

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

COMMERCIAL CASE NO 79 OF 2007

**HOOD TRANSPORT COMPANY
LIMITED.....1ST PLAINTIFF
MOHAMED HOOD.....2ND PLAINTIFF**

VERSUS

**BARCLAYS BANK (TZ) LTD.....1ST DEFENDANT
SAID MOHAMED HOOD.....2ND DEFENDANT**

JUDGMENT

MRUMA, J.

The first plaintiff is a limited liability Company incorporated under the Company laws of Tanzania and it deals with the business of public transport. The second defendant is the owner and Managing Director of the first plaintiff's company. Their place of business is in the Morogoro Municipality.

On the other hand the first defendant is a banking institution. It is an entity with legal personality and incorporated under the laws of Tanzania to undertake the business of banking. The second defendant is the son of

the second plaintiff, he is working for gain here in Dar Es Salaam.

The bone of contention in this suit is an alleged fictitious loan which was allegedly imposed upon the plaintiffs by the first defendant's bank in collusion with the second defendant.

It is stated in the plaint that the second defendant acting and presenting himself as the Managing Director of the first plaintiff obtained a loan facility to the tune of T.shs 460,000,000/ from the first defendant bank which was never brought to the attention of the plaintiffs.

It is stated further that the said "fictitious" loan was discovered by the plaintiffs when the first plaintiff approached another bank, the United Bank of Africa (UBA) for a loan whereby he was informed that all the securities of the first defendant they sought to offer as security were encumbered by the charges created in favour of the first defendant in another loan.

Furthermore it is stated that the first defendant through its officers threatened to forfeit the assets of the first plaintiff thereby forcing the second plaintiff to sign in the presence of the second defendant an undertaking to pay a restructured facility of the said loan of T.shs 460,000,000/= payable over a scattered period of three years. It is stated also that following that undertaking the plaintiffs have been forced to pay a total of T.shs 512,789, 170/=.

The plaintiffs' endeavours to have the matter settled amicably have met a dead end and hence, they have come to this court claiming against the defendants jointly and severally for;

- a) Declaration that the loan facility of T.shs. 460,000,000/= is fictitious for neither being solicited by nor disbursed to the 1st plaintiff's Company and thus no right of claim of the same or balances thereof accrue in favour of the first defendant.
- b) That the first defendant be compelled to lay before the court for inspection the background information, namely; loan application, agreements and securities thereof if any in support of the said loan.
- c) The defendants jointly and severally are compelled to exhibit before the court the vehicles sought to be funded or purchased by the loan facility.
- d) The amount of Tanzania Shillings 512,789,170/= which has been paid to the 1st defendant by the plaintiff be refunded.
- e) General damages for disrupting plaintiff's business to be assessed by the Court.
- f) Interest on (d) and (e) above at the commercial rate of 35% per annum from the date when payment was done (sic!) to the date of judgment be granted.

- g) Interests on the decreed sum at the Court's rate of 12% per annum from the date of judgment to the date of payment in full are awarded.
- h) Costs of the suit and
- i) Such other reliefs as the court deem fit and just to grant.

Together with the defence in which they deny liabilities the first defendant has put up a counter claim. Briefly the contention in the counterclaim is that the first plaintiff had applied for three separate loan facilities, the first being of T.shs 500,000,000/= as a working capital which was granted but not repaid, the second being of T.shs 239,645,000/= for purchase of three new buses from Scania (T) Ltd, which was also granted but not fully repaid and on demand a Loan facility of T.shs 460,000,000/= for restructuring the old facility.

It is stated in the counterclaim that the latter had been partly repaid and the outstanding amount thereof remained unpaid is T.shs 148,407,554.79/=. Accordingly the first defendant is praying for the following orders against the plaintiff (defendant in the counter claim)

- a) The plaint be dismissed with costs
- b) Payment by the plaintiffs of the sums of T.shs 148,407,554.79/= to the 1st defendant being loan outstanding
- c) Interest on item (b) and (d) above (sic!) at the rate of 17% per annum as per the loan facility

agreement from the date of default of repayment by 1st plaintiff to the date of judgment.

- d) Interest on decreed sum from the date of judgment to the date of full and effective payment at the court rate of 9%
- e) Costs of this suit
- f) Any further and other relief deemed just and equitable by this honourable court to grant.

From the pleadings in this matter the crux of the matter seems to be the advancement on non advancement of various facilities as contended and counter-contended by the parties herein. It is on this perspective that issues were drawn to encompass all of the claims. The issues for determination by this court therefore are;

- 1. Whether the first plaintiff did apply for and was granted bank facilities of TZS 500,000,000/= 329,645,000/ and 460,000,000/=respectively by the first defendant with full knowledge and acquiesces of the second plaintiff.**
- 2. If yes, whether the first plaintiff did fully pay back the bank facility to the first defendant.**
- 3. Whether there was any connivance between the defendants against the plaintiffs.**

4. Whether the first plaintiff is entitled to refund of the 512,789,170/=

5. What reliefs are the parties entitled to?

For the plaintiff, **Mr. Mohamed Hood Saidi PW.1** (the second plaintiff) was called as the first witness. He introduced himself as a businessman and Managing Director of the first plaintiff's company. He told the court that the first plaintiff's company is a transport company which was registered in 1985. He said as that per the Memorandum and Articles of Association of the plaintiff's company there are only two shareholders; himself as a Managing Director and one Saidi Mohamed Hood (The second defendant) who was his assistant since the inception of the Company. It is his further testimony that he has been running the Company even when he is abroad in which case he manages the company through telephone.

