IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO 24 OF 2008

KENYA COMMERCIAL BANK (T) LTD.....PLAINTIFF

VERSUS

PETROMARK AFRICA LTD
ZAID BARAKA
MWITA WAISAKA
MOHAMED ISMAIL
HUMPHREY YONA
JULIANA BARAKA
.....DEFENDANTS

JUDGMENT

Mruma, J

Conceivably this is an old matter whose judgment has been overdue. I can vouch that it is due to unavoidable circumstances. The hearing commenced on 25/3/2009 and defence case was closed on the 29/7/2009. Final submissions were filed on 21/8/2009, and the judgment

was scheduled for 11/9/2009. When the judgment was pending and probably being prepared the trial judge, his lordship Mr. Justice Werema, was appointed the Attorney General of the United Republic. He crossed from the bench to the bar and since then he is number 1 member of the bar. The record of the case had to be reverted to this court (As a member of the bar cannot compose a judgment) for necessary action and orders. This was done on the 8/4/2011 and it was immediately re-assigned to me for preparing and delivering the overdue judgment.

The case:

Briefly the facts of the case are as under:-

The plaintiff, a limited liability Company incorporated under the Company laws of Tanzania and is doing the business of banking. It has sued the defendants claiming against them severally and jointly for:-

(a) Payment of Tanzania shillings 364,332,659.97/= (three hundred and sixty four million, three hundred and thirty two thousands, six hundred

fifty nine and ninety seven cents) being the sum due and payable to the plaintiff.

(b) An order for sale of mortgaged premises to clear the outstanding overdraft and the loan

(c) General damages as the same shall be assessed by the court

(d) Interest at bank's rate on (a) above from the due date to the date of judgment and at court's rate from the date of judgment to the date of full payment;

(e) Costs of the suit ; and

(f) Any other relief this honourable court shall deem appropriate.

The defendant 1st defendant is a private and limited liability company incorporated under the Company's Act [Cap 212 RE 2002].

The second to fifth defendants are natural persons and directors of the 1st defendant's company who executed director's guarantee as security for monies advanced to the first defendant's company. The sixth defendant is the director of the first defendant's company and the wife of

the second defendant who signed personal guarantee in favour of the plaintiff's bank.

The bone of contention is rooted in the alleged failure of the defendants to make repayment of the overdraft facility, bank guarantee, and term loan in the tune of 100,000,000/=, 30,000,000/= and 120,000,000/= respectively which the plaintiff had extended to the first defendant. The said facilities were extended to the first defendant after she had accepted an offer by way of a form of acceptance (**Exhibit P.1**).

It is stated in the plaint and admitted in the joint written statement of defence that the loan and overdraft facilities advanced to the first defendant were secured by collaterals and securities which were mentioned as:-

(i) A debenture for T.shs 250,000,000/= over the first defendant's assets (Exhibit P2);

(ii) Legal charge for T.shs 250,000,000/= over a house on Plot No 2 Block E Sinza Dar Es Salaam executed by the second defendant and consented by the sixth defendant (Exhibit P2);

(iii) Legal charge for Tshs 250,000,000/= over a house on Plot No 30 Kijitonyama executed by the second defendant and consented by the sixth defendant (Exhibit P2);

(iv) Directors' guarantees for T.shs 250,000,000/= by the 2nd, 3rd, 4th, and 5th, and personal guarantee by the 6th defendant each in favour of the plaintiff (Exhibit P2).

It is further stated that the first defendant has defaulted repayment of the overdraft facility and the loan term together with accrued interest. In the overdraft facility the amount due by March, 2008 was T.shs 208,752,154.55/=while in the term loan account the amount due and payable was T.shs 155,580,505.42 by same March, 2008. In total the amount due and payable to the plaintiff is Tanzania shillings **364,332,659.97**. It is this amount that the plaintiff is now claiming against the defendants jointly and severally.

