IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MWANZA SUB-REGISTRY

AT MWANZA

CIVIL CASE NO. 06 OF 2021

MSINGO INVESTMENT LIMITED ---------- PLAINTIFF

VERSUS

THE ATTORNEY GENERAL---------- 1ST DEFENDANT

TIB DEVELOPMENT BANK LIMITED----------2nd DEFENDANT

JUDGMENT

Last Order: 26.06.2023
Judgment Date: 15.09.2023
M. MNYUKWA, J.

The Plaintiff have instituted this suit claims against the defendants for a declaration that the 2nd defendant is in breach of loan agreement amounting to Tsh. 1,000,000,000/= lately advanced to the plaintiff for an agricultural project.

Plaintiff instituted this suit seeking for the following orders:

(a) *The declaration that the 2nd defendant is in breach of the loan agreement, following the loan of about Tshs 1,000,000,000/- lately advanced to the plaintiff for an agricultural project.*

(b) *In the Alternative, the 2nd defendant be compelled to yield to the condition and terms and equally be restrained from the further continuation of the breach.*

(c) *The 2nd defendant to refund the plaintiff all amount*

the latter used from her pocket in trying to mitigate costs.

(d) The Defendants to pay the plaintiff general damages.

(e) The defendants to pay costs of the suit.

(f) And any other reliefs this court finds it fit to grant.

When the 1st and the 2nd defendants were served with the plaint, along with the written statement of the defence, they also filed a counterclaim against the plaintiff for the following reliefs: -

a. *Declaration that the Defendant in Counterclaim is in breach of the Credit Facility Agreement, Mortgage Deed, Debenture Deed as well as the Loan Guarantee Agreement.*
b. *Payment of the outstanding loan amounting to Tsh 1,364,542,972/= as of 7th September 2021 including accruing penalties and interests by the Defendant in the Counterclaim to the 2nd Plaintiff in the Counterclaim.*
c. *Payment of Interest at the Court rate from the date of filling this suit to the date of Judgement.*
d. *An order to the Plaintiffs in the Counterclaim to exercise their right under the debenture and mortgage deeds*
e. *An order against Defendant for attachment and sale of guarantors' personal properties to realize the outstanding amount.*
f. *Costs of this Suit.*
g. *Any further and or other relief as this Honourable Court shall deem just and fit to grant.*

The plaintiff had the legal service of Mr. Julius Mushobozi learned advocate while the defendants had the service of Ms. Sabina Yongo and Ms. Tausi Swedi learned state attorneys. The fact of the case goes that, the plaintiff secured a loan facility from the 2nd defendant in 2014 at a tune of Tshs 1,000,000,000/- with a short-term loan of Tsh 55,400,000/= and the long-term loan at a tune of Tsh 944,600,000/-. Based on the terms of the loan facility, and the nature of the project, the 2nd defendant was to pay the suppliers of the agricultural equipment while the plaintiff had to procure goods/works or consultancy services and miscellaneous item as appropriate. The plaintiff claims against the 2nd defendant that he did not honour the terms of the agreement.

Before the hearing of the matter, this Court with the consultation of the parties formed three issues that:-

1. *Who breached the credit facility agreement?*
2. *If the 1st issue is answered in the affirmative, what is the outstanding loan, interest and penalties?*
3. *What are the relief parties entitled to.*

PW1, Samwel Mkufu Chelunga a resident of Geita, 63 years old and a farmer sworn and testified as PW1. He stated that he knows the plaintiff Msingo Investment Company Limited and he is the managing director of the company. He stated that the company deals with the cultivation of

food crops such as maize, rice, and potatoes and it owns 302 acres of farmland which was given by his director, Samwel Mkufu Chelunga.

He went on saying that the company wanted to expand its agricultural activities and approached the 2nd defendant in 2013 applying for a loan facility and in 2014 the 2nd defendant agreed to fund the project to the tune of Tsh 1,000,000,000/-. The plaintiff pledged the 302 acres farm situated at Geita, the house at Nyakato and a plot situated at Luchelele, Nyegezi as securities for the loan both with the name of Samwel Mkufu Chelunga.

