

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

COMMERCIAL CASE NO.61 OF 2009

HAMED CARRIERS LIMITED.....PLAINTIFF

VERSUS

STANBIC BANK (T) LIMITED.....DEFENDANT

Date of exparte proof hearing: 4th November 2011

Date of last order: 04/11/2011

Date of exparte judgment: 25/11/2011

EXPARTE JUDGMENT

MAKARAMBA, J.:

On the 3rd day of August, 2009 the Plaintiff, HAMED CARRIERS LIMITED, lodged a suit in this Court against the Defendant, STANBIC BANK (T) LIMITED, claiming for the following reliefs, namely:-

- (a) *That the Defendant bank has overcharged an interest for a total sum of **Tshs.150,820,062.09** hence to be deducted from the charges due of interest, on the chargeable amount of loan.*
- (b) *That for what has been averred in the contents of paragraph 10 of the plaint, the repayment schedule of the whole loan.*
- (c) *That for what has been stated in the contents of paragraph 12, 13, 14, 15 and 16 of the plaint, for specific performance of the contract and as per debenture deed.*

- (d) A declaration that the Plaintiff's failure to adhere to the terms of contract is unlawful.*
- (e) Any order(s) this Honourable Court may deem proper and fit to grant.*

On the 25th day of August, 2009, the Defendant, STANBIC BANK TANZANIA LIMITED, filed its Written Statement of Defence pleading that the Plaintiff has failed to perform the terms of the loan facilities having defaulted on payments as per the agreed installments. In its defence, the Defendant by way of a counter claim against the Plaintiff in the main suit, M/s Hamed Carriers Limited as the 1st Defendant, and Mrs. Warda Majid Said and Mr. Salim Seif Hemed as the 2nd and 3rd Defendants respectively prayed for judgment and decree against the 1st, 2nd and 3rd Defendants in the counter claim, jointly and severally for the following reliefs, namely:

- (a) Payment of the outstanding amount of TZS. 631,840,705.44;*
- (b) Interest on (a) above as per clause 5.1.1.and 5.2 of the Facility Letter;*
- (c) Interest on the decretal sum at the Court's rate from the date of judgment till the final settlement, in the alternative;*
- (d) Attachment and sale of the secured assets listed in the schedule to the debenture;*
- (e) Any other relief which this Honourable Court may deem just.*

The facts of this suit briefly as could be gathered from the plaint are that on the 24th day of November, 2005, the Plaintiff, which is a limited

liability company incorporated under the Companies Act, Cap.212 R.E 2002 and dealing in the business of transportation of various goods within and outside the country the Plaintiff company herein issued a single debenture in favour of the Defendant's bank as security for the Term Loan Facilities amounting to **TZS 609,163,197/=** (*Say Tanzanian Shillings Six Hundred and Nine Million, One Hundred Sixty Three Thousands and One Hundred Ninety Seven*). The Defendant is a limited liability company incorporated under the Companies Act Cap.212 [R.E 2002] and carrying on banking business, among others advancing loans to its customers including the Plaintiff. The registered security for the total sum of **TZS 784,945,200/=** plus interest and other charges thereon. The loan facilities were of two different categories. The first loan was to the tune of **TZS 447,362,500/=** plus interest of **TZS 226,899,686/=** making a total of **TZS 674,262,186/=** to be repaid by the year 2010. The second loan was for the total sum of **TZS 161,800,697/=** plus interest of **TZS 47,278,777.10** making a total of **TZS 209,079,474.10** to be repaid by May 2009, an extension of time inclusive. The Plaintiff has to paid back **TZS 12,500,000/=** monthly from May 2007 to December, 2009 and **TZS 19,000,000/=** from January to December 2010. The Plaintiff's claim against the Defendant's bank is for a total sum of **TZS 150,820,062.09** being interest overcharged, unilateral increase of interest and total breach of the contract created by the debenture between the parties.