In paragraph 10 of the written statement of defence for all defendants, the first defendant admits to have defaulted in repayment of the overdraft but asserts that

this was because the plaintiff had failed to issue bank guarantee as it was suggested by her. The first defendant denies to have received any term loan from the plaintiff.

In paragraph 8 of the written statement of defence the first defendant makes an admission of a debt of T.shs 52,422,727.00 in connection with the overdraft facility issued to her.

On 4th December, 2008 parties were ordered to file a statement of agreed issues pertinent to this matter. Apparently they did not and instead each party filed issues which it considered itself pertinent. That notwithstanding, this court framed the following issues as issues between the parties in this case. The issues are:

(i) Whether or not the plaintiff extended and the first defendant received:-

(a) Overdraft facility amounting to Tshs 100,000,000/=

(b) Bank Guarantee in the sum of Tshs 30,000,000/=

(c) A loan facility amounting to Tshs 120,000,000/=

(ii) Whether or not the facilities in (i) above were dully secured by collaterals and securities, i. e.

(a) The debenture for Tshs 250m over the first defendant's assets registered by the Registrar of Company as legal charge on 29th April, 2004, and whether the charge was executed by the second defendant and there was consent of the spouse (6th defendant)

(b) Whether Plot No 30 Kijitonyama area was executed by the 2nd defendant and spouse's consent was obtained

(c) Whether there were guarantee from 2nd , 3rd, 4th, 5th and 6th defendants;

(iii) Whether the first defendant is in default in repayment of the overdraft, loan and guarantee amounting to Tshs 364,33,659.97

(iv) To what reliefs are the parties entitled.

To prove its case the plaintiff called one witness **MR. Henry Lema PW.1** who introduced himself as an economist working in the capacity of Head of Credit Risk Management in the plaintiff's bank. He has been working as a banker for over 19 years. He told this court that he knows the first defendant as one of the customer's of the plaintiff's bank who had once in 2004 applied for a loan. He said that following that application a loan amounting to T.shs 250 million was advanced to the first defendant. That loan was divided in three parts comprising of T.shs.30,000,000/= as a bank guarantee, T.shs 120,000,000/= as a term loan and Tshs.100, 000,000/= as an overdraft facility.

The witness tendered in evidence an agreement in respect of the said facilities (**Exhibit P.1 which is an offer document and acceptance form thereof**), together with documents evidencing securities for the said facilities (**Exhibit P.2**).

It is PW1's further testimony that the plaintiff had earlier on issued a bank guarantee of T.shs 150,000,000/= to Engen Petroleum Company which was rejected by Engen.

Following refusal by Engen to accept the guarantee parties (the plaintiff and defendants) agreed to change the said T.shs 150 million guarantees into a term loan of T.shs 120,000,000/= and the remaining T.shs 30,000,000/=was to be treated as a guarantee. According to PW1 the said T.shs 120 million were issued to the first defendant through its account No 321028651013 in October, 2004. He tendered a loan history inquiry for A/c No 321028651013 of the first defendant (**exhibit P.4**). The witness also Tendered several demand notes (**exhibit P.3)** tending to show that the defendants did not comply with the loan conditions and that they were being reminded by the plaintiff's bank to comply from time to time.

As to when was the said term loan was issued, **PW.1** referred to exhibit **P.4** and said that it was issued on the 27/10/2004 through account 321-028-651-013 which he described as a loan account of the first defendant. He however conceded that the defendant made some repayments of the overdraft facility to the tune of T.shs **52,168,768.35**. through that account.

As to when the overdraft facility was issued to the first defendant, it is PW1 testimony that a total of T.shs 100 million was issued to the first defendant in May, 2004 and up to 31/12/2005 the first defendant had exceeded the limit and the outstanding amount in that account on that date was **T.shs. 129,533,816.15** which is unpaid to date. According to this witness although the T.shs 30,000,000/= million bank guarantee facility was agreed upon by the parties but it was not issued to the first defendant. This means that the total amount issued to the first defendant is T.shs 220,000,000/= comprising of T.shs 100,000,000/= over draft and T.shs 120,000,000/= term loan.