He denied to have any knowledge of the first loan allegedly advanced to his company by the first defendant's bank and said that if at all it was advanced, it was so advanced without the Company's authority. He stated that the said loan was brought to his attention for the first time on the 11th February, 2004 when he was attempting to secure a loan facility from the United Bank of Africa (UBA). According to him, UBA requested him to bring and deposit Motor vehicle registration cards for his existing Motor vehicles. He took the registration cards as advised but to his surprise the bank (i.e. UBA) informed

him that all motor vehicles registration cards he submitted indicated that they were already mortgaged to the first defendant's bank.

He told the court that on the 24/7/2004 he visited the first defendant's bank in order to know what had transpired but the second defendant's officers and particularly one *Irene Madeje* confirmed that the first plaintiff was indebted to their bank. It is further evidence of **PW1** that the first defendant official threatened to confiscate his assets including his (**PW.1's**) personal car. In the circumstances he was forced to sign a document indicating his agreement to discharge the said indebtedness. **PW1** tendered **Exhibit P.I** and said that he signed it after he was coerced by Irene Madeje. Apart from that document (Exhibit P1) it is his evidence that to the best of his recollection there was no any other document he had in relation to that loan.

The witness also tendered a Memorandum and Articles of Association of the first plaintiff's company (**Exhibit P.II**) in his bid to show that any loan must be approved by the directors who were himself and the second defendant only. He stated that there was even no board resolution for the said facility.

He also tendered a letter (**Exhibit P.III**) allegedly from the plaintiff to the first defendant purportedly written by the second defendant as the Managing Director of the first plaintiff. This letter was attached with a profoma

invoice from Scania for three buses soliciting the loan facility for acquisition of those buses. It is his further testimony that according to his investigations five buses were acquired in the name of the first plaintiff's company but none of them was actually received by the first plaintiff.

He said that his investigations revealed that the money acquired from the first defendant's bank was paid to Scania. He tendered a letter (**Exhibit P.IV**), showing that five buses were to be acquired from Scania. He said that his efforts to get information from the first defendant's bank about the loan allegedly issued to his company were without any success.

He said that while he was corresponding with the first defendant about the legality of that loan, he was making repayment and up to the date he was giving his testimony in this matter he had already made some repayments amounting to T.shs **512,789,179.00**. He said he was making payment because he wanted to protect the Company's reputation. He tendered a letter from the first defendant (**Exhibit P.VI**) and said it was a claim for the balance of T.shs 148,407,554.79 which the first defendant put up after the plaintiffs instituted this case.

He prayed this court to declare that it was improper for the defendants to advance and take loan respectively without his consent.

Regarding the first defendant's claim PW1 said that it is nonexistent since he had already paid the said amount to save the reputation of the first plaintiff.

In cross examination PW1 stated that the first plaintiff had no relationship with the first defendant and doesn't even have an account with her. It is his testimony that there was no board resolution authorizing the plaintiff's company to borrow from the first defendant's bank. When he was referred to **Exhibit P.III** he said that the letter was a forgery and he does not know where the proforma invoice came from.

He conceded that when he is abroad for treatments or any other reasons the company is run by the second defendant but the second defendant's powers in such circumstances are limited. He said that the Company has no secretary and instead any of the directors can be a secretary for the purpose of a particular meeting.

On further cross-examination by Dr. Mvungi, PW1 told the court that he had not travelled abroad since 2000. On whether the second defendant had mandate to acquire loans for the company, PW1 said that the second defendant was not authorized (in his absence) to acquire new debts but only to discharge the existing ones. He said that he did not recognize **Exhibit P.III** which was signed by the second defendant. He also stated that the said letter which was wrote by the second defendant indicated three buses while the one wrote by the first

defendant indicated five busses. He told this court that the second defendant left the first plaintiff's company since 16/10/2001. He conceded that that it is possible that the second defendant wrote more letters to the first defendant after his exit from the Company. In that respect he referred this court to **Exhibit P.I** under which the second defendant is said to have presented himself as the Director while he was not. He stated also that on his leaving the Company he did not enter into any agreement with the second defendant.

In re-examination PW1 stated that upon leaving the Company on 16th October, 2001 he was not aware of the first defendant's loan transaction because the second defendant did not inform him about it. He contended that the second defendant must have colluded with the first defendant because at the time of issuance of the said facility the second defendant was no longer a Director in first plaintiff's company.

Another witness who testified for the plaintiff Abubakari Maulid (**PW.2**) who introduced himself as an accounts and administrative officer of the first plaintiff's company.

