

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM**

COMMERCIAL CASE NO.4 OF 2000

**TRUST BANK TANZANIA LTD-----PLAINTIFF
VERSUS**

**1. LE-MARSH ENTERPRISES LTD]
2. JOSEPH MBUI MAGARI] DEFENDANTS
3. LAWRENCE MACHARIA]**

R U L I N G

NSEKELA, J.

PW1, one Swaraj Kumař Boss, Deputy Managing Director of the plaintiff bank, while being led by Mr. Rwechungura in his examination in chief stated in part as follows –

" As at 29.6.99 the loan outstanding was shs 45,230,040/= and the overdraft outstanding was shs 47,030,044.09. I would like to tender in evidence".

This was admitted in evidence as exhibit P6 without objection from Mr. Msemwa, learned advocate for the defendants. Exhibit P6 was a letter from the plaintiff's advocates to the three defendants, being notice of recalling the loan extended to them by the plaintiff bank. It is important to reproduce part of this letter. It provides as follows –

"You are hereby required to immediately pay either to us for the account of our client or to our client directly, the following:

- a) The principal loan amount of Shs 45,230,040.00 outstanding as on 29th June, 1999;*
- b) Interest on the loan amounting to shs 47,030,044.09 as on 29th June, 1999*
- c)*
- d)*

PW1 then continued on to explain that the interest figure included penalty interest and prayed to tender in evidence the computation of interest. It was at this point that Mr. Msemwa raised an objection to that computation of interest being admitted in evidence, basically because it was allegedly a photocopy and not an original one and that the same was not part of the pleadings. Mr. Rwechungura on his part submitted that it was a computer print-out and that it was part of the reply to the written statement of defence. Instead of my delivering a Ruling there and then I thought I should have the benefit of researched arguments specifically on the question as to whether or not a computer print-out is a bankers book under the Evidence Act, 1967.

Mr. Msemwa has briefly submitted that the words "*bankers' book*" have not been defined in the Evidence Act but the learned advocate prayed in aid the definition on ***Sarkar on Evidence***, (15th edition), Vol.2 at page 2370 where bankers books have been defined to include –

"ledgers, day books, cash books and all other books used in the ordinary business of a bank."

The learned advocate then implored the court to adopt this definition. He was of the settled view that a computer print out is not contemplated in that definition. He emphatically stated that if there was a vacuum in the law, then it was up to the Legislature to take it up and not the court. Mr. Rwechungura had as his starting point the English Bankers' Books Evidence Act 1879 which in section 9 defines bankers' books to include –

"ledgers, day books, cash books, account books and all other books used in the ordinary business of the bank."

I share the concern of both the learned advocates that Part IV of the Evidence Act, 1967 which deals with Bankers' Books does not define what is in fact a bankers' book. Section 76 contains definitions but the definition of

bankers' books is conspicuously missing. Section 77 of the Evidence Act, 1967 reads –

" 77. Subject to this Act, a copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of such entry and of the matters, transactions and accounts therein recorded."

As I have stated before section 76 of the Evidence Act does not define what sort of books are covered. Like Mr. Rwechungura, I trace back to section 9 of the Bankers Books Evidence Act 1879. It reads as under –

" 9. Expressions in this Act relating to "bankers' books" include ledgers, day books, cash books, account books, and all other books used in the ordinary business of the bank."

This definition was amended in 1979 by replacing it with a new definition of 'bankers' books' which is in the following terms –

" 9 (2) Expressions in this Act relating to "bankers' books" include ledgers, day books, cash books, account books and other records used in the ordinary business of the bank, whether those records are in written form or are kept on microfilm, magnetic tape or any other form of mechanical or electronic data retrieval mechanism."

Mr. Rwechungura has drawn my attention to the case of **Barker v Wilson** {1980} 2 All ER 80 in which at page 82 I have found a statement we could usefully adopt. This is what **Bridge, L.J.** said –

*"The Bankers' Books Evidence Act 1879 was enacted with the practise of bankers in 1879 in mind. It must be construed in 1980 in relation to the practice of bankers as we now understand it. So construing the definition of "bankers' books" and the phrase 'an entry in a banker's book' it seems to me that clearly both phrases are apt to include any form of permanent record kept by the bank of transactions relating to the bank's business, **made by any of the methods which modern technology makes available**,, including in particular, microfilm." (emphasis supplied). (See also: **Williams v Williams; Tucker and others v Williams and another** [1987] 3 All ER 256.*

The important point to note is that the law must keep abreast of technological changes as they affect the way of doing business. It may be true, as Mr. Msemwa argues, that the banks in this country still maintain the old fashioned books that were being used in 1879. This reminds me of the famous words used by Lord Denning in the case of ***Packer v Packer*** [1954] P 15 wherein he stated at page 22 –

"What is the argument on the other side? Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has never been done before, we shall not get anywhere. The law will stand still whilst the rest of the world goes on: and that will be bad for both."

I certainly do share with his Lordship's sentiments. Tanzania is not an island by itself. The country must move fast to integrate itself with the global banking community in terms of technological changes and the manner in which banking business is being conducted. The courts have to take due cognizance of the technological revolution that has engulfed the world. Generally speaking as of now, record keeping in our banks is to a large extent **"old fashioned"** but changes are taking place. The law can ill afford to shut its eyes to what is happening around the world in the banking fraternity. It is in this spirit that I am prepared to extend the definition of banker's books to include evidence emanating from computers subject of course to the same safeguards applicable to other bankers books under sections 78 and 79 of the Evidence Act. Under the circumstances I decline the invitation by Mr. Msemwa, learned advocate, that evidence produced by computers should not be considered as bankers' books. As I have stated above, in as much as I subscribe to the view that the court should not be ignorant of modern business methods and shut its eyes to the mysteries of the computer, it would, however, have been much better if the position were clarified beyond all doubt by legislation rather than by judicial intervention. But in taking this

course of action, I am certainly not traversing virgin territory. The highest court of the land in the case of **Tanzania Cotton Marketing Board v Corgecot Cotton Company SA [1997] TLR 165** had occasion to construe the words " *registered post*" appearing in Rule 4 of the Arbitration Rules, 1957. This is what the court stated –

"While it is an undisputed fact that under Rule 4 of the Arbitration Rules, 1957, the award is to be forwarded to the Registrar of the High court by registered post, the words 'registered post' should be interpreted widely enough to take into account the current development in communication technology that has taken place since 1957 when the rules were enacted. It is common knowledge that since that time other modes of postage have been introduced. The DHL system which was used in this case is among such modes of communication" (emphasis supplied).

I have no doubt in my mind at all that old fashioned bankers' books are giving way to modern advanced ways of keeping bank records. In ***Barkers*** case (supra) the microfilm was added to the list. We can safely do likewise with evidence generated by computers subject to the same safeguards. I therefore with respect, overrule Mr. Msemwa's objection and the trial will proceed with the examination in chief of PW1 from where it ended. It is accordingly ordered.

**Certify that this is a true and correct
original order judgement
Registrar
Commercial Court
Dar es Salaam**

**H.R. Nsekela,
JUDGE**

30.8.2000

Ruling delivered in the presence of Mr. Msemwa and Mr. Rwechungura, learned advocates for the parties.

**H. R. Nsekela,
JUDGE
30.8.2000**

Order: Hearing to resume on the 21.9.2000.

**H.R. NSEKELA,
JUDGE.
30.8.2000**

*I Certify that this is a true and Correct
copy of the original Order Judgement Ruling
.....
Registrar
Commercial Court
Dar es Salaam
dated 31/8/2000*