The loan agreement was entered in writing on 30.10.2014 between the plaintiff and the 2nd defendant. He produced the said agreement which was admitted as exhibit P1. He went on testifying that the loan of Tsh 1,000,000,000/= covered Tshs. 55,400,000 as short loan for working capital and Tsh 944,600,000/- as loan facility for purchasing farming equipment, working tools and infrastructure. The scheduled tools were a water pump machine and its accessories, a transplanting machine, a combine harvester rice milling machine, trucks for crop transportation and a tractor. The infrastructure includes levelling and clearing the farm ready for farming and inserting a system of irrigation using the lake water.

PW1 went on that, according to the facility, the regional engineer was to build the infrastructure and was to be paid by the 2nd defendant. Likewise, the working tools, machines, trucks and milling machines were to be purchased by the 2nd defendant. He went on that the 2nd defendant introduced him to the supplier who was from China and the 2nd defendant was responsible for the payment of taxes, clearance and transportation costs from Dar es Salaam to the farm but it was paid by the company on the ground that the 2nd defendant hit its limit in financing the project.

He went on that, the money for infrastructure was kept in the plaintiff's account and the 2nd defendant directed the plaintiff to pay local suppliers who construct the infrastructure. The company has no direct control of the funds and it was under the control of the 2nd defendant.

PW1 further testified that, the grace period for the loan was one year which ended in 2015 but the last payment of the 2nd defendant to the company was made in 2018 to the last supplies who supplied the tools and the constructor who constructed the infrastructure was paid in early 2018. The company had no power to deal with the delay of the tools as the 2nd defendant delayed payment.

PW1 added that, after the end of the grace period, the plaintiff was required to start servicing the loan while the project did not even start. He claims that this resulted to penalties and interests for failure to pay

within time. Pointing out to another challenge, PW1 claims that the supplied tools were handled by the plaintiff and they were not inspected and found defective and could not work properly. He claims that the water pump, the combine harvester and the transplanting machine were defective and the period of warranty was one (1) year which had already lapsed due to the act of the 2nd defendant who delayed to make payments for other tools that work together with the delivered tools and therefore the plaintiff was not in a position to demand any improvement. PW1 also claims the climatic changes which caused the farm to be flooded since they could not start the project in the anticipated time.

PW1 tendered the documents which were admitted as exhibit P2 collectively. He went on that, he received the working tools in the year between 2015 -2017 due to the delay of the 2nd defendant to pay the suppliers. He went on that the constructor who installed the water pump denied the plaintiff to use the pump for the reason that it was not paid for. As a result, the project stopped and the remained infrastructure for irrigation got damaged.

He went on that, the plaintiff made several correspondences with the 2nd defendant on the status of the project insisting 2nd defendant to pay the contractors. PW1 tendered a correspondence later reminding the 2nd defendant to pay contractors and was admitted as exhibit P3. PW1

also tendered other correspondence made on 05.04.2017 and 23.03.2017 and admitted as exhibit P4 collectively.

PW1 went on that the interest accrued from 2015 to 2022 and to date the project did not take over. He went on that he contacted the 2nd defendant to waive the interest and penalty so as to find another donor to take up the project but he was denied through the letter by the 2nd defendant dated 11.06.2018 which was also tendered and admitted as exhibit P5.

PW1 went on that, he approached another donor, Tanzania Agriculture Development Bank (TADB) for the purpose of shifting the debt to them as the 2nd defendant reached the limit. That, the 2nd defendant introduced the plaintiff to another donor who could take over vide a letter dated 05.11.2018 which was also tendered and admitted as exhibit P6. PW1 approached the TADB requesting for funding of the project at the tune of Tshs. 885,000,000/= and TADB requested the 2nd defendant the report of the project and the 2nd defendant instead, submitted to TADB the interests and penalties and TADB rejected to take over the project unless the 2nd defendant waived the interest and penalties whereas the 2nd defendant denied.

PW1 testified that, the plaintiff asked the 2nd defendant to top up the required amount and 2nd defendant agrees on the condition that, they

should review the valuation of the securities and add some including the godown and this time would be a commercial loan whose interest is higher than agricultural loan.