He briefly stated that he did not know existence of the bank facilities in issue. He said that as a finance officer, he was not aware of the existence of any relationship between the first plaintiff's company and the first defendant's bank. He said that the plaintiff was alerted on the facility by the auditor query that was raised during

auditing exercise after it was realized that there were payments which were made without the supporting documents of the facility.

The witness said that after they realized that there was a loan facility he was instructed to visit the first defendant's bank to inquire on the said loan. At the bank he was shown a bank statement which showed that the first plaintiff had an outstanding amount payable to the bank through an account which they (the plaintiffs) were not aware.

On cross examination, he conceded that he did not know what transpired in the Company in 2005, 2004 and 2002. He said that the audit query was raised by the auditors after they found that there was a single entry in the debt side without entry in the credit side, contrary to the requirements that entries are two ways traffic.

He conceded that there were several other payments which were made without justifications even before he was employed by the plaintiffs. He said that the query was not answered but the auditors were informed that the matter was being followed up.

For the first defendant the first witness is **Mr. Saleh Suleiman Mohamed (DW.1)**. According to his introduction he is the Head of Business Support and Corporate Recoveries of the first defendant's bank who was recruited since 2005.

He said that he knew the plaintiffs as customers of the first defendant's bank who had and operate an account with the bank.

It is his evidence that the plaintiffs applied for a loan facility of T.shs 500,000,000/= as a working capital through their application letter (**Exhibit D1**). The application was dully approved by the first defendant's bank letter of offer dated 21/9/2001 (**Exhibit D.2**). The letter was endorsed by the Managing Director of the first plaintiff's company.

The witness stated that as a security for the loan, the bank requested the plaintiff to deposit title deeds of a landed property in Morogoro (he did not mention exactly which was the said property), debentures fixed and floating on all buses and planting machineries belonging to the plaintiff's company and a joint and severally guarantees worth T.shs 500,000,000 from Saidi Mohamed Hood and Nassir Hood. The witness tendered an extract from an extra-ordinary meeting of the plaintiff's company dated 19th May, 2001(**Exhibit D.3**), expressing unanimous willingness and decision of the first plaintiff's directors to approach the first defendant's bank for the said amount of the facility

The witness said told the court that loan was not repaid instead the plaintiffs requested for another loan whereby the first loan was rescheduled and the facility was changed. He said that the second loan of T.shs

329,645,000/= was issued to the Managing Director Said Hood for the purpose of purchasing 3 brand new Scania buses from Scania (T) Ltd. The agreement to that effect (**Exhibit D.4**), was signed by saidi Mohammed Hood, the Managing Director of the first plaintiff's company and one Mr. Nassir Hood (as a director of the plaintiff's company) on the 14/10/2002

According to him the entire amount in the loan was paid directly to Scania (T) Ltd through bankers cheques number 105728 (which was not produced in court) upon the plaintiff's request its receipt by the plaintiffs was acknowledged by the plaintiff's company vide a Board resolution dated 14.10.2002(**Exhibit D.5**). The witness stated that up to 14th October, 2002 the loan had not been repaid and the outstanding amount in the plaintiff's account was T.shs 472,540,901.40 (**as per Exhibit D.6**).

Furthermore **DW.1** stated that despite the fact that until that time the outstanding loan had not been repaid they granted the plaintiffs another loan of Tshs 460,000,000/= upon their (i.e. plaintiffs) request. The agreement (**Exhibit D.7**), for this subsequent loan was signed by the second plaintiff Mohammed Hood (PW1) and the second defendant, Said Mohammed Hood (DW3). DW.1 also tendered a board resolution (**Exhibit D.8**) which was signed by the Chairman and the director signifying acceptance of the said loan as restructuring of the original loan.

According to him, this loan met the same fate; it was not repaid and hence they wrote a demand notice to the plaintiffs (**Exhibit D.9**).

On allegation of issuing a fictitious loan to the plaintiffs, the witness denied it as being false accusations and equally rejected the allegation that the second plaintiff was coerced to sign any document. He requested this court to dismiss the suit and order the plaintiff to pay the outstanding loan amount of T.shs 148,407,554.79 plus interest at the rate of 17% per annum from the date the plaintiffs stopped repayment, and at the rate of 9% per annum from the date of judgment till final payment and an order for costs of the suit in their favour.

When cross-examined by Mr. Kariwa, learned counsel for the plaintiff **DW.1** stated that he was not in the bank when the loan was taken and added that there was no report showing that the plaintiff was verbally threatened.

Regarding **Exhibit D.8** he stated that the same was signed by the board chairman though not named and said that the signature which was verified by the bank office was that of Mohamed Hood who is the first defendant's company signatory and chairman of the board of plaintiff's Directors.

He further stated that according to the records in the first defendant bank the Managing Director is the second defendant and the second plaintiff is the Board chairman. However, upon being referred to **exhibit D.7** where the

title of the second plaintiff is indicated as the Managing Director, and verified by the bank officer, he said that the verification was in respect of the signature and not title, which he said is an internal arrangement of the plaintiff's company and the bank, has anything to do with it.