On cross examination PW1 stated that the first defendant had requested for an overdraft facility of T.shs 100 million and a bank guarantee of T.shs 150 million but after Engen refused the guarantee, T.shs 150,000,000/= was converted into term loan of T.shs 120,000,000/= and bank guarantee of T.shs 30,000,000/=. He said that the first defendant wrote an application letter for the said loan though he could not recollect the dates.

He said further that it is a procedural requirement that a Company wishing to apply for such facility must file a Company's resolution authorizing the directors to borrow.

When PW1 was referred to **exhibit P.5** which he recognized as an offer letter issued by the plaintiff, he said that procedurally a borrower is required to write a letter requesting for the facility. As to the whereabouts of that letter, it was his testimony that the letter might be misplaced by the bank due to bank relocation and movements.

On further cross examination by the defendant's counsel PW1 recognized **Exhibit P.6** as having being signed by two directors of the first defendant and containing its stamp. He stated that the bank guarantee of T.shs 150,000,000/= was not issued and therefore he can only talk about the over draft of T.shs 100 and the term loan of T.shs 120,000,000/=

He said that the purpose of the overdraft facility as per **exhibit P.5** was to provide a working capital to the first defendant and added that the conditions for approval contained in paragraph 11 thereof refers to the

securities, which he explained to be those mentioned in **exhibit P.2 collectively**). He stated that it is his assumption that all the conditions were met before the T.shs 100,000,000/= and T.shs 120,000,000/= facilities were granted. Upon being questioned about the letter for the first facility (**Exhibit P.1)**, PW1 said that the plaintiff received it but he reiterated that it was nowhere to be found due to relocation and was not sure whether the plaintiff received a board resolution of the first defendant in that respect or not.

On the authenticity of the **Exhibit P.1**, it was his evidence that it was signed by one Mr. Haji, who at the time of **PW.1**'s was recruited by the plaintiff he had left the country to Kenya. He stated further that one Mr. Robert Ngassa took over the post of relationship manager and dealt with among others the present customers' account. He expressed his belief that although the letter in question (**Exhibit P.1**) was not signed by Haji it was signed by another officer authorized by Haji.

On the guarantors, he said that Mr. Mwita Waisaka guaranteed the first loan but was not sure whether he

guaranteed the second loan. He conceded that there was no specific mortgage for the second loan. He said that the term loan was in the second agreement and not in the first agreement. He stated that the first loan continued up to the second loan. He conceded that the overdraft facility in **Exhibit P.5** is the same as that in **Exhibit P.1** though he refuted the fact that the defendants had paid a sum of 47,577,273/=.

Mr. Zaidi Baraka **DW.1** is the only witness who testified for the defendants. He is the second defendant in the suit and the Director and shareholder of the first defendant's company. He is also among the guarantors and mortgagor to the plaintiff bank.

He introduced himself as a dealer in petroleum products and a transporter and also a Managing Director of the first defendant's company. He described the 3rd, 4th and 6th defendants as directors and the 5th as the General Manager of the first defendant's company.

He conceded that the first defendant requested for and received from the plaintiff's bank an overdraft facility of T.shs 100 million and a guarantee of T.shs 150 million

through **Exhibits P.5** and **P.6.** He told the court that exhibit P5 (i.e. a letter of offer) was signed by Mr. Abdulwahid Y. Haji for the plaintiff's bank and the form of acceptance **(Exhibit P6)** was signed by two directors of the first defendant's company that is himself and one Mr. Humphrey Yona (The fifth defendant) on 22/4/2004.

He recognized various securities issued for the said facilities as contained in **Exhibit P.2.** He said that the first one was his guarantee of the T.shs 250,000,000/= to guarantee the banker's guarantee and is dated 29/4/2004. He thereafter one by one identified the rest of the securities being guarantees of T.shs 250,000,000/= by each of the rest 4 defendants all dated 29/4/2004 including mortgage charges created over the houses on Plots Nos.30 and 2 at Kijitonyama Medium Density area and Sinza Medium Density area both in Dar Es salaam.