PW1 went on that, they could not evaluate the loan for the reason that evaluation was already done before and the plaintiff was not ready to take a commercial loan for the interest was 24% per annum different from the previous loan which was 5%-6% per annum. PW1 tendered correspondences between the plaintiff and 2nd defendant from 8.4.2019 to 23.12.2019 which were admitted collectively as exhibit P7.

PW1 went on that, the 2nd defendant wrote to the plaintiff to recall for the facility granted. The plaintiff replied that he could not perform the contract because of the breach of the terms of the same by the 2nd defendant. The document letter was admitted as exhibit P8. He prayed thus the reliefs sought in the plaint be awarded.

When cross-examined, PW1 stated that he once paid the supplier of the pipes and the constructor of the pump house for the 2nd defendant's delay. He went on that the 1st disbursement was at a tune of Tsh 50,000,000/= and was used at the initial stage of preparation of the farm. On the defective tools, he claims that they were supposed to be inspected by the 2nd defendant. He went on that Speron investment and builders combined were paid by the 2nd defendant and the last payment was done

to Builders Combine by early 2018. He also avers that the short-term loan of Tshs, 55,400,000/- was paid to the plaintiff while the long-term loan of Tshs. 944,600,000/- were paid to different contractors by the 2nd defendant and the plaintiff had no access to the funds. He went on that, on 11.06.2018 the project was still stagnant and the plaintiff asked for a waiver of penalties and interest because the 2nd defendant want the retirement of the loan.

When he was re-examined, he went avers that, they were farming 183 acres and were not irrigating for the equipment was not installed. He went on that all the money for the project was given as per the loan facility but they were not released on time which led to the delay of the starting of the project that's why he filed this case for the 2nd defendant to waive the penalties and interests. The grace period was a term of one year from January 2015 to December 2015 when all the activities were to be completed.

The plaintiff case was marked closed and the defence case opens whereas Emanuel Mwilenga, Monitoring and Supervision officer of TIB Bank, (the 2nd defendant) testified as DW1. He testified that he was an employee of the Tanzania Investment Bank as a Monitoring and Supervision officer and his responsibilities are to supervise projects which are loan beneficiary projects to make sure funds released are utilized

according to the project, implementation of the project, payment and repayment of the loan and communicate with the customers on the development of the project.

He went on that the plaintiff entered a loan agreement with the 2nd defendant in 2014 and he was given Tshs. 1,000,000,000/- for the purpose of developing an agricultural scheme by improving the irrigation system and buying of farming equipment. DW1 went on that the plaintiff and the 2nd defendant signed a letter of offer which he tendered and was admitted as exhibit D1. He went on that, the plaintiff and the 2nd defendant also signed a credit facility agreement which he tendered and was admitted as exhibit D2.

He went on that, after the signing of the credit facility, it was the duty of the 2nd defendant to release funds on time but the duty to solicit suppliers and service providers was the duty of the plaintiff. He avers that, the 2nd defendant released all the loan on time as requested by the plaintiff but it was the plaintiff who failed to honour the terms and pay the loan on time.

He went on that the securities for the loan were all the assets of the plaintiff, mortgage and guarantees whereas the mortgage and debenture were between the plaintiff and the 2nd defendant while the guarantee was between the 2nd defendant and shareholders of the plaintiff. DW1

tendered the mortgage agreement, debenture and guarantee which were collectively admitted as exhibit D3.

He went on that plaintiff had managed to pay a loan at a tune of Tsh 10,000,000/- and they took different initiatives to help the plaintiff pay the loan including restructuring of the loan but the plaintiff failed to pay. He went on that, the plaintiff come up with another initiative which was to top-up the loan and as the terms and conditions of the agricultural loan, the maximum is Tsh 1,000,000,000/=. DW1 went on that the plaintiff was advised to take a commercial loan who denied for the reason that the interest was high.

They also offers another initiative to the plaintiff to restructure the loan payment schedule as the loan was accruing due to interest and in order to do that, the plaintiff was required to add up securities but the plaintiff failed and it was difficult to restructure the loan.