On 25th day of July 2011, **Mr. Mafuru**, learned Counsel for the Plaintiff withdrew his services from representing the Plaintiff for what he claimed to be lack of proper instructions from his client, which this duly

granted and fixed the 4th day of November, 2011 for hearing of the main suit, pursuant to summons to appear for hearing by way of the substituted service which was published in the CITIZEN and the GUARDIAN Newspapers of Friday 29, July 2011 respectively. On the date fixed for the hearing of the main suit, the Plaintiff, despite being served by substituted service, did not appear to prosecute his case, whereupon the Defendant's Counsel, **Ms. SAMAH SALAH** prayed before this Court that the Plaintiff's claim be dismissed under Order IX Rule 8 of the Civil Procedure Code Cap.33 [R.E 2002] for non appearance, which prayer this Court duly granted. This Court accordingly dismissed the Plaintiff's suit for non-appearance. Since there was a counter claim in the Written Statement of Defence, this Court ordered that the Plaintiff in the counter claim to proceed with the case against the Defendants by way of *ex parte proof* and hence this judgment. The case for the Plaintiff in the counter claim was argued by **Ms. SAMAH SALAH**, learned Counsel, who also made her closing submissions orally.

On the first day of hearing of the matter by way of *ex parte proof*, the learned Counsel for the Plaintiff in the counter claim framed the following issues which this Court accordingly recorded for the determination of this suit, namely:

- (1) Whether the Defendant defaulted in making the loan repayment under the provisions of the loan agreement and the facility letter.***
- (2) If yes, for what sum is the Defendant in default.***

(3) To what relief is the Plaintiff entitled.

In support of its case, the Plaintiff in the Counter-Claim summoned only one witness, **Mr. JOHN ROBERT LUKIKO**, who testified as **PW1**. PW1 testified that he works with STANBIC BANK TANZANIA LTD as Team Leader of the Special Recoveries Department, and that his main responsibility is to make a follow up of customers who get loans as well as all those who default in paying back the Bank loans. PW1 testified further that he knows the 1st Defendant in the counter claim who was among the customers of the Bank, and that the 1st Defendant applied for a term loan in November, 2005, which he was granted by the Bank as requested.

PW1 testified further that the loan was of two categories, the first one being for **TZS 447,362,500/=** and the second one being for **TZS 161,800,697/=**. PW1 tendered in Court the Term Loan for the first loan dated 15th November, 2005 which was admitted by this Court and marked as **Exhibit P1**. PW1 testified further that the agreement was for the 1st Defendant to pay the loan in equal installments of **TZS 11,247,703.10** within 60 months, and for the second loan, the 1st Defendant was supposed to pay **TZS 5,807,763.99** within 36 months. The loan attracted interest of 77.5% as per clause 5.1.1 of **Exhibit P1**. It was the further testimony of PW1 that in case of default, the 1st Defendant was supposed to pay a penalty interest of 10% as per clause 5.2 of **Exhibit P1**, from the date of the default to the date on which it is actually paid. PW1 testified further that the 1st Defendant is now required to pay interest at 17.5% plus interest on default of 10%, which makes a total interest of 27.5%.

PW1 testified further that the first loan was secured by two bank guarantees dated 18th May, 2005, which were signed by **MRS WALDA MAJID SAID**, the 2nd Defendant in the counter claim, and **MR. SALM SEIF HEMED**, the 3rd Defendant in the counter claim. PW1 tendered in this Court the two bank guarantees which this Court admitted and marked them as **Exhibit P2** collectively.

