IN THE HIGH COURT OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

COMMERCIAL CASE NO. 75 OF 2014

FIRST NATIONAL BANK TANZANIA LIMITED . ... PLAINTIFF

VERSUS

WASWARD WILSON MAPANDE ..... DEFENDANT

Date of Last Order: 4th December, 2015

Date of Judgement: 10th December 2015

HON. I. MAIGE, J

JUDGEMENT

By way of summary procedure, the Plaintiff has instituted this suit against the Defendant claiming for payment of **TZS 171, 962, 554** as outstanding loan in respect an overdraft facility of **TZS 60,000,000/=** and business loan of **TZS 100,000,000/=** extended to the Defendant on 8th February, 2013 and 23rd March, 2013, respectively (together "the two loan facilities"). The Plaintiff has

also claimed interest on the principal sum, at the rate of 21% from 11th June 2014 to the date of judgement, and on the decretal sum, at the rate of 12% from the date of judgement to the date of payment in full.

Upon being served with court summons, the Defendant successfully applied for leave to defend on the main ground that the claimed amount did not reflect the correct figure of the outstanding balance in respect of the **two loan facilities**. In his Witness Statement, the Defendant, while not disputing the existence of the **two loan facilities** and the outstanding balance thereof, questions the maintainability of the suit on account that the **two loan facilities** were separate contracts incapable of being enforced simultaneously, and that the institution of the suit was not preceded by a proper notice of default. He also alleges impossibility of the performance of the contract occasioned by non-delivery of his cargo imported from China.

Before trial, the Court, in consultation with the parties, framed the following four issues. (1) Whether the Defendant was duly served with the notice of default? (2) Whether the Plaintiff is entitled to enforce two loans jointly at a single claim? (3) Whether the Defendant had valid reason for his default to service the loan? (4) To what reliefs are the parties entitled to?

During hearing, the Plaintiff enjoyed the service of Mr. Innocent Mushi and Ms. Adeline, learned advocates whereas the Defendant was unrepresented. Upon conclusion of the trial, parties were allowed to address the Court generally by way of Written Submissions and they did.

The evidence, as is the procedure, was adduced by way of Witness Statements supplemented by cross examination. For the Plaintiff, the Witness Statement was deposed by Mr. Gerald Kessy, the Credit Manager of the

Plaintiff. For the Defendant, Mr. Wasward Wilson Mapande, the Defendant, was the one who deposed the Witness Statement. Each of the witnesses produced documentary evidence in support of his case.

The **two loan facilities**, parties are not in dispute, were secured by legal mortgages on the Defendant's Properties at Himo Urban Areas described as Plot Nos. 271 and 328 Blocks Nos. B and D, with certificates of title Nos. 9989 and 16433, respectively. Before the execution of the two mortgages, the Defendant procured spousal consents. The two mortgage Deeds were exhibited as **P-3 (a)** and **P-3 (b),** respectively whereas the spousal consents were admitted as **P-4(a)** and **P-4(b).** The Overdraft Facility was admitted as **P-1** and the Business Loan as **P-2**.

It was express in exhibit **P-1** that interest would accrue on the debit balance (s) of any overdraft and would be levied at the Bank Rate Plus (21% plus 1%) subject to variation from time to time and that repayment would be on demand. It was also an express condition that interest would be calculated on the daily outstanding balance and capitalized monthly in arrears.

As for exhibit **P-2**, it was express that the loan should be liquidated within a period of 18 months from the date thereof at the interest rate of 21% in equal monthly installments of **TZS 6,522,942.05.** Express in **P-2** was also the fact that non payment of any of the monthly installment would amount to an event of default and was repudiatory to the contract.