DW1 went on that the plaintiff approached Tanzania Agricultural Development Bank, TADB who wrote to the 2nd defendant asking for the status of the loan including the outstanding, the repayment information and the aim of the loan. The correspondence between the 2nd defendant and TADB was tendered and admitted as exhibit D4 (also exhibit P6). The TADB could not offer a loan to the plaintiff and was equally advised to settle arrears with the 2nd defendant first for him to be eligible.

DW1 went on that, since the plaintiff defaulted to service the loan, the 2nd defendant took the initiative to recover the loan by issuing a recalling letter of 30 days but the plaintiff did not pay. The 2nd defendant thereafter issued a 60 days statutory notice the loan was not settled, instead the plaintiff commenced the case. DW1 tendered the recalling letter and a statutory notice which were collectively admitted as exhibit D5.

DW1 went on that, the outstanding loan amount as per 03.02.2023 was Tsh 1, 458,000,000/- involving the principle sum, interest and penalties. DW1 insisted that the plaintiff breached the terms of the loan agreement and therefore the case against the plaintiff be dismissed and the reliefs sought on the counterclaim be provided.

When cross-examined by the plaintiff's learned counsel, DW1 stated that he visited the farm project twice in 2019 and in 2021 and last time in 2021 when he visited, the farm was planted with rice and he saw farming equipment and infrastructure and he did not see the irrigation pump and the truck and he was told that the truck was at Mwanza.

He also stated that, the plaintiff was required to procure goods, works and services according to the rules and procedures of the 2nd defendant and he did not know if there are terms which allow the client to appoint suppliers and constructors of his own choice.

DW1 avers that what governs the conduct of parties in the loan is the credit facility letter and the credit facility agreement which specify the commencement of the payment and both specified that the grace period was 1 year and there was no clause which shows that the repayment will start after the commencement of the project. He went on that, the contract stipulate that the client will be responsible for procuring all services, goods and works and the bank could only pay when instructed by the client who was also given instruction by the 2nd defendant on how to get the suppliers and constructors.

On re-examination DW1 insisted that according to the contract, it is the duty of the client to procure items, goods and services and solicit the suppliers and it was the duty of the client to know the procurement policy. He went on that, the defective procured agricultural equipment were procured by the client.

DW2 John Mboje testified that he was a senior officer of the 2nd defendant responsible for analyis of the projects and making a follow-up thereof. He said, the plaintiff secured a loan of 1 billion for agriculture and he was to start paying after a grace period of one year. He said, according to the contract, the plaintiff had a duty to disclose the name of the service provider and instruct the 2nd defendant on the amount to be paid to him.

He said, it was upon the plaintiff to choose who should be the service provider. He tendered the letter which was admitted as exhibit D6.

He testified further that as of 14.09.2021, the outstanding loan inclusive of interest and penalties was Tshs 1,365,534,755.03/-. He tendered a bank statement which was also admitted as exhibit D7. He said, until on the date of his testimony, the outstanding loan plus interest and penalties had reached Tshs. 1,468,000,000/=.

On cross examination, he avers that the last amount of money disbursed to the plaintiff's account was an amount of Tshs. 100,000,000/= which was disbursed on 25.09.2015. That from 25.09.2015 to 04.03.2021 a total of 829,409,393.75 were disbursed to the plaintiff's account. The plaintiff did not pay the same even after the expiry of the grace period. He said, the Bank's standard bidding document is not for the use of the customers but for the bank itself while procuring its own items. He said, though according to the contract the plaintiff was to use bank standard bidding documents, no document to that effect have been tendered. He insisted that the 2nd defendant is not responsible for the defects of goods supplied to the plaintiff as claimed for the reasons that the 2nd defendant was not a party to the contract.

When re-examined by Ms. Sabina Yongo, the learned state attorney, DW2 stated that the debt as of 14.09.2021 was at a tune of Tshs.

1,365,534,755/- and the plaintiff did not service the loan therefore it accrues and by 26.06.2023 the debt stands at Tsh 1,468,000,000/=. Refereeing to clause 4 and 5 of the credit facility the client was required to do procurement according to bank procurement bidding documents and appoints the suppliers and constructors.