PW1 testified further that the 1st Defendant has paid part of the loan within one and half year but he started to default such that up to the 7th day of May, 2009, the outstanding amount of the loan was **TZS 253,991,761.53**. PW1 stated further that the Bank convened several meetings with the 1st Defendant reminding him on the payment of the outstanding balance. PW1 testified further that despite these meetings the 1st Defendant continued to default to the extent that the Plaintiff's Bank was compelled to write a demand letter to the 1st Defendant asking for immediate payment of the defaulted amount. PW1 tendered in this Court the Notice of Default dated 7th May 2009, which was admitted and marked as **Exhibit P3**. PW1 stated further that as per the Bank Statements, the total outstanding amount for the two loan facilities is **TZS 631,840,705.44**. PW1 tendered in this Court the Bank Statements which were admitted by this Court and marked as **Exhibit P4** collectively. It was the further testimony of PW1 that thereafter the Plaintiff appointed one MR. SADOCK DOTTO MAGAI from IMMMA Advocates as Receiver Manager to make a follow up on the debt over the 1st Defendant's assets. PW1 testified further that MR. SADOCK DOTTO MAGAI tried to repossess the trucks of the 1st Defendant without any success. PW1 tendered in this

Court the Deed of Appointment of Receiver/Manager of Hamed Carriers Limited, which was admitted by this Court and marked as **Exhibit P5**.

PW1 stated further that the second loan granted to the 1st Defendants was for **TZS 161, 800, 697/=** and tendered in this Court the Term Loan dated 15th of November, 2005 which this Court admitted and marked as **Exhibit P6**. PW1 testified further that according to clause 5.1 of **Exhibit P6**, the interest rate agreed for the second loan was 17.5%, and in case of default, the 1st Defendants was to pay a penalty interest of 10% as per clause 5.2 of **Exhibit P6**. PW1 stated further that the 1st Defendant was required to repay the loan within a period of 36 months. PW1 stated further that the total outstanding amount for both two loans provided under **Exhibit P1** and **Exhibit P6** respectively stands at **TZS 631,840,705.44**.

It was the further testimony of PW1 that in the year 2009, the 1st Defendant made only two payments, one in January, 2009, of **TZS 5,900,000/=** and another in March 2009 of **TZS 18,000,000/=**, making a total of **TZS 23,900,000/=**. PW1 stated further the amount of **TZS 23,900,000/=** if deducted from the total loan granted by the Plaintiff to the 1st Defendant, the 1st Defendant, is still indebted to the Plaintiff to the total sum of **TZS 631,840,705.44**. PW1 prayed that the Defendants should pay this balance plus interest and costs of this suit, and further that in the alternative, in case the Defendants fail to pay the outstanding balance the Plaintiff be allowed to attach the assets of the Defendants.

Let me, having summarized PW1's testimony and the Exhibits tendered and admitted in this Court, turn to consider the issues as framed and recorded by this Court for the determination of this suit.

The first issue is ***whether the Defendant defaulted in making the loan repayment under the provisions of the loan agreement and the facility letter.*** PW1 stated that the Plaintiff has advanced two loans facilities to the 1st Defendant as per **Exhibit P1** and **Exhibit P6** on record. As per **Exhibit P1**, on the 15th day of November, 2005, the 1st Defendant was granted by the Plaintiff's Bank a loan of **TZS 447,362,500/=** which was to be repaid in full within 60 months in equal monthly installment of **TZS 11,237,703.10**. In terms of **Exhibit P6**, on 15th day of November 2005, the 1st Defendant was granted loan by the Plaintiff's Bank of **TZS 161,800,697/=** which was to be repaid in full within 36 months in equal monthly installments of **TZS 5,807,763.17**. Both the first and the second loans attracted interest of 17.5% per annum and penalty interest of 10% in case of default from the date of default to the date on which it is actually paid. According to the testimony of PW1, the 1st Defendant has paid part of the loan within a period of one and half year and thereafter the 1st Defendant stopped to pay the loan. The testimony of PW1 points to the fact of the 1st Defendant effecting only two payments one in January, 2009 of **TZS 5,900,000/=** and another in March 2009 of **TZS 18,000,000/=** making a total of **TZS 23,900,000/=**. In terms of **Exhibit P3**, until the 7th day of May 2009, the 1st Defendant was required to have paid the Plaintiff a total amount of **TZS 253,991,761.53**, which the 1st Defendant has failed to do so.