In fundamental breach of the contracts in exhibit **P-1** and **P-2**, it is claimed, the Defendant defaulted to service the loan, and as a result, the outstanding loan due and payable in respect **P-1** and **P-2** as of 11th June 2014 was **TZS 171,962,554**. By 9th March, 2015, the total liability of the Defendant inclusive

of the principal amount, interests and other charges according to the Witness Statement of **PW-1** stood at **TZS 217,000,000/=.** This figure is detailed in the Bank Statement Accounts admitted as **P-6.** It is clearly indicated in **P-6** that of the total outstanding balance of **TZS 217,000,000/=** claimed, **TZS 105,268,999.74/=** was in respect of **P-2** whereas **TZS 113, 878,290.29** was in respect of **P-1.** The computation of the outstanding balance has not been challenged. It's worthy to note that the Bank Statement in **P-6** was also relied by the defendant in his testimony and was tendered as **D-3**. I will therefore find as a fact that the outstanding balance in respect of the **two loan facilities** as of 9th March 2015 was **TZS 217,000,000/=**, and that out of the said total amount, **TZS 113, 878,290.29** is in respect of **P-1** and **105,268,999.74/**is in respect to **P-2.**

I will now address the issues framed starting with the first one which is whether the Defendant was duly served with a notice of default. The Plaintiff, according to exhibit **P-5,** filed a notice purporting to be a statutory notice under the two mortgages in question. While the existence of the notice of default in exhibit **P-5** is not debatable, its compliance with the provision of section 127 of the Land Act is vigorously contentious. In particular, the notice is attacked for not particularizing the nature and extent of default in each of the **two loan facilities**. For the counsel of the Plaintiff however the notice of default is proper and it addresses both the **two loan facilities**.

The controversy between the parties on the issue of notice, it would seem, is largely premised on presupposition that prior notice is a precondition for enforcing a credit agreement secured by mortgage. The Defendant has, in addition to the provision of section 127 of the Land Act, referred me to the authority of the Court of Appeal in NATIONAL BANK OF COMMERCE VS. WALTER T. CZURN (1998), TLR 380 to support that proposition.

It has to be noted right from the outset that the decision of the Court of Appeal in NATIONAL BANK OF COMMERCE VS. WALTER T. CZURN was reported in 1998 when the current Land Act was not in existence. The authority, in my reading, was in relation to the provisions of Land (Law of Property and Conveyance) Act 1881. The said law forms part of the English statutes of general application, and it was, by virtue of section 2 (3) of the Judicature and Application of Laws Act, Cap. 358, R.E., 2002, applicable in Tanzania in mortgage and finance, among other areas. The applicability of the substances of the English common law and statutes of general application is conditional upon there being a *lacunae* in our domestic laws. Before the enactment of current Land Act there was a *lacunae* in the law relating to mortgage and finance which necessitated for the application of the received laws.

The enactment of the current Land Act with its comprehensive provisions on mortgage and finance in Part X thereof, has, in my considered opinion, rendered the application of the provisions of the Land (Law of Property and Conveyance) Act, 1881 in mortgage and finance in Tanzania Mainland next to never. It follows therefore that unless the provisions of Part X of the Land Act is silent, the provisions of the said English Act on mortgage is inapplicable in Tanzania. Since the provisions of Part X of the Land Act address the issue of notice of default in relation to mortgage exhaustively, the authority of the Court of Appeal, in so far as it was interpreting the provision of English Land (Law of Property and Conveyance) Act 1881, is distinguishable and does not apply in the instant case.

I will now examine the issue in relation to the provisions of Land Act. The essence of the submissions by the Defendant is that, according to section 127(1) of the Land Act, a notice of default in a form prescribed under section 127(2) is a precondition for enforcing a loan secured by mortgage. The provision of section 127 of the Land Act read as follows:-

(1) Where there is a default in the payment of any interest or any other payment or any part thereof or in the fulfillment of any condition secured by any mortgage or in the performance or observation of any covenant, express or implied, in any mortgage, the mortgagee shall serve on the mortgagor a notice in writing of such default

The provision refers to interests or any other payment "secured by any mortgage". Admittedly, the payment claimed in the instant suit arises out of an overdraft and business loan secured by mortgages. The provision, in the absence of other tools of statutory interpretation, is broader enough to capture every loan secured by mortgage. Nevertheless, it is a rule of statutory interpretation that a statute is construed wholistically and not in isolation. Section 127 of the Land Act falls under part X of the Act which is on mortgage and finance. The opening section of part X which is section 111 (1) of the Act, provides as follows:-