The witness denied any knowledge of the term loan facility of T.shs 120 million alleged to have been extended to the first defendant through **exhibit P.1 (banking facility letter and form of acceptance)**

dated 21/10/2004. When referred to Exhibit P1 he told the court that it was being shown to him for the first time in Court. To stress the matter, he said that no security had been offered for the said loan term facility.

The witness pointed out that there were contradictions regarding which loan between the first and the second loan was secured by the securities in **Exhibit P.2**. He insisted that the securities that he offered on the 29/4/2004 was for the 22/4/2004 loan and that he did not know anything about the T.shs 100 million overdraft, the 30 million bank guarantee and a term loan of T.shs. 120 million. He however, immediately thereafter proceeded to tell the court that he received an overdraft of T.shs. 100 million without the bank guarantee because the supplier (Engen) in whose favour the same was to be issued had refused it and therefore he does not know where the guarantee in exhibit **P.1** was directed to. He said that T.shs 100 million overdrafts received was utilized and it had been repaid.

On further cross-examination by the plaintiff's counsel DW1 told the court that the only directors of the first

defendant left in the company is himself and the 6th defendant (his wife). The rest had resigned from their positions. He conceded that at the time of applying for the facilities the signatories of the first defendant's documents were himself and Humphrey Yona (The fifth defendant).

As to bank accounts maintained by first defendant's company in plaintiff's bank DW1 said that the first defendant had only one current account with the plaintiff's bank which he could not recall its numbers.

He told the court that after the guarantee was refused by the supplier (Engen), they proposed another supplier but the plaintiff never responded. Regarding the alleged repayment made he said that it was in respect of the over draft and not the term loan and were paid into the first defendant's account.

As to when he learnt about the term loan DW1 replied that he learnt it in 2008 after the plaint was served on him. He told the court that the signatures appearing on the facility letter (**Exhibit P.1**) is not his signature but he

could not take any step against the plaintiff's bank for that because the matter was already in court.

He said that having received demand notes which were served to all directors, they met and resolved to defend themselves in a suit threatened by the plaintiff.

It should be noted at the outset that from the evidence adduced by both sides the crux of the matter in this suit revolves around what is the actual amount claimed by the plaintiff and how it accrued.

Counsels for the parties filed their closing submissions in relation to the issues in contention. In as much as I commend them for their jobs, I will revert to the same in the course of this judgment.

But before going further and for purpose of easy of analysis of the evidence adduced in the case let me reproduce hereunder the issue as framed by this court before hearing was commenced:

The first issue is:

Whether the plaintiff extended and the first defendant received:

(a) An overdraft facility amounting to T.shs. 100 million.

(b) A bank guarantee of T.shs 30 million and a term loan of T.shs 120 million to the first defendant on the 21st October, 2004;

(c) And (what were the terms).

Now going by the pleadings it would appear that the granting and receiving of the over draft facility of T.shs 100,000,000/= is not seriously disputed. For instance under paragraphs 8 and 9 of the plaint it is pleaded that:-

8. That the plaintiff claims against defendants jointly and severally for a sum of T.shs. 364,332,659.97.....due and payable from the defendants to the plaintiff in respect of outstanding overdraft and loan facilities,....."

9. That on or about 21st October, 2004, the plaintiff offered a facility in the form of overdraft facility for Tanzania shillings 100,000,000/=..., Bank guarantee of Tanzania shillings 30,000,000/=... and Term loan facility of Tanzania shillings 120,000,000/=. The first defendant accepted the offer via form of acceptance."

In paragraph 8 of the written statement of defence the defendants admits a debt of T.shs 52,422, 727/=.....In paragraph 9 they admit to have mortgaged their property for the over draft facility and in paragraph 10 of the same written statement of defence they admit that the first defendant to have defaulted in repayment of the over draft facility and they give reasons. I therefore find that the overdraft facility for T.shs 100,000,000/= was issued to and was received by the first defendant.