Regarding disbursement of the loan, he said that the money was paid directly to Scania (T) Ltd and since Scania (T) Ltd issued to the first defendant a proforma invoice in that respect, he was sure that the buses were delivered and therefore that the loan was not fictitious.

On the bases of the interests rates prayed for, he said that the 17% was a market rates where as the 9% is the court rate.

On his efforts to keep things right for the first defendant's case through re-examination, **DW.1** stated that his evidence was based on the bank records and procedures of the bank. He said what the bank verifies is the signature of the authorized customer signatories basing on their specimen kept at the bank but added that the bank had no means of interfering with the internal arrangement of the first plaintiff's company.

On the other hand the second defendant **Saidi Mohamed Hood (DW.2)**, admitted to have applied for and granted with a loan facility of T.shs 500,000,000/=on behalf of the first plaintiff's company. He told the court that at the material time he was acting as the Managing Director of the first plaintiff's company.

The business of the first plaintiff was not doing good therefore having given authority by the second plaintiff Mohamed Hood who is also his father, and in his capacity as the Acting Managing Director he applied for T.shs 500,000,000/= loan from the first defendant's bank. The bank approved and issued the money to the plaintiff's company. According to this witness, the said loan helped to boost the company's business as a result of which the first defendant's bank agreed to extend another loan to the company. The company did well and started to repay the loan as scheduled. However, while the business affairs of the company was doing well some family problems arose between him (i.e. the second defendant) and his co-directors which resulted into this case being instituted. According to DW2 the first plaintiff's company had two directors that is himself and his father Mohammed Hood who is the second plaintiff in this suit.

He said that according to the Memorandum and Articles of association of the first plaintiff's company any of the two directors had powers to apply for loan on behalf of the company.

He said that he assumed the position of the Acting Managing Director of the first plaintiff's company in December 1994 when his father (I. e. the second plaintiff) left the country for treatment abroad till 2004, despite the fact that the second plaintiff returned to the country in 2001.

He said that his appointment to that position was written and it was drafted by a lawyer, but he did not keep a copy thereof because it was a family arrangement. He further stated that after the problems he was forced to sign a resignation letter therefore he is no longer a director of the plaintiff's company.

It was his further testimony that at the time he applied for the loan in 2001, the second plaintiff (his father) was in the country but he (**DW.2**) was the acting Managing Director.

When he was referred to **Exhibit D.2**, DW2 said that Exhibit D2 was signed by himself and his young brother Nassir Hood who signed as a director. He testified that Nassir Hood was appointed to that position by the second plaintiff. He said that they did not keep records of appointments because they considered it a family arrangement.

Regarding the meetings and resolutions which decided to borrow from the first defendant's bank DW2 told the court that Mohamed Hood (I. e. the second plaintiff) did not participate but he was aware of the process.

He said further that his three young brothers with whom he used to sit and pass resolutions where necessary were all appointed by the second plaintiff although the founder directors were himself and the second plaintiff.

Regarding the expense of the T.shs 500,000,000/= loan, he said that T.shs 91,206,215/= were used to pay for spare parts for the company's vehicles, T.shs 308,163,099/= were used for servicing loan account with Stanbic bank and T.shs 100,000,000/= was used for servicing another loan with the same Stanbic bank.

As of the second loan of T.shs 329,645,000/= DW2 said that it was paid directly to Scania (T) Ltd for three (3) brand new buses namely Scania Marco polo Andare, with registration number TZS-315 and Chassis number 3522016, Scania F94HRB 310 Marco polo Andare semi-luxury, registration Number TZS 316 and chassis number 3522017 and Scania F.94 with registration Number T.311 AAF and chassis number 8011634. He told the court that all these buses were registered in the name of the first plaintiff's company and are still operating under the company.

On whether he involved the second plaintiff on mortgages and the securities, DW2 said that he did not involve him because he (**DW.2**) believed that the second plaintiff would not agree. He said that the first plaintiff did not sign any other documents except the final documents (referring to **exhibits D.6 and D.7**). He said that it is after the second plaintiff noted that the loan was used properly, that he (second plaintiff) continued to repay.

DW2 conceded that he has a company of his own known as SABCO incorporated in 2004, but denied to have used the loan issued for the first plaintiff's company to acquire buses for his company.

When he was cross examined on the signatures appearing in **Exhibits D.6, D.7 and D.8**, DW2 told the court that they were signatures of Mohammed Hood (the second plaintiff). He said that the second plaintiff was not harassed and/or forced to sign those documents or any of them including **Exhibit D.6**.

DW2 concluded by telling the court that appointment note by which he was appointed an Acting Managing Director of the plaintiff's company was not submitted to the bank. He said that since it is not disputed that the first plaintiff's company accepted delivery of the buses the first defendant's bank had right to claim the amount outstanding.

Mr. Nassir Mohamed Hood (DW.3) appeared to testify for the second defendant. He gave a very brief testimony confirming that the second defendant applied for a loan from the first defendant's bank in order to rehabilitate the company which was left in poor condition by their father Mohammed Hood (the second plaintiff) when he left for treatment abroad. He said that almost all 20 buses left by him were grounded.