111(1) This part applies to all mortgages of land or interests in land, made or coming into effect on and after the coming into operations of this Act and any other mortgages of land which are specifically referred to any section in ***this Part and references to mortgages in this Part shall apply and apply only to mortgages of land and interests in land.***

It would seem to be the intention of the legislature, according to section 111 of the Act, that the provisions of Part X would only apply in relation to enforcement of the powers under mortgage. It is because of that reason that section 127 of the Act refers to "mortgagee" and "mortgagor" and a notice thereof is, according to section126 of the Act, a prerequisite for the exercise of the powers under mortgage. The powers under mortgage are stated in section 126 of the Act as to include taking possession of the mortgage, sale, lease and appointment of the receiver. In my view, pursuing an action to Court, unless is

in relation to the enforcement of the powers under mortgage, is not among the powers stipulated in section 126 of the Land Act. Therefore, since the instant case is an ordinary suit for a breach of loan contract, and does not have any claim pertaining to the powers stated in section 126 of the Land Act, I hold that it is not covered by the provision of section 127 of the Land Act as to notice.

The Defendant has submitted, in the alternative that notice requirement is imposed by the terms and conditions of the **two loan facilities**. In particular, the Court was referred to clause 5:2 of the General Terms of each of the **two loan facilities**. I have examined both **P-1** and **P-2** and established that a copy of Terms and Conditions has been attached and incorporated in each of the loan documents. The provisions of the Terms and Conditions in respect of the **P-2** however is silent on the issue of notice requirement. It is only the overdraft (**P-1**) which provides in its clause 5:2 of the Terms and Conditions for a notice, in the following words:-

> *In the event of breach, the bank shall be entitled to claim and charge default interest at the rate published by the bank from time to time and notified to the client, calculated from the date of breach to the date of payment and compound months in arrears, on the full outstanding balance of the facilities*

The provision of the contract as quoted above imposes a notice requirement in the event that the lender seeks to claim and charge default interests. It may, in the same way, apply in a situation where, as in this matter, the lender treats the contract repudiated and pursue an action in court. This has been a common banking practice in relation to overdraft. The reason being that an overdraft falls under a contract between a banker and customer and has to be distinguished from ordinary case of loan of money. In JOACHIMSON VS. SWISS BANK CORPORATION, (1921) All ER. 92 it was held *that an advance made on overdraft does not become due until the banker has actually*

demanded payment. This requirement has been sufficiently incorporated in exhibit **P-1**. For instance, in clause 2.1 thereof, it is stated that "*the facility is payable and terminable on demand from the Bank*". This position is also reflected in clause 2.4 of the General Terms and Conditions Applicable to the Facility which is part of **P-1**, and it has been expressly admitted in paragraph 7 of the Witness Statement of **PW-1**. I will therefore hold as a fact that a notice of default in the form of demand note was an ingredient for enforcement of an overdraft facility (**P-1**).

Having established that a demand note was a mandatory requirement for enforcement of **P-1**, I will now consider whether the notice in exhibit **P-5** amounts to a demand notice for the purpose of enforcement of the overdraft facility. I am preparing myself to answer this question negatively for three main reasons. First, the notice given in exhibit **P-5** was in respect of the mortgages in exhibits **P-3(a)** and **P-3(b)** and was served on the Defendant in his capacity as a mortgagor and not a borrower. Two, the amounts demanded in exhibit **P-5** was a combination of the outstanding balances for both the overdraft and business loan without specification. Three, there was nothing in exhibit **P-5** to distinguish between the principal loan and interests in each of the **two loan facilities**. So, I have no doubt, given the foregoing exposition that exhibit **P-5** was not a demand notice for the purpose of the terms of the Overdraft Facility (**P-1**). In my opinion therefore, the suit in respect of an Overdraft Facility (**P-1**) in so far as it was filed before issuing the mandatory demand notice, was premature and ought to be and is hereby struck out.