The next question is whether the term loan of T.shs 120,000,000/= and a bank guarantee of T.shs 30,000,000/= were issued and received by the defendant. This allegation is strongly contested by the defendants through its pleadings and the testimony of

DW1. Apparently concentration is centred on the procedural aspect of it rather than on the factual aspect of the issue. The defendant's main contention is that the procedure was not followed.

Explaining the procedure to be complied with and evidence required to be submitted before issuance of any bank facility **PW.1** stated that there should be a request letter for the facility from the applicant's company and among other documents required is the board of directors' resolution which should show that the directors or any of them are allowed to borrow for the company. The witness said that the conditions for approval (those contained in clause 11 of **Exhibit P.1)** must be fulfilled before the facility can be issued.

On the other hand it is the defendants' contention that the first defendant never applied for and granted with term loan. They challenged the plaintiff to produce evidence showing that the first defendant followed the procedures for obtaining bank facility including board of directors' resolution. The plaintiff could not.

Logically the procedure explained by PW1 are followed after an offer has been made by the bank and accepted by the customer. But before the offer is made there must be preliminary discussions between the bank and its customer over the issue. This is so because it is inconceivable that the bank would rise out of the blue and make an offer to advance loan term to its customer. In a situation like the one at hand where the loan was intended to be used as a cash capital, it is the customer who initiates the negotiations. The bank would then require securities for realisation of the loan to be advanced. The said securities must be provided before the facility can be issued. At least that is the procedural picture as painted by **PW.1**'s testimony in that regard.

Now applying these facts in the case at hand there can be no disputed that there was an offer which was duly made by the plaintiff and accepted by the first defendant. The form of acceptance **(Part of Exhibit P1),** indicates that Zaid Baraka (DW1), the Managing Director of the first defendant signed as a director of the first defendant's company. The acceptance form is also

stamped with the common seal of the first defendant's company.

It has been submitted for the defendant that on the evidence on record the defendant's company did not make formal application for the overdraft or loan facilities in a form of a letter accompanied by a company's board resolution, therefore this court should find that there was no agreement entered for the provision of the said facilities. As stated this argument is gathered from the testimonies of PW1 and DW1. According to PW1 the term loan is in the loan account and it cannot be opened without the customer's request. On the other hand it is the testimony of DW1 that he does not know who asked for the facility dated 21st October, 2004. He said that the said facility does not have security because he never asked for a loan.

On my part I do not agree with the counsel for the defendant's conclusion that there was no agreement entered for provision of the said loans.

In the first place as stated hereinbefore, the overdraft facility is not very much disputed by the defendants in

their pleadings. For instance in paragraph 4 of the written statement of defence for all defendants it is clearly stated that the first defendant accepted the offer of credit facility on 22nd April, 2004. Again in paragraph 7 of the said written statement of defence the defendant admits to have utilized the said facility in its business and made repayment thereof to the tune of T.shs. 47,577,243.00. Further admission is made under paragraph 8 of the said written statement of defence where the defendants state that they admit a debt of T.shs 52,422,727.00.

It is trite law of the land that parties in litigation are bound by their pleadings. This position was expounded by Kimaro J, (As she then was) in **Commercial case No 3 of 2004 between Bata Shoe Company Versus Standard Chartered Bank & Another (Unreported).** A similar position was taken by this court in Commercial **case No 39 0f 2000 between NBC (1997) Ltd Versus Mehboob Karmal & 2 Others (unreported)**. In a Ugandan case of **Interfreight Forwarders (U) Ltd Versus East African Development Bank (1990-1994) EA 117** it was held that:

"The system of pleading is necessary in litigation. It operates to define and deliver it with clarity and precision the real matters of controversy between the parties upon which they can prepare and present their respective cases and upon which they will be called to adjudicate between them....."