As I hinted earlier that during the final pre-trial conference, this Court framed three issues. After finalization of the hearing of the case, both parties filed their respective final submissions. I commend them for the nob le work they have done in the final submissions and they may be considered whenever I find pertinent.

To appraise the evidence on record, the plaintiff, Msingo Company limited did admit that he secured a loan from the 2nd defendant at the tune of Tsh 1 billion and he is indebted by the 2nd defendant. The plaintiff furry is on the repayment schedule that he failed due to the 2nd defendant's breach of terms and the accrued loan amount due to the interest and penalties.

Starting with the 1st issue as to who breached the credit facility agreement, it was the plaintiff's claim that it was the 2nd defendant who breached the terms of the contract which made the plaintiff incapable of servicing the loan. The 2nd defendant denied the allegation. He shifted the

wrong to the plaintiff and accordingly raised a counterclaim for a breach of contract. To appreciate the terms of payment of the loan, it is inevitable to go through the Credit Facility Agreement exhibits P1 and D2. In the agreement under clause 2.01.6 which reads: -

2.01.6 **Grace Period:** *The first instalment shall fall due after a grace period of twelve months counted from the date of first drawdown.*

From the testimony of the PW1, he did not dispute that the payment was not made as agreed in the loan agreement in clause 2.01.6 above. He claims however that the failure to pay was due to late disbursal of the loan by the 2nd defendant. On its part, the 2nd defendant through DW2 insisted that the laon was timely disbursed and the last disbursement was done on 25.09.2015 and that from 25.09.2015 to 04.03.2021 a total of Tsh 829,409,393.75 were disbursed to the plaintiff's account as per exhibit D7.

In determining as to who breached the contract based on the terms of the agreements in conjunction with the submissions by both parties and the exhibits tendered, it is settled that parties are bound by the terms of the agreement they freely and legally entered. This is in terms of Section 37 of the Law of Contract Act, [Cap 345 R.E. 2019] which provides that:-

"The parties to the contract must perform their respective promises unless such performance is dispensed with or excused under the provision of this act or by any other law."

See also the case of **Simon Kichele Chacha v Aveline M. Kilawe,** Civil Appeal No. 160 of 2018 CAT at Mwanza where it was stated that:

"Parties are bound by the agreement they have freely entered into, and this is a cardinal principle of the law of contract that there should be a sanctity of the contract."

According to PW1, the project encountered difficulties and the 2nd defendant did not disburse the loan on time whereas on 05.04.2017 the 2nd defendant was yet to disburse a total of Tshs. 225,041,495.75 to the plaintiff (Exhibit P4).

On 22nd March 2018, PW1 wrote to the 2nd defendant requesting for the waiver of the normal interest and past due interest and disbursement of the remaining sum. The 2nd defendant agrees with the plaintiff to withdraw the recalling of the facility and the disbursement of the facility Tshs. 212, 126,126,925 to finalise the procurement of the pending equipment to enable the project to proceed and secondly, the condition set forth that the monies disbursed be used to finalise the project to

operational for the repayment of the loan to be rescheduled and the plaintiff to be given a grace period of 12 months from August 2017. In January 2018, the bank restructured the exposures of Tshs. 1,133,328,116.00/- to a long-term tenor of 6 years including one-year period counted from August 2017 (Exhibit P5). This connotes that, to this point, all the loan was disbursed and the project was completed.

The plaintiff could not honour the agreement for the reasons stated on the letter dated 05.11.2018 and the plaintiff requested to transfer the loan to TADB to top up the loan, the request which was rejected (exhibit P6). On 31 February 2019, the plaintiff wrote to the 2nd defendant requesting for the loan restructure. The 2nd defendant agreed with the condition that the securities valuation was to be performed as the status of the debt accrued and was below the margin. The plaintiff was given 30 days to complete the valuation for the request to be implemented. They carried a valuation in respect of property on plot No. 331 Block GG Nyakato area which fell below the required coverage ratio of 1.25 and therefore, the plaintiff was required to add new securities and was given 42 days to that effect. On 08.10.2019, the 2nd defendant wrote to the plaintiff notifying him that the given days were over and also reminded him of the status of the loan. (Exhibit P7).