On cross examination he said that he was not among the directors of the Company, but was involved in running

the first plaintiff company assisting to advise the Director. He also said that he used to sign various company documents such as letters to the employees and to the Taxing Authorities etc. He said that he did not remember to have signed any letter to the bank.

When he was referred to **Exhibit D.4** he said that he knew it as a loan facility letter he had signed on behalf of the first plaintiff and said that he did so as an assistant Director. He said further that he assumed that position after the departure of their father (second plaintiff) who appointed him as such.

He said that when the second defendant took the first loan, the second plaintiff was abroad in Sana Yemen but he was informed through telephone. He also said that as directors of the plaintiff's company they used to have meeting as and when necessary. Further, he stated that during the absence of the second plaintiff, they bought about 3 to 4 buses which were all handed over and are still in possession of the first plaintiff's company.

Regarding his involvement in another Company known as SABCO DW3 told the court that he has 50% shares in that company and that upon their leaving the first plaintiff's company, their father Mohammed Hood (the second plaintiff gave them four buses) which they mortgaged to the bank and get another loan from ABC bank. As a result, currently 3 of their buses are attached by the ABC bank.

1. Whether the first plaintiff did apply for and was granted bank facilities of T.shs 500,000,000/= T.shs 329,645 and T.shs 460,000,000/= by the first defendant with full knowledge and acquiesces of the second plaintiff.

To appreciate the above issue, I shall examine evidence in respect of each of the said facilities. This will ease the analysis since they were allegedly issued separately under different circumstances and were all sought to be proved separately. Accordingly, I will start with the T. shs 500,000,000/= loan facility.

As intimated earlier, this arose by way of counter claim where the defendant claims a refund of the amount allegedly extended to the plaintiffs.

It is **DW.1's** testimony that the first plaintiff applied for the loan of T.shs 500,000,000/= as a working capital. To prove this he tendered two documents; one is an application letter for the facility dated 12/3/2001(**Exhibit D.1**), and the second is an extract from the Extra-Ordinary Meeting of the plaintiff's company expressing unanimous decision of the first plaintiff's Directors to approach the first defendant for the said loan (**Exhibit D.3**)

Along with these documents DW1 also tendered **Exhibit D.2** which is an offer letter from the first defendant's bank to the plaintiffs for the said amount purporting to bear signatures of the Directors of the first plaintiff (the second plaintiff and second defendant respectively)

On the other hand the second plaintiff has refuted completely knowledge of such facility. He has disowned the signatures, resolutions (**Exhibit D3**) and the application letter (**Exhibit D1**). The second plaintiff testified that the first plaintiff had no any relationship with the first defendant and had no any bank account therein.

I find the testimonies of PW1 and that of both **DW.2** and **DW.3** to be of greater assistance as it sheds light into the veracity of foregone competing arguments and documents adduced in that regard.

Now starting with the application for the loan of T.shs 500,000,000/=DW1 tendered in evidence an application letter (**Exhibit D1**), dated 12th March, 2001 from Hood Transport Company Limited (the first plaintiff) introducing itself to the second defendant's bank and requesting for a loan of T.shs 500,000,000/=. The said letter is signed by S. M. Hood. The second defendant (Said Mohamed Hood DW2) confirmed that it is actually him who signed that letter. DW1 also tendered an extract (**Exhibit D3**) from the Extra-Ordinary Meeting of the 2nd plaintiff's Board of Directors dated 19th May, 2001.

Further to that DW1 tendered in evidence a loan facility letter of offer (**Exhibit D2**) dated 21st September, 2001 addressed to MR. Said Mohammed as a Managing director of the first plaintiff's company. In that letter (I. e. Exhibit D2), the first defendant's bank offered a loan facility of T.shs 500,000,000/= to the first plaintiff's company. Apparently the offer was accepted by the plaintiff's company through Mr. Said Mohammed Hood (DW2) who signed as Managing Director and Mr. Nassir Mohammed Hood (DW3), who signed as director.

The plaintiffs have submitted that the loan was fictitious and was obtained without the knowledge and consent of the plaintiffs therefore illegal because neither the first plaintiff company nor the second plaintiff who is the Chairman and Managing Director of the first plaintiff's company was aware and approved it.

From the evidence on record (see the testimonies of DW1, DW2 and DW3 and exhibits adduced in connection with the said facility (Exhibits D1, D2, and D3), there can be no doubt that the said facility was actually issued to the first plaintiff's company. The only logical question that would follow is whether the first plaintiff authorized the said borrowing and if yes whether the loan was used to finance the plaintiff's company or was siphoned and used to finance the second defendant's business in SABCO.

It is the evidence of Said Mohammed Hood that under the Articles and Memorandum of Association of the first plaintiff's company, one director could borrow for the company. On the other hand it is the evidence of the second plaintiff Mohamed Said Hood PW1, that according to the Memorandum and Articles of Association (Exhibit P2), borrowing powers are vested to the two directors who at the material time were himself and Said Mohammed Hood (DW2). He said that he was not involved and he only came to know about the loan for the first time on 11th February, 2004 when he was trying to secure a loan from United Africa Bank (UBA).