Now reading from the pleadings in the instance case there can be no dispute that the first defendant was granted an overdraft facility by the plaintiff's bank. The issue is not in controversy between the parties and in law it cannot be challenged by way of final submissions. Written final submissions do not constitute evidence. They are simply summary of the case from the perspective of the party who is submitting. It should contain the summary of pleadings and evidence as adduced by either side.

Submissions by the defendant's counsel on this issue which is contrary to what had been pleaded by the defendants themselves and also contrary to the evidence on record cannot stand.

That notwithstanding there is nothing in terms of evidence showing that there were formal application from the first defendant's company in terms of an application letter addressed to the plaintiff's bank accompanied with a copy of a resolution from the defendant's Board of Directors' requesting for an overdraft facility which the defendant admit to have been issued to the first defendant's company. They cannot be heard denying the term loan on the ground that there was no formal application or that the procedures as explained by PW1 were not followed. Having conceded to have accepted an overdraft facility which was issued without following the procedures, they are now estopped from denying the term loan which was issued to the first defendant's company in the same transaction and without following the procedures.

That apart, as intimated above Exhibit P1 implies that indeed there was an application from the defendant which was accepted by the plaintiff's bank. I gather this from the fact that the 1st defendant's company would not have accepted the facility without there being an application to that effect. It is on that ground that the 1st

defendant duly accepted the offer as signified by the signature of Zaid Baraka DW1 in the Form of Acceptance (Part of Exhibit P1). The Form of Acceptance is sealed with the defendant's seal confirming its acceptance thereof. Exhibit P5 shows that among the conditions prerequisite to the granting of the facilities was registration of legal mortgages over Right of Occupancy No 47058 Plot No 30 Block Kijitonyama Medium Density area in Dar Es Salaam and Right of Occupancy No 55040 Plot No 2 Bock E Kinondoni both in Dar Es Salaam. Exhibit P2 shows that these offers are indeed in possession of the plaintiff's bank to cover the facility of T.shs 250,000,000/= interests and other charges.

For the defendants the guarantee agreements were signed by Zaid Baraka (DW1) and witnessed by Advocate Joseph Thadayo on 29th April, 2004. For the plaintiff's bank they were signed by one B. A. Tabulo who was the director in the plaintiff's bank and witnessed by the same advocate. Consent to create mortgage was obtained from Julliana Baraka (the 6th defendant) and it was witnessed by Dr. M. K. B. Wambali, Commissioner for oaths. Although neither advocate Thadayo nor Dr Wambali was

called to testify in this case but the defendants have not explained how these documents reached the plaintiff's bank possession. DW1 does not deny to have signed the guarantee agreements. He agreed to sign a guarantee for T.shs 250,000,000/=.There is undisputed evidence from PW1 that the said amount was comprised of T.shs 100,000,000/= overdraft, T.shs 120,000,000/=term loan and T.shs 30,000,000/=bank guarantee. Admittedly the bank guarantee of T.shs 30,000,000/= was not issued. For undisclosed reasons the 6th defendant did not show up to challenge the allegation that she gave consent to create the said mortgage. Similarly the 3rd to 5th defendants opted to stay away from the trial. In **Hemed Said v. Mohamed Mbillu [1984]**, TLR 113 at page 114, this court, Sisya J (as he then was) held that:

"Where for undisclosed reasons a party fails to call a material witness on his side, the court is entitled to draw an inference that if the witness were called they would have given evidence contrary to the party's interest"

In the instance case the 3rd to 6th defendant who otherwise could have been material witnesses particularly in this issue were not called or they opted not to testify and no explanation has been given for that.

The inference that could be drawn is that had they shown up they could have testified against the interest of the defendants and particularly the first defendant in this case.

Still on the term loan, it has been submitted by the defendant's counsel that because there is no proof that there was a Board Resolution authorizing the first defendant to apply for the term loan and because the banking facility letter (Exhibit P1) which constituted an offer to the first defendant is not signed by Mr. Abdul Wahid Haji, the plaintiff's bank Corporate Relationship Manager, there was no agreement entered between the parties for the provision of term loan facility.