The plaintiff notified the 2nd defendant that he was unable to add another security for he was looking for another sponsor and on 02.03.2020, the 2nd defendant issued a 30 days' notice to the plaintiff to recall the facility granted to the plaintiff (exhibit P8).

PW1 claims that the 2nd defendant breached the terms of the agreement for failure to disburse the loan to the plaintiff. DW1 and DW2 denied the allegation claiming that, the 2nd defendant paid the plaintiff promptly when he was requested according to the loan facility. As we observed on records, parties entered into an agreement which was once not honoured, that is by the plaintiff for failure to pay the loan after the expiry of the grace period as per article II section 2.01.6 of the credit facility agreement and as per the claim of the plaintiff that the 2nd defendant did not disburse the loan at a tune of 212,126,126,925. According to exhibit P5, this was resolved on 11.06.2018 whereas, the loan was fully disbursed to the plaintiff and after finishing the project as required the loan payment schedule was restructured to 6 years tenor including one year grace period counted from August 2017.

It is from this point that the parties had their agreement. Thus, a contract is based on a principle that agreement of the parties must be honoured. The intention of the parties cannot be interfered by the court.

Once the parties entered into agreement they are bound by it and the pimary duty of the court is to ensure that parties' contract is enforceable.

In the case of **Philipo Joseph Lukonde vs. Faraji Ally Saidi**, Civil Appeal No. 74 of 2019 which quoted the case of **Michira vs. Gesima Power Mills Ltd** [2004] eKLR the court determining a similar issue stated:-

> *"That fact does not give room to this Court to tamper with the agreement... If the words of the agreement are clearly expressed and the intention of the parties can be discovered from the whole agreement, then the court must give effect to the intention of the parties"*

Moreover, the Court of Appeal **Miriam E. Maro vs. Bank of Tanzania,** Civil Appeal No. 22 of 2017 while quoting the findings in **Unilever Tanzania Ltd vs. Benedict Mkasa Trading as Bema Enterprises,** Civil Appeal No. 41 of 2009 the Court of Appeal stated that:-

> *"Strictly speaking, under our laws, once parties have freely agreed on their contractual clauses, it would not be open for the courts to change those clauses which parties have agreed between themselves..."*

It is the plaintiff's claim that the 2nd defendant breached the contract because she lately disbursed the loan to him and that the 2nd defendant procured defective equipment which resulted the project to

collapse. I have carefully gone through the evidence of both parties and I found this claim lacks proof. I say so because in his joint written statement of defence, the 2nd plaintiff stated that they disbursed all money in time and the last disbursement was made on 25th September 2015. This evidence was supported by DW2 who testified under oath that the money was disbursed on time and he tendered Exhibit D7 to prove the same.

Thus, it is upon the plaintiff to prove his assertion as it is settled that the one who alleges must prove his allegation. This is a trite law as per section 110 and 112 of the Law of Evidence Act, Cap 6 R.E 2019. (See also the case of **Attorney General and two others v Eligi Edward Massawe and Others,** Civil Appeal No 86 0f 2002). Therefore, the plaintiff is duty bound to prove that the money was lately disbursed to either him or suppliers/contract by producing document to that effect. I understand that, the plaintiff produced correspondence which is Exhibit P3 and P4 which are letters addressed to the 2nd defendant. However, it is my humble view that those exbihits cannot establish a proof that the loan was lately disbursed since they are the mere letters authored by the plaintiff herself. As the 2nd defendant pleaded and produced bank statements proving the said disbursement, the plaintiff was to plead and

produce evidence of the alleged delay of disbursement. He would have adduced evidence when was the first disbursal and the last one.

The 2nd defendant tendered Exhibit D7 to prove as to when the loan was disbursed to the plaintiff contrary to the plaintiff as he did not substantiate his claim of late disbursement with any documentary proof. Thus, it is my firm view that, the nature of the plaintiff's claim demands documentary proof to show when the fund was disbursed to him. In absence of the same, the court cannot rely on a mere words.