All businesses no matter of what size will at some time need to raise more money. Every company has implied power to borrow for purpose of the company's business. The implied power to borrow is too indefinite to be relied upon. Thus, it is wise to include an express power to borrow in the objects clause of the memorandum. In the case at hand the plaintiff tendered in evidence a copy of the Memorandum and Articles of Association of the first plaintiff's company **(Exhibit P2)**. Clause 19 of the Articles of Association of the plaintiff's company gives the directors power to borrow money. The clause provides:

"The directors may exercise all the powers of the company to borrow money and to mortgage or charge its undertakings, property and uncalled capital.....or other securitiesfor any debt, liability or obligation of the company or of any third party:"

At page 2 of the loan facility offer letter (Exhibit D2) sent to accepted by the plaintiff's company among the document required by the bank was copies of resolution of the borrower's board of directors authorising the acceptance and execution of the offer letter..... The plaintiff complied to this requirement by submitting to the defendant's bank an extract from the extra-ordinary meeting held on 19th May, 2001 (**Exhibit D3**), wherein it was resolved that the first plaintiff's company should approach the defendant's bank for a term loan of T.shs 500,000,000/=

There is nothing in terms of evidence which suggests that the documents submitted to the defendant's bank were forged or at least are not genuine. The only complaint of the second plaintiff Mohamed Hood is that he was not involved in the transactions which led to the granting of the first facility. It is on this ground, I would guess that the first plaintiff joined Said Mohamed Hood as the second defendant in this case.

Generally, the first thing lenders check before lending to a company is whether the company has power to borrow money. As stated earlier, the plaintiff's power to borrow is expressly stipulated under clause 19 of the Articles of Association (Exhibit P2). This had been confirmed by the evidence of both PW1 Mohammed Hood and DW2 Saidi Mohamed Hood. Therefore the plaintiff's company had powers to borrow and therefore the first defendant's bank was justified to lend money to the plaintiff's company.

In the case at hand the argument put forward by the plaintiffs is that although the money was in fact advanced upon representation by the second defendant Saidi Mohamed Hood (DW2), that it was money to be advanced to the company, yet the company is not liable to repay it because (it is alleged by the company and by PW1), that Saidi Mohamed Hood (DW2), though at the material time was a director of the plaintiff's company had no authority to borrow for the company.

I do not agree. If that argument is held to be a valid one there can be no doubt about the hardship that will be inflicted to the first defendant's bank (and to any third party dealing with the company), and in this case a hardship much greater than usual because this is not simply a case of a director either wilfully or inadvertently doing that which is ultra vires his powers or the powers of the company, but actually in truth and in fact here is a family company and the transaction was done by a director who was the only person running the affairs of the company at the material time. I gather this from the testimony of PW1 himself who stated that the company had two directors only, himself and the second defendant (DW2) and the loan facility in dispute was acquired when he was abroad for medical check up.

However, Clause 33 of the Articles of Association of the plaintiff's company excludes a director who is outside the country from taking part in proceedings of the company, and Article 34 validates a resolution in writing made by

all the directors then in Tanzania or **all the members respectively**, though not passed at the director's meeting or general meeting therefore there is nothing in the document (Exhibit P2), that necessitates the presence of the first plaintiff at whatever capacity before the company could validly exercise its powers under clause 19 of its Articles of Association.

Moreover, in view of the resolutions (Exhibits D3, D5, D7 and D8) and the application letter (Exhibit D1) the first defendant's bank could not have any means of realizing that the second defendant Said Mohamed Hood had no authority to apply for the loan. It seems to me that in this case we must look at the document which formed the company (Exhibit P2) and not the individuals who transact the company's business. The only effect which can be given to the acts of an individual (Like DW2), who is a director in the company is to see whether in the document which creates the company there are powers given to the company to borrow from a third party. If there are such powers, then how the company exercises them is an internal affair of the company itself.

It is not the business of a third party (in the present case the defendant's bank), dealing with the company to investigate and satisfy itself that the affairs of the company are strictly conducted in the manner prescribed in its Articles of Association.

There is an allegation that the first defendant's company does not have an account with the defendant's bank. However, **DW.1** testified unchallenged that the plaintiff was granted the said amount through an account which it operates the first defendant bank. This piece of evidence is corroborated by the contents of exhibit D6. This is a letter from the first plaintiff's company with ref, no HTC/DSM/SH/11/04 dated 14th July, 2004 and addressed to the first defendant's bank. It made reference to a demand letter from the bank dated 13th July, 2004 and a meeting between the Managing Director of the first plaintiff's company Mr. Mohamed Hood PW1(the second plaintiff herein), Director Mr. Said Mohamed Hood DW2(the second defendant herein) and the Credit Risk Manager of the defendant's bank one Irene Madeje. The letter state categorically that:

".....and agree that HOOD TRANSPORT COMPANY LIMITED will start paying the loan. The loan is made up as follows:

*Loan **A/C 4001484** shs. 147,784,981.40*

***A/C 4004297** 204,925,641.45*

*Arrears on **A/c 4000747**.....shs 119,830,278.55*

TOTAL.....472,540,901.40"

This is a clear admission by the plaintiffs that they had and operated loan accounts Nos **4001484**, **4004297** and **4000747** with the defendant's bank.