I will now consider the issue of notice in relation to the business loan (**P-2**). As pointed out above, the contract in **P-2** is silent on notice requirement and the Defendant has not cited any law with the effect of implying such a requirement in the said contract. Express in **P-2** is the fact that the loan was repayable by equal monthly installments. Failure to pay any installment within

two days from the date when it became due, amounted to an event of default under clause 6.2 of **P-2**, and would entitle the Plaintiff to enforce the loan without notice. From the express admission in the Witness Statement of **DW-1** it is manifestly apparent that by the time when this suit was being filed, the Defendant had already defaulted to service the loan in **P-2.**

It appears to me that in the absence of any statutory law imposing a requirement of a prior notice of default, the Plaintiff has right, under clause 6.2 of the business loan to take legal action for recovery of the outstanding loan plus interests accrued thereon, in the event of default, without necessarily servicing a notice to the Defendant. To my knowledge, this has been the position in common law. P.J.M. Fidler, a renown jurist in Banking law jurisprudence, in his PRACTICE AND LAW OF BANKING, 1982, Macdonald and Evans, 11th Edition, London, at page 53, makes a commentary on when does an ordinary loan become due and payable in the absence of contractual terms as follows:-

> *If a customer owes money to the banker in respect of a loan account and the loan is repayable in a single lump sum on an agreed date, the banker's right of action accrues on the date that the loan becomes payable. If the loan is payable in installments, a separate right of action accrues in respect of each installment: but if the whole loan becomes repayable, or the banker has the right to make the whole loan repayable, in the events that the customer defaults on an installment, the right of action on the balance of the loan accrues on the date of any such default*

This position was also stated in WALTON VS MASCALL, (1884) 13 M&W 452 (referred in JOACHIM CASE, *supra*) where it was held that " *a request for payment of debt is quite immaterial, unless the parties to the contract have stipulated that it shall be made; if they have not, the law requires no notice or request, but the debtor is bound to find out the creditor and pay him the debt*

when due". A similar position was stated in NORTON VS ELLAN, 1837, 2M&W 461 (Referred in JOACHIM CASE *supra*)

It follows therefore that since notice is not an ingredient for enforcing an ordinary loan agreement, whether the Defendant was served with a notice of default or not is irrelevant in the claim relating to the loan in **P-2.**

I will now pass to the second issue which is weather it was proper for the Plaintiff to claim the outstanding loans for the **two loan facilities** jointly. This is an issue of joinder of causes of action which is regulated by the provision of order II rule 3(1) of the Civil Procedure Code, Cap 33, R.E., 2002 ("the CPC"). Under the said provision, the plaintiff may unite in the same suit several causes of action against the same defendant, if the actions arise out of the same transection. In this case, although the two loans were contracted differently and separately, they were both secured by the same mortgages. Since under section 80 of the Law of Contract Act, Cap.345, R.E., 2002, the liability of the guarantor and the borrower is generally coextensive, the causes of action in this matter are deemed to have arisen out of the same transection. I have also considered the irrefutable fact revealed in exhibit **D-2** that there was a single letter of offer which was issued in respect of both the **two loan facilities**. The joinder of the causes of action in respect of the **two loan facilities** was therefore proper. The second issue is answered affirmatively.

I will now turn to the third issue as to whether the delay to service the loan was justified. In as long as the claim in respect of **P-1** has been held to be premature, this issue will be dealt with in relation to **P-2** only.

In his Written Statement of Defense and the Witness Statement, the Defendant has sought an asylum to the defense of frustration provided for in section 56(2) of the Law of Contract Act, Cap. 345, R.E., 2002. He has deposed in paragraph 5 and 6 of his Witness Statement that his efforts to service the loan was frustrated on account of non-delivery of the goods that were ordered from China. The Defendant claims to have notified the Plaintiff of the happening of the said event. More so, the Defendant claims to have asked for reschedule of the loan repayment and for additional loan but in no avail.

