

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

COMMERCIAL CASE NO. 13 OF 2009

BOA BANK (TANZANIA) LTDPLAINTIFF

VERSUS

KILOMBERO HOLDINGS LTD1ST DEFENDANT

ERIC OWEN WINSON2ND DEFENDANT

Date of last order: 18/06/2009

Date of ex parte proof: 16/06/2009

Date of judgment: 10/08/2009

JUDGMENT

MAKARAMBA, J.:

On the 12th day of February 2009, the Plaintiff, BOA Bank Tanzania Ltd, formerly trading by the name of Eurafrikan Bank Tanzania Ltd, filed a suit in this Court against the defendants jointly and severally, claiming the sum of US\$ 125,645.33, being the outstanding overdraft facility plus accrued

interest advanced by the Plaintiff to the 1st Defendant. In this suit, the Plaintiff prays for judgment and decree against the Defendants jointly and severally for:

- a) US \$ 125,645.33 or their Tanzanian shilling equivalent at the exchange rate ruling (sic!) on the date of payment;*
- b) Interest on the said sum of US \$ 125,645.33 at the rate of 12% per annum from the 1st day of September, 2006 until judgment.*
- c) Interest on the decretal amount at the court rate from the date of judgment till payment in full.*
- d) Costs of this suit.*
- e) Any other or further relief as this Honourable Court may deem fit to grant.*

Despite several attempts by the Plaintiff to serve them, the Defendants have failed to enter appearance in Court to defend the suit. The Plaintiff even attempted to effect service by way of substituted service on the defendants through the Court's brokers, by affixation at a conspicuous place at the defendants' place of business, but this did not bear any positive results. Consequently, this Court, on the 02nd day of June, 2009, granted the prayer by the learned Counsel for the Plaintiff to proceed by *ex parte* proof.

In this suit, the Plaintiff is represented by Mr. Mbuya, learned Counsel. The Plaintiff's side fielded one witness, Mr. Massawe, (PW1), a Business

Support Manager from the Plaintiff's Bank, who testified in support of the Plaintiff's claim against the Defendants.

On the 2nd day of November 2007, the Plaintiff, through its Counsel, Felix Mbuya (Advocates), issued a Demand Notice (**Exh.P6**) to Mr. Eric Owen Winson, the 2nd Defendant, the guarantor for the 1st Defendant, under the terms of the personal guarantee he executed on the 26th day of September, 2003 in favour of the Plaintiff, as security for the sum of US\$ 180,000.00 plus accrued interest thereon. Prior to that, on the 21st day of July 2004, the Plaintiff, then trading by the name of Eurafrikan Bank (Tanzania) Ltd, had written a letter to the Managing Director of the 1st Defendant's company reminding him of the payment of the outstanding debit balance of US\$ 180,764.27 (**Exh.P2**). In that letter, the Plaintiff agreed to the Repayment Plan of the entire outstanding debt balance, on the condition that the first down payment was to be of US\$ 15,000, and the remaining balance of US\$ 165,764.27 was to be settled on or before 30th day of September 2004. It does not appear that the Defendants kept part of their bargain to clear the debt due as per the rescheduled payment terms plan stipulated in **Exh.P2**.

On the 1st March 2006, the Plaintiff again in a letter, (**Exh.P5**), issued a Formal Demand to the Managing Director of the 1st Defendant's company giving him fourteen (14) days to clear his overdraft current account. Despite these demands, the Defendants have failed to settle the debt balance due as per the terms and conditions in the Facility Agreement and the Debenture and Guarantee and Indemnity. This left the Plaintiff with no

other option but to come to court to demand from the Defendants the payment of the outstanding overdraft facility. This was pursuant to the meeting of the Board of Directors of BOA Bank Tanzania Limited, held on the 15th day of October 2007, where it was resolved to use all means necessary and measures including instructing legal firms to institute on its behalf proceedings for the recovery of monies from the Company's loan defaulting customer, Kilombero Holdings Limited, the 1st Defendant, together with its Director Mr. Eric Owen Winson, the 2nd Defendant. A copy of the Certified Board Resolution authorising institution of legal proceedings against the Defendants (**Exh.P7**) is on record.

At the centre of the controversy in this suit is the Plaintiff's claim of an outstanding overdraft facility plus accrued interest against the Defendants jointly and severally. At the time when the Plaintiff advanced the overdraft facility to the 1st Defendant, the Plaintiff was trading by the name of ***Eurafrican Bank Tanzania Ltd.*** In the course of the hearing of this suit, PW1 tendered a copy of Certificate of Incorporation No.26235 dated the 3rd day of September 2007, **Exh. P1**, according to which the Assistant Registrar of Companies entered the new name of ***BOA Bank Tanzania Limited*** on the Register of Companies in lieu of the former name of ***Eurafrican Bank Tanzania Limited.***

The business relationship which gave rise to the current dispute between the Plaintiff, a limited liability company incorporated in Tanzania and carrying on banking business, and the 1st Defendant, a limited liability company incorporated in Tanzania and having its registered office at