When the second plaintiff (PW1) was cross-examined by Dr. Mvungi counsel for the second defendant, he admitted that he signed that letter (Exhibit D6) in which he, in his capacity as the Managing Director of the first plaintiff's company committed the company to repay the loan and requested the bank to allow them to pay by instalments. Had it been true that the plaintiff's company had never before operated a bank account with the defendant's bank he would have had queried the accounts before committing his company to pay the loans

The net result of the circumstances and evidence analysed above leaves a certain conclusion that the first plaintiff did apply and was granted a bank facility of T.shs 500,000,000/=

Similarly and on the same strength there is ample evidence that in October, 2002 the plaintiff's company was granted another loan facility of T.shs 329,645,000/=. In its extra-ordinary meeting held on 14th October, 2002 at its registered office in Morogoro, the plaintiff's company agreed and resolved to execute a term loan facility of T.shs 329,645,000/= from the defendant's bank. An extract from the resolutions made in that meeting (Exhibit D5) was submitted to the defendant's bank for purposes of facilitating the acquisition of that loan. The loan was granted through a loan facility letter (Exhibit D4) sent to the first plaintiff's company. The offer was dully accepted by the plaintiff's company and to signify its acceptance it was signed by

Said Mohamed Hood DW2 as Managing Director and Nasser Mohamed Hood DW3 who signed as a director. I have already found as a matter of fact that the issue whether Said Mohamed Hood DW2 was an ordinary director or Managing Director cannot be of a big concern to the lending bank provided he was a director and the document creating the company (Exhibit P2) gives it powers to borrow.

There is further unchallenged evidence from DW1, DW2 and DW3 to the effect that the said loan was used to purchase three buses from Scania (T) Ltd. This is substantiated by a proforma invoice issued by Scania (T) Ltd and addressed to the plaintiff's company and a letter from the plaintiff's company addressed to the defendant's bank requesting the bank to issue a cheque for the amount of T.shs 329, 645,000/= to Scania (T) Ltd

Regarding the last loan it is the testimony of DW1 and DW2 that the first plaintiff company failed to service the loan facility in accordance with the terms therein. On receiving the first defendant's demand notice, the first plaintiff responded by a request to have the payment schedule restructured (Exhibit P1). The request was duly granted and the parties entered into an on Demand Loan Agreement on 7th October, 2004 (Exhibit D7). The agreement is signed by Mohammed Hood PW (the second plaintiff), in his capacity as Managing Director of the plaintiff's company and Mr. Said Mohamed Hood DW2 (the second defendant) in his capacity as the director of

the plaintiff's company. The plaintiff's company submitted to the bank a special resolution of the Board of Directors of the plaintiff's company (Exhibit D8), which acknowledged their acceptance and their consent to the contents of letter of offer of an on demand loan agreement.

All what has been stated leads to a conclusion that T.shs 460,000,000/= was actually granted to and received by the first plaintiff's company by way of restricting of all previous facilities dated 21st September, 2001 and 7th October, 2002 respectively.

The second issue seeks to answer the question; ***"If yes, whether the first plaintiff did fully pay back the bank facility to the first defendant"***.

It is the evidence of PW1 that the first plaintiff has repaid the loan according to the restructure schedule to the tune of T.shs 512,789,170/=. This testimony was not supported by any documentary evidence to substantiate how and when the said repayment was made. The defendants however did not dispute the allegations that T.shs 512,789,170/= had been paid towards liquidation of an outstanding loan of T.shs 460,000,000/=. Instead the first defendant through DW1 stated that there is still some amount outstanding to the tune of T.shs **148,407,554.79**. In paragraph 23 of the reply to the first defendant's written statement of defence and the written statement of defence to the counter claim, the

plaintiffs have admitted that the first plaintiff paid to the 1st defendant until a balance of T.shs 148, 407,554.79. The said paragraph reads:-

"That to the extent that the 1st plaintiff company has paid to the 1st defendant until a balance of T.shs 149,407,554.79[sic] remain outstanding, that is admitted...."

This means that the plaintiffs admit that there is an outstanding balance of T.shs 148,407,554.79. It is this amount that the first defendant's bank is claiming by way of counterclaim. Because the first plaintiff is admitting that there is an outstanding balance, I answer the second issue in the negative. That is to say, the first plaintiff did not fully pay back the loan facility extended to it by the first defendant's bank.

The next issue is **whether there was any connivance between the defendants against the plaintiffs.**

The term connivance implies a secret or indirect condonation of another's unlawful act.....

There is nothing on record in terms of evidence suggesting that the first defendant's officials overlooked the second defendant

wrong doings or unlawful acts to the detriment of the plaintiffs in this case.