I have already ruled that in practice parties are bound by their pleadings. Needless to say that Rule 6 of Order VI of the Civil Procedure Code [Cap 33 RE 2002]; prohibit departure from the previous pleadings. The law says:

"*No pleadings shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same*"

In paragraph 2 of the written statement of defence, the defendants state that they did not receive credit facility letter dated 21st October, 2004 Ref No KCBTZ/DAR/10/36 as indicated in the form of acceptance **(part of Exhibit P1)** which was ***"mistakenly"*** signed by one director only. I find this is a bit contradictory. It is contradictory because in one part the defendant denies to have received the credit facility letter dated 21st October, 2004 but in another part of the same pleadings they concede that one of the first defendant's director who ostensibly is the owner thereof signed though *"mistakenly"* the acceptance form attached to that letter. This contradiction has not been cleared. There is no doubt that the director who is said to have had *"mistakenly"* signed exhibit P1 is DW1. Had they not received Exhibit P1 DW1 would have not been able to *"mistakenly"* sign it.

I have scrutinized exhibit P1 and I have come to a conclusion that the defendants were very much aware of the document and actually they agreed to the terms therein.

Firstly, apart from the fact that exhibit P1 is signed by DW1 in his capacity as the director of the first defendant's company, on the right hand side at a space where a director was supposed to sign, it is stamped with the common seal of the plaintiff's company. DW1 did neither give any explanation on how a common seal of his company could be used without his knowledge and/or authorization nor did he tell the court what steps did the company take on the alleged use of its director's signature and/or use of company seal without its consent.

Exhibit P.4 is a loan history inquiry prepared by the plaintiff's bank. On slot dated 27/10/2004 it is indicated that a total of T.shs 120,000,000/= were disbursed to account number 321-028-65101-3. The plaintiff's testimony is that this account is owned and operated by the 1st defendant's company. The defendant admits to have made some repayment through the said account. This impliedly means that it admits to own and operate it. It is also in line with clause 13.2 of the banking facility offer (**Exhibit P1),** which provides inter alia that:-

and the defendant did receive the term loan facility of T.shs 120,000,000/=.

Regarding the bank guarantee, as rightly submitted by the plaintiff's counsel and readily conceded by the defendant's counsel, there is no dispute at all that the guarantee of T.shs 30,000,000/= was not utilized by the first defendant and the plaintiff does not claim anything arising there from. That being the case I find it more academic to discuss the second part of the first issue which seek to answer the question whether or not in the first place the term loan was issued.

1. **Whether the said banking facilities amounting to Tshs. 250 million were dully secured by the 2nd, 3rd, 4th, 5th and 6th defendants' property, Director's and personal guarantees.**

I have already found that as matter of fact the 2nd and 6th defendants offered and consented to mortgage two certificates of the Rights of Occupancy as security for the banking facilities amounting to T.shs 250,000,000/=.There is further evidence through Exhibit P2 that the second defendant (DW1), the third defendant

Mwita Waisaka, the fourth defendant Mohamed Ismail and the 5th defendant Humphrey Yona signed directors' guarantee of T.shs 250,000,000/= while the 6th defendant Juliana Baraka signed a personal guarantee of the same amount. This evidence is not challenged. As intimated earlier, except for the second defendant, other defendants opted not to give any defence in this case. In my opinion where a defendant chooses not to give any defence against an allegation against him an adverse inference should be drawn against him. In this case the allegations against these defendants are that they signed directors' guarantees. They have opted to keep quite on the allegation. The only inference that could be drawn is that they actually signed them. I therefore find that the 2nd to 5th defendant signed directors' guarantee as alleged while the 5th defendant signed personal guarantee of T.shs 250,000,000/=.