Ifakara, as well as the 2nd Defendant, a natural person who resides and carries on business at Ifakara, Morogoro, started way back in 2003. As per the Debenture dated 3rd day of November 2003, **Exh. P3**, by a Facility Agreement dated 29th September 2003 between the Bank, the Plaintiff, and the Borrower, the 1st Defendant, the Bank agreed to make available to the Borrower credit facilities of an unspecified amount to finance the Borrower's working capital requirements. On the 21st day of July 2004, the Plaintiff wrote a letter, **Exh. P2**, to the 1st Defendant apparently responding to the 1st Defendant's proposal to extend the repayment period of its outstanding debit balance of US Dollars 180,764.27 up to the 30th day of September 2004, to which the Bank readily agreed. In the course of giving his testimony, PW1 stated that the overdraft facility was secured by a debenture creating a fixed charge over a number of properties of the 1st Defendant, and a Guarantee and Indemnity dated 26/09/2003 which was executed by the 2nd Defendant as a director of the 1st Defendant for unlimited sums. The debenture and guarantee and indemnity were tendered in Court by PW1 and marked collectively as **Exh.P3**. PW1 also tendered in Court a Certificate of Registration of a Charge dated the 14th of November 2003, **Exh. P4**, as evidence of the registration of the debenture dated the 3rd day of November 2003. The Debenture was created by Kilombero Holdings, the Borrower, in favour of Eurafrican Bank (Tanzania) Limited, the Bank, the previous name under which the Plaintiff was trading. The Debenture was for an unspecified amount but at that time it was created it was limited to United States Dollars Five Hundred Fifty Two Thousand (US\$ 552,000.00) only. The Debenture, **Exh.P3**, was given by

the Borrower, the 1st Defendant, in favour of the Bank, the Plaintiff, as a continuing security for the moneys obligations and liabilities mentioned therein.

On the 16th of June 2009, in the course of the ex parte proof proceedings, PW1 produced bank statements evidencing the outstanding overdraft facility. These were admitted by this Court but only for Identification Purposes. On that date, this Court ordered PW1 to bring duly stamped bank statements. PW1 duly complied with this order. On the 17th of June 2009, PW1 tendered in Court two bank Statements of Account from BOA Bank Tanzania Limited bearing the Bank's stamp. These were admitted and marked collectively as **Exh. P8**, being for Account 10201214009, a dormant current account in US Dollars operated by Kilombero Holdings Ltd, the 1st Defendant. According to **Exh.P8**, as of 01.09.2006, the outstanding balance was US\$ 125,645.33, the same amount the Plaintiff is claiming from the Defendants jointly and severally as the outstanding overdraft facility plus accruing interest as of that date.

It is without dispute that the Plaintiff is demanding from the Defendants jointly and severally the amount of US\$ 125,645.33 being the outstanding overdraft facility due and payable by Kilombero Holdings Ltd, the 1st Defendant, to BOA Bank Tanzania Limited, the Plaintiff. It is on record that the 2nd Defendant, as a director of the 1st Defendant executed a personal guarantee for unlimited amount. The joint and personal liability of the 1st and 2nd Defendant over the overdraft facility therefore arises from the clear terms and conditions stipulated in the registered debenture and the

guarantee and indemnity. The Plaintiff claims that the 1st Defendant has defaulted in the payment of the overdraft facility plus the accrued interest on the due dates in breach of the terms and conditions of the Facility Letter.

On the evidence on record and from the testimony of PW1 in court, it is without doubt that the 1st Defendant as guarantor under the terms of the personal guarantee he executed on 26.09.2003 in favour of the 1st Defendant as security for the sum of US\$ 180,000.00 plus accrued interest thereon, has, despite several verbal and written demands by the Plaintiff, failed to pay the amount of US\$ 125,645.33 being the outstanding overdraft facility due plus accrued interest as at 1st day of September 2006. In the circumstances this Court finds that the Defendants, jointly and severally are in breach of the terms and conditions of the Facility Letter as well as the terms and conditions in the Debenture and of the personal guarantee and indemnity. The said breach has caused the sum of US\$ 125,645.33 to remain outstanding as at 30th September 2004, with interests and other accruing charges therefrom.

In the upshot, judgment and decree is hereby entered against the 1st and 2nd Defendants jointly and severally with costs. The Plaintiff is entitled to the following reliefs:

- (a) ***US Dollars one hundred twenty five six hundred forty five thousand thirty three cents only (US \$ 125, 645.33) or***

its Tanzanian shilling equivalent at the exchange rate on the date of payment;

- (b) Interest on the said sum of **US \$ 125,645.33** at the rate of 12% per annum from the 1st day of September, 2006 until judgment;*
- (c) Interest on the decretal amount at the court rate from the date of judgment till payment in full; and*
- (d) Costs of this suit.*

Order accordingly.



R.V. Makaramba

Judge

10/08/2009.

Judgment delivered in Chambers in the presence of Mr. Mbuya for the Plaintiff and in the absence of the Defendants.



R.V. Makaramba

Judge

10/08/2009.

1,760 words.