I have already found that the pleadings, evidence adduced and exhibits tendered in this case all points out to the fact that the first plaintiff as a company applied for and received loan facility from the defendant's bank. The fact that there were misunderstandings between the plaintiff's directors and that some internal procedures of the first plaintiff's company were flouted does not amount to connivance or fault the loan granted to it.

The fourth issue is whether the first plaintiff is entitled to refund of the 512,789,170/=. I have already found that payment of this amount has not been proved to the satisfaction of this court. Therefore I hold that the 1st plaintiff is not entitled to refund of any amount.

The reliefs:

Having so found in respect of the issues and before I can proceed to determine to what reliefs are the parties entitled, I pose to make some observations in regard to the whole transaction and legal quagmire that it presents. The hurdle particularly relates to whether the creditor as a third party can be protected by a fraudulently secured authority to transact? What is the extent of the protection under sections 36(1) and 37 of the Companies Act no.12 of 2002, to third parties dealing with the Company?

The above provisions of the law are couched as thus:-

36.-(1) *Subject to subsection (5), in favour of a person dealing with a company in good faith, the power of the board of directors to bind the company, or authorize others to do so, shall be deemed to be free of any limitation under the company's constitution.*

37. *A party to a transaction with a company is not bound to enquire as to whether it is permitted by the company's memorandum or as to any limitation on the powers of the board of directors to bind the company or authorize others to do so.*

First, it is a common ground that at the time of the alleged procuring of the said facilities, the second defendant was a director of the first plaintiff per exhibit P2. Secondly, it is a common ground that, the second plaintiff on behalf of the first plaintiff signed a loan restructured repayment schedule in respect of the 472, 540, 901, and 40. Whether that was under duress or else cannot be entertained at this juncture for it was not sufficiently brought up on evidence.

Whereas PW.1 said that the Memorandum and Articles of Association prohibits taking of loans by one director, the second defendant asserted the opposite. But going by the provision of **Section 37** of the companies Act quoted above it was not upon the first defendant to inquire into the internal arrangement of the plaintiff's company as to the limitations of the directors' power to borrow and commit the company to the terms and conditions thereof. This position is qualified under s.36 (1). Thus a third

party will not be affected by any constitutional limitations on the authority of the board of directors or a director provided it deals with a company in good faith.

From the analysis of the evidence adduced and exhibit tendered in this case, there is nothing which can be used to condemn the first defendant on the ground that his dealing with the first defendant's company was not in good faith. In fine therefore, though the first plaintiff was not under such duty to make inquiry, such legal protection will only extend to the third parties who adheres to the principle of good faith in its conducts or relation with the customer. Having so concluded, I now turn to the reliefs.

The first prayer was to have the loan facility of T.shs 460,000,000/= declared fictitious. I decline to declare that the said loan and other parts of the facility to be fictitious for reasons explained above.

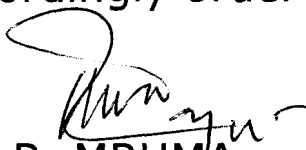
The second prayer and third prayers have been overtaken by events in the course of trial. The background information albeit insufficiently so, as shown above has been supplied. Therefore the prayer abates. No basis has been laid for this court to compel the defendants to exhibit the vehicles purchased by using loan facility. As stated in the course of this judgment those are internal affairs of the plaintiff's company.

Regarding refund, I have already ruled that the plaintiffs are not entitled to any refund

The plaintiffs have also failed to prove that they suffered any damages let alone general damages. Thus, prayer number five also fails.

In fine therefore the plaintiff's suit is dismissed in its entirety.

Regarding the counter claim, I have already found as a matter of fact that the plaintiffs have admitted in their joint written statement of defence to the counter claim that there is an outstanding amount of T.shs 148,407,554.79 which remains unpaid. I enter judgment for the defendant on the counterclaim to that extent. The defendant is also awarded interest on the principal amount awarded at the rate of 17% per annum from the date of filing the counter claim to the date of Judgment. The 1st defendant is awarded further interest at court's rate of 7% per annum from the date of this judgment to the date of full payment. The first defendant will have his costs of the case. It accordingly ordered



A.R. MRUMA,

JUDGE

23/9/2011

Coram: Hon. A.R.Mruma, Judge.

For the 1st Plaintiff – Present. By Mr. Abubakari Hassan
Maulidi (Human Resources Officer).

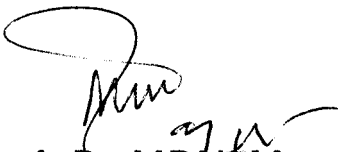
For the 2nd Plaintiff – Absent.

For the 1st Defendant – Absent.

For the 2nd Defendant – Present in person.

CC: J.Grison.

COURT: Judgment delivered in presence of the second defendant but in absence all other parties except the 1st plaintiff who is represented by Mr. Abubakari Hassan Maulidi who introduced himself as Human Resources Officer of the 1st plaintiff's Company.



A.R. MRUMA,

JUDGE

23/09/2011

8,254 words