It is an established position of law that for a defense of frustration to stand, the defendant must establish, among other things that the unforeseeable event which rendered the performance of contract impossible, was essential to the attainment of the fundamental object which the parties had in view. In KRELL VS. HENRY, (1903) 2 KB 740 it was held that discharge of contract will not be decreed on account of frustration if the claimed event cannot reasonably be regarded as the real basis of the contract. I have casted a glance over **P-2** and satisfied myself that there is nothing therein to infer that importation of goods from abroad was an essential elements of the contract in **P-2**. I would also say with certainty that there is nothing in the contract to suggest that utilization of the granted loan for importation of goods from abroad was in the minds of the parties at the time of the conclusion of the contract in **P-2** or at all.

Even if it was assumed, for the sake of argument, that the delivery of the goods from China was essential to the attainment of the fundamental object of the contract, yet the Defendant would not succeed for the main reason that there has not been tendered any document in evidence to establish the alleged importation of goods and the value thereof. Indeed, there is nothing in

evidence to show when were the said goods imported, under what circumstances did they disappear and what steps did the Defendant take to trace the same. Besides, there is no evidence of communication of the event to the Plaintiff. The importation of goods from abroad being not essential to the attainment of the object of the contract, and there being no evidence to prove the alleged non-delivery of the imported goods, the defense of frustration, I will agree with Mr. Mushi, learned advocate , cannot stand. The third issue is henceforth answered negatively. The default to service the business loan (**P-2**) was without any valid justification.

I will now proceed with the last issue as to reliefs. The Plaintiff has in the first place claimed for the sum of **TZS 217,000,000/=** as outstanding balance in respect of the **two loan facilities** as of 9th March 2015. The computation of the outstanding balance is found in **exhibit P-6/D-3** which has not been challenged. It is evident in exhibit **P-5/D-3** that of the total outstanding balance of **TZS 217, 000,000/=**, **TZS 113,878,290.29** is in respect to **P-1** and **TZS 105,268,999.74** is in respect of **P-2.** The Plaintiff is therefore entitled payment of the sum of **TZS 105, 268,999.74** as outstanding balance in respect of the loan in **P-2** and it is hereby awarded.

The Plaintiff has also claimed interest on the principal sum at the rate of 21% per year from the date of accrual of the cause of action to the date of judgement. It is on record that during deposition of the Witness Statement the outstanding balance, inclusive of interests, in respect of **P-2** was, as of 9th March 2015 **TZS 105, 268,999.74**. The interest rate of 21% was express in the loan agreement and there is no reason why I should not grant. Since under the ordinary practice of bankers, the interest due is from time to time added to the principal and becomes itself part of the principal, (See THE NATIONAL BANK OF COMMERCE VS. WAKULIMA ENGINEERING COMPANT AND TWO OTHERS **(**2005), TLR., 273), I will award interest on the principal

amount of **TZS 105, 268,999.74** at the rate of 21% per year from 9th March 2015 to the date of judgement.

The Plaintiff has also claimed interests at the court rate of 12% per year from the date of judgement to the date of payment of the decretal amount in full. I understand that interest on decretal sum is a consequential relief under section 29 of the CPC. The court interest rate ranges from 7% per annum to 12% per annum, and the Court has discretion to determine the appropriate rate of interest. Under the circumstance of this case, I find that the minimum rate of 7% per year is appropriate. The Plaintiff is therefore awarded interest on the decretal sum at the rate of 7% per year from the date of judgement to the date of full settlement of the decretal sum.

In view of my finding in issue number one in respect of **P-1**, I will not give an order as to costs.

It is so ordered.

HON.I.MAIGE

JUDGE

10/12/2015

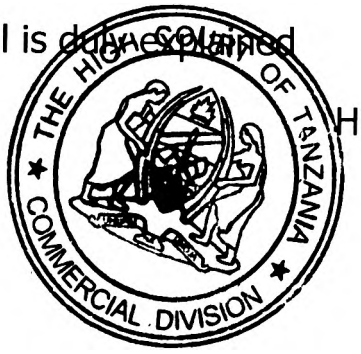
Delivered in the presence of Mr. Mushi and Ms. Adeline, learned advocates for the Plaintiff and in the presence of the Defendant in person this 12th day of December, 2015.

HON.I.MAIGE.

JUDGE

10/12/2015

Right to appeal is duly explained



HON.I.MAIGE.

JUDGE

10/12/2015