The plaintiff also claims that the 2nd defendant breached the contract since he procured defective machines and other agricultural equipment which resulted the project to yield low fruits as it was expected. Fortunately, parties entered into a written agreement which binds them. I revisited Exhibit P1and D2 only to find that, it was the plaintiff who was responsible to procure goods and service from different contractors and suppliers. Article II of section 2.01.5 states that:

> *"..... Msingo Investments Company Limited will be responsible for procurement of Goods/ Works/ consulting services and miscellaneous items as appropriate."*

Thus, the above clause clearly shows that, it was the plaintiff who was responsible for procurement of goods and service and not the 2nd defendant. This is proved by Exhibit D6 which is the letter from plaintiff dated 16th April 2014 addressed to the 2nd defendant informing hiim about the selected suppliers of machines. This evidence was backed up by the evidence of plaintiff on cross examination where admitted that he paid some of the contractors and suppliers meaning that, he procured the items to them that's why he was able to pay them.

I understand that plaintiff tendered Exhibit P4. With due respect, the said exhibit does not show that the procurement was done by the 2nd defendant, rather, it shows that the plaintiff was asking and advising the plaintiff to pay the contractors directly. Again, this shows that the 2nd defendant was not involved in procuring goods and services in the project.

To that end, it is my conviction that it was the plaintiff who breached the contract in the credit facility agreement entered between the plaintiff and the 2nd defendant.

Next for consideration is the second issue which is if the first issue is answered in the affirmative, what is the outstanding loan, interest and penalties.

It is undisputed that, the credit facility agreement, Exhibit P1 and D2 is very clear that any amount of principal or interest that remain unpaid after due date shall be charged a penalty as it is provided under section 2.03.1 on past due interest. Further to that, section 2.01.9, 2.01.10 and 2.02.7 provides term and conditions of interest on a long term loan and short term loan. It follows therefore that, whenever there is a default which resulted into unpaid loan, it goes without say that the interest accrues from the principal amount and attracts penalties.

It is from the evidence of DW2 that the status of the loan up to 14th September 2021 when Exhibit D7 was printed was Tsh 1, 365,000,000 while to the date in which DW2 was testifying, according to his evidence of 26th June 2023, the total loan was Tsh 1.468,000,000/-. DW2 was consistently stated that amount when he was cross examined and re-examined. Since Exhibit D7 shows that the total loan up to 14th September 2021 was Tsh 1, 365,000,000, it is my finding that as the debt is still unpaid, the interest and penalties are accruing. Therefore, the plaintiff is entitled to pay outstanding loan as it will be reflected in the bank statement.

As to what reliefs are the parties entitled to; It is common ground that, the reliefs follow after a party has been declared a winner in a civil

litigation. In our case, the 2nd defendant managed to prove his case in the counter claim on the required standard that is on the balance of probability since the one with heavier evidence become the winner. That is to say, the 2nd defendant had the right to exercise the rights provided under the law to realize the properties pledged as a security for loan including the right to sale.

I am fortifying the above stand by the decision of the Court of Appeal in the case of **Abdalla Yussuf Omar v. People's Bank of Zanzibar and another** (2004) TLR 399 among other things observed that;

> *"By failing to repay any of the installments due until May 2002, when he was served with a demand notice the appellant was in breach of the loan repayment terms and the bank was entitled to exercise its power of sale of the mortgaged property...*

In the final analysis, I find the plaintiff case without merit and dismiss it. On the other hand, I find the counterclaim by the defendants meritorious. I accordingly enter judgement and decree in favour of the defendants in respect of her counterclaim for payment of Tshs 1,365,000,000.00 as outstanding loan inclusive of interests and penalties. The 2nd defendant had the right to exercise the rights provided under the

law to realize the properties pledged as a security for loan including the right to sale. The defendants are also awarded Interest as per court rate of 7% per annum from the date of this Judgment to the date of full payment of the decretal sum. Each party to bear its own costs.

M. MNYUKWA
JUDGE
15/09/2023

Court: Right of appeal fully explained

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MWANZA DISTRICT REGISTRY

M. MNYUKWA
JUDGE
15/09/2023