In her closing oral submissions, Ms. SAMAH SALAH, learned Counsel for the Plaintiff in the counter claim, referred this Court to the case of **NATIONAL BANK OF COMMERCE LIMITED V. SOMO CONTRACTORS LTD**, Commercial Case No. 241 of 2001, (unreported), a copy which she availed to this Court. In that case, Hon. Kimaro J, (as she then was) observed that where a defendant defaults to pay the interest remaining outstanding, the defendant cannot be said to have discharged fully the debt due. On the evidence on record, and as rightly submitted by Ms. SAMAH SALAH, there is no flicker of doubt that the 1st Defendant has defaulted to repay the loan as per the terms of the Bank's facilities. This Court finds and holds so. Since the term loan facilities were secured by the personal guarantees of the 2nd and 3rd Defendants in the counter claim, the Plaintiff was perfectly entitled in law as per the decision of Hon. Kimaro, J (as she then was) dated the 6th day of June, 2003 in **Commercial case No. 18 of 2003 between AKIBA COMMERCIAL BANK LTD AND THE NETWORK OF TECHNICAL PUBLICATION IN AFRICA & 4 OTHERS**, to sue both the borrower and the guarantors.

It is for the foregoing reasons that the first issue *whether the Defendant defaulted in making the loan repayment under the provisions of the loan agreement and the facility letter has been answered in the affirmative.*

The second issue is ***for what sum is the Defendant in default.*** PW1 stated in this Court that the 1st Defendant has paid to the Plaintiff's Bank **TZS 23,900,000/=** only comprising of **TZS 5,900,000/=** paid in

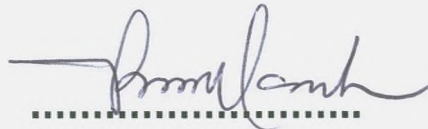
January, 2009 and TZS **18,000,000/=** paid in March 2009. As rightly submitted by Ms. SAMAH SALAH, and as per testimony of PW1 and the Bank Statements, **Exhibit P4** collectively, the Defendants are still indebted to the Plaintiff for the total sum of **TZS 631,840,705.44**. It is a fundamental principle of law as per the case of **NBC LIMITED V. EDWARD MASSANJA NG'WHANI, Commercial Case No. 116 of 2001**, which Ms. SAMAH SALAH referred to in her oral closing submissions that, even where a party is called upon to prove his or her case *ex parte*, he or she must strike the required standard of proof in civil cases, which is *on the balance of probability*. On the evidence on record, the Plaintiff in the counter claim, has managed to establish to the satisfaction of this Court on a balance of probability that despite the fact that the 1st Defendants has paid the Plaintiff's Bank **TZS 23,900,000/=** of the total loan granted by the Plaintiff's Bank to the 1st Defendant, the Defendants are still indebted to the Plaintiff for the total sum of **TZS 631,840,705.44**.

In the event and for the foregoing reasons, judgment and decree is hereby entered in favour of the Plaintiff in the counter claim against the 1st, 2nd and 3rd Defendants in the counter claim jointly and severally as follows:-

- (a) Payment of the outstanding amount of TZS 631,840,705.44;**
- (b) Payment of interest on (a) above of 27.5% per annum as per clause 5.1.1. and 5.2 of the Facility Letters from the date of default to the date of judgment;**

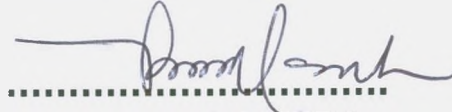
- (c) Interest on the decretal sum of 7% per annum from the date of judgment till final settlement;**
- (d) In the alternative, attachment and sale of the secured assets listed in the schedule to the Debenture;**
- (e) Costs of this suit.**

It is so ordered.



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R.V. MAKARAMBA
JUDGE
25/11/2011

Judgment delivered this 25th day of November, 2011 in the presence of M/s Samah Salah, Advocate for the Plaintiff and Exparte for the 1st, 2nd and 3rd Defendants.

A handwritten signature in purple ink, appearing to read 'R.V. Makaramba', is written over a horizontal dotted line.

R.V. MAKARAMBA
JUDGE
25/11/2011.

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