtogesewa, I made an order that the defendants failed to adduce their evidence in opposition of the plaintiff's case.

Therefore, this judgment is based on the one sided evidence. The important question to respond is whether the plaintiff's claims have been

established as per law. In order to reach that end, it is important to traverse on the issues raised as compass bearing of the case.

According to the available evidence by the plaintiff (P1 exhibit – credit facility as created on 26th July 2011) and the exhibits P2, P3 and P5, it is undoubted that the 1st defendant took loan from the plaintiff to the tune of TZS: 1,000,000,000/= repayable in 36 months of equal instalments. It is unfortunate that there was no full repayment as there was default, as of 11th August 2014 the amount of **TZS: 721,882,769.05** was outstanding balance comprising of principle sum and interest. From then on, the 1st defendant could not pay any balance to the outstanding balance, thus there was accrual of interest and penalty which came to the making of total balance as at 30th June 2017 being at **TZS: 1,605,477,991.94.**

According to the evidence in record, it is clear that the 2nd to 4th defendants, extended their securities to the 1st Defendant in servicing the said loan (Exhibits P3). That said, the issues one and two are answered in affirmative that the first defendant is indebted to the plaintiff and that the 2nd to 4th Defendants are guarantors to the 1st defendant. However, as to whether the actual debt is **TZS: 1,605,477,991.94/=** is a matter of

banking calculation. Nevertheless, it is clear that until 11th august 2014, the principle sum and its interest to the loan stood at **TZS: 721,882,769.05**/=.

On the issue whether the first defendant was under receivership as of the date of filing this suit, I have not been able to find any evidence in favour of the issue. Thus, it is responded in negative.

Whether the plaintiff was supposed to submit his claim to the receiver, is a discussion in issue no.4 of the case. As the third issue has been responded in negative, equally, there has been no material to support the response in the fourth issue in positive, though upon breach of the said credit facility, the covenant provided for that remedy of receivership *(Exhibit P2 clauses 4.01 and 7.01).* I have no material in record to respond to that issue in positive as well. Thus, it is responded in negative.

The next discussion which is central for the determination of the merit of the case lies on issue no.5, *'Whether the plaintiff breached its duty of care against the 1st Defendant'*. In deliberation to this issue, for the plaintiff it was expected to establish how she exercised her rights over the said credit facility. In that way, this Court would have been in a proper position to weigh

whether the plaintiff breached her duty of care towards the performance of the contract.

According to exhibit P2 (debenture security by the 1st Defendant to the Plaintiff – Debenture holder) on the security clause (4.01) says this:

> *As principle security for the repayment of the facility, interest and all other monies intended to be hereby secured, and for the performance of its covenants and obligations under the facility letter, the company as beneficial owner,* ***HEREBY CREATES A CHARGE OVER*** *its assets in favour of the debenture holder, by way of a first ranking fixed and floating charge over all assets of the company including but not limited to goods in stock, goods in transit or about to be shipped, landed properties, good will and debts, howsoever, whosesoever, both present and future.*

On the enforcement of the debenture at clause 7.01, provides:

Appointment of Receiver. *That the Debenture Holder (plaintiff) may at any time after the asset financing loan, interest, cost and other charges hereby secured shall have become payable and the company fails to pay as agreed in the Facility Letter,* ***appoint in writing any person or persons***

whether an officer or officers of the Debenture Holder and/ or Manager or joint Receivers and/ or Managers ..... [emphasis added].

In my thorough digest of the plaintiff's evidence, I have not been able to find any evidence by the plaintiff exercising this legal right covenanted. Instead, the plaintiff jumped into impounding the procured buses (exhibit P4) and sold them at such lower price much less quarter to the purchasing price. She being a joint owner of the said buses, she was duty responsible to know the close follow up of the said business from the commencement of the business in 2011 to 2014, and thereafter. Was there then compliance to the contract?

It is common knowledge that parties to a contract are bound by the terms of their contract (See: **Unilever Tanzania Ltd v. Benedict Mkasa trading as BEMA Enterprises,** Civil Appeal No. 41 of 2009; **Philipo Joseph Lukonde v. Faraji Ally Saidi,** Civil Appeal No. 74 of 2019 and **Simon Kichele Chacha v. Aveline M. Kilawe**, Civil Appeal No. 160 of 2018, Lulu Victor Kayombo Vs. Oceanic Bay Limited and Mchinga Bay Limited, Consolidated Civil Appeals Nos. 22 of 155 of 2020 (all unreported)).

That the parties who freely entered into the agreement like the one at hand are bound by this cardinal principle of the law of contract. That is, there should be a sanctity of the contract as lucidly stated in **Abualy Alibhai Azizi v. Bhatia Brothers Ltd** [2000] T.L.R 288 at page 289 thus: -

> *"The principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud (actual or constructive) or misrepresentation, and no principle of public policy prohibiting enforcement"*

With the same spirit of the principle of sanctity of contract and being mindful with the clauses of the **Exhibit P2**, I am reluctant to hold otherwise than that the plaintiff breached its duty of care into the said contract against the 1st Defendant by impounding the two buses (P4) and did sell them instead of first appointing the receiver. The excuse for non-performance of the agreement which she freely entered with her sound mind is unexplained for. On my part, I am satisfied that the contract entered between the plaintiff and the defendants had all attributes of a valid contract. It was not prohibited by the public policy and in essence as per nature of this contract could not be obtained by coercion, undue influence, fraud or misrepresentation in order to make it voidable in terms of the provisions of section 19 (1) of the

Law of Contract Act, Cap. 345 R.E 2002. I therefore wish to emphasis here that since the plaintiff at the time she executed Exhibit P2 with the defendant was of sound mind, she must first adhere and fulfill the terms and conditions thereof.

With the above observation, it is my holding that the plaintiff breached her duty of care in the execution of the said contract and as such she cannot be a beneficiary of her own wrong doing.

Lastly, as to what reliefs are the parties entitled to as per nature of this suit, I am of the considered view that as per facts of this case, the parties should resort to square one. That is, the plaintiff must first execute the terms of their covenant as dully executed (P2 exhibit) by appointing the receiver or repossessing all the purchased vehicles and supervise their running. Otherwise, all that done was contrary to the covenant and are hereby declared invalid. The plaintiff's suit is thus dismissed with costs.

It is so ordered.

DATED at Dar es Salaam this 31st day of July, 2023.

THE HIGH COURT OF TANZANIA

F.H. MAHIMBALI

JUDGE