Similarly there is a debenture issued by the first defendant's company Petro Mark Africa Limited. This too is not challenged. By all intent and purport the guarantees and collaterals were intended to be securities for the said facilities amounting T.shs. 250,000,000/=

being a total of the facility offered to the 1st defendant. This answer the second issue which seeks to answer the question whether the facilities issued to the 1st defendant were duly secured by collaterals and securities (I. e. personal and directors' guarantee, debenture issued under authority of Petro Mark Africa Limited).

The next issue **is whether the first defendant has defaulted in repayment of the overdraft, term loan and bank guarantee.** As stated above admittedly the bank guarantee was not issued therefore the defendant cannot default in repayment of a facility which was not issued.

Regarding the overdraft facility, there is undisputed evidence that a total sum of T.shs 47,577,273.00 was repaid towards liquidation of the said facility. In paragraph 8 of the written statement of defence the defendants admitted the debts of T.shs 52,422,727/= which implies that out of T.shs 100,000,000/= advanced to the first defendant as an overdraft they have managed to pay (T.shs 47,577,273/= i.e. T.shs 100,000,000/= Minus T.shs 47,577,273/= is equal to T.shs

52,422,727/=). However, Exhibit P1 shows that the borrower had to pay interest and other charges. It would appear that on the amount repaid, interest was avoided. Again it was agreed that the repayment period was on written demand and/or in 34 months instalments of T.shs 4,591,295/= per month. The evidence i.e. the written demand notices (Exhibit P3) issued to the defendants indicates that the defendants defaulted in repayments of both the overdraft facility and the loan term. I therefore answer the third issue in the affirmative. That is to say, the defendants have defaulted in repayment of both the overdraft facility and the term loan but as stated earlier he has not defaulted in repayment of the bank guarantee which was not issued to and guaranteed by them.

To what extent are the defendants jointly and severally liable to the plaintiff;

As analyzed above the first defendant's company received and utilized the overdraft facility of T.shs 100,000,000/= and the term loan facility of T.shs 120,000,000/=. Both securities were secured by the 2nd, 3rd,4th, 5th and 6th defendants. In their directors'

guarantee agreement each of the defendants agreed to be liable to the amount recoverable from the 1st defendant not exceeding T.shs 250,000,000/=. They are therefore held liable to the extent they agreed.

Now the reliefs; The plaintiff is praying for several reliefs including T.shs 364,332,659.97 which is the sums due and payable to them under the agreement. I grant that prayer and declare that the plaintiff is entitled to that amount (i.e. T.shs 364,332,659.97), minus the amount already paid (which is T.shs 47,577,278/=). The plaintiff is also awarded interest on principal sum at commercial rate of 21% per annum from the date of filling the suit to the date of judgment and further interest at court's rate from the date of judgment till payment in full.

The plaintiff is also praying for an order for sale of the mortgaged premises. That prayer is granted but only as an **alternative award** to the payment of the decreed amount. In other words sale of mortgaged properties could only be resorted to if the defendants are unable to pay the monies due and payable as ordered in prayer one (1) above.

The claim for general damages is rejected. There is nothing in the evidence to establish damages suffered by the plaintiff. The awarded amount in prayer one above is sufficient to place the plaintiff's bank in the position it could have been had the defendants not defaulted.

For the reasons and extent explained above Judgment is entered for the plaintiff against the defendants jointly and severally. The plaintiff shall have its costs of the suit.

It is accordingly ordered.

A.R. MRUMA,

JUDGE.

DATE: 19/9/2011

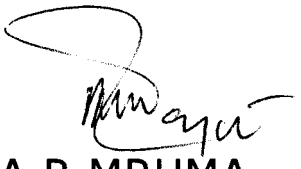
Coram: Hon. A.R.Mruma, Judge

For the Plaintiff – Mr. Msuya for Mr. Semu for the Plaintiff.

For the Defendant – Mr. Msuya for all Defendants.

CC: J. Grison.

COURT: Judgment delivered this 19th day of September, 2011 in presence of Mr. Msuya, Counsel for the defendants who holds the brief of Mr. Semu, Counsel for the Plaintiff.



A.R.MRUMA

JUDGE

19/9/2011

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