IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT ARUSHA

COMMERCIAL CASE NO. 20 OF 2011

ARUSHA HARDWARE
TRADERS LIMITED.....1ST PLAINTIFF

ELLYSON KIRENGA SWAY.....2ND PLAINTIFF

SIKUDHANI MWENDA SWAY.....3RD PLAINTIFF

VERSUS

EXIM BANK (TANZANIA) LIMITED.....DEFENDANT

JUDGEMENT

Mansoor, J:

Date of Judgement- 23TH OCTOBER 2015

The defendant-bank sanctioned a term loan of THz. 100,000,000 and an overdraft facility of THz 60,000,000 to the defendant on 29th June 2007 and that amount was secured by the 2nd plaintiff as guarantor and three certificates of titles

over Farm no. 1150, at Oldadai Village, Arumeru District, Arusha, C.T. No. 16849 in the name of the 3rd plaintiff, a certificate of title over property on plot no 14 Block GG Kijenge Area Arusha, C.T. no. 9861 in the name of the 2nd plaintiff, a property over plot no 112, Block GG Kijenge Area Arusha C.T. No. 11330 in the name of the 2nd plaintiff . The mortgage deed and the Loan Agreements were executed by the plaintiffs in favor of the defendant-bank agreeing to pay the said amount together with interest at 19% per annum and penal interest of 27% per annum on any expired limit or unauthorized excesses of the overdraft, and the same interest rates for the Term Loan Facility. The Term Loan was for 36 months from the date of the first disbursement and the overdraft was for 12 from the date of the last expiry i.e. on 30/08/2007. The defendant agreed to repay the overdraft facility on demand within twelve months and amount of the Term Loan in 36 equal monthly instalments commencing from the date of the first disbursement.

The Plaintiffs agreed to sign on the Default Clause Exhi P1, clause 16 and became bound by the Agreement which states that the Bank reserves the right to recall the entire liability outstanding under the various facilities sanctioned to the Borrower, together with accrued interests on the happening or occurrence of the events of default. Events of default were annexed as Annexure 1 to Exh p1 which included one or more of the following events occurring, namely, (1) breach of covenants, namely , if the borrower shall make default in payment secured or any part thereof or in the performance or observance of any term or undertaking contained in the facility and the securities offered, and on the part of the borrower to be observed and performed or.....then the entire balance thereof outstanding shall become forthwith due and payable.

Under the aforementioned agreement, the instalment had fallen due for payment but the plaintiffs averred that her operations faced difficulties in that it used the money advanced to it for purchase of materials from Malaysia, the ship in which the materials were loaded could not dock in

Mombasa due to election violence, and had to go to South Africa, but in South Africa the containers were found empty. Thus, the plaintiffs had not paid the instalments amounts; the plaintiff avers that it informed the bank of the occurrence of loss of the materials, and requested the defendant bank to waive the interests. The plaintiffs avers that the Bank Credit Risk Manager one, Felix Mselle had advised them orally that they should repay the principal sum in time to allow the request for waiver of interest to be processed, the plaintiff avers that they had repaid the entire principal sum on 3rd August 2010 and the overdraft was fully paid on 25th August 2010. Copies of the Deposit slips were admitted as Exh P6. the plaintiffs avers that believing that the entire amount of the loan and the overdraft facility have been paid and the interest have been waived, they wrote to the bank asking for release of the securities, the bank wrote to the plaintiff, a letter dated 24th November 2010 stating that the outstanding balance was THz 115,059,590.88 as at 24th November 2010 and that this amount plus interest should be paid within 12 months with a minimum monthly instalment of THz 3 million, and the bank

had agreed to waive the penal interest of THz 12,997,452.76 till 29th October 2010 on condition that the residual outstanding due and interest are paid in full. In 2011, the plaintiffs avers that they acted on the advice of the Defendant Assistant Credit Risk Administrator they wrote a proposal to the Bank to pay THz 35,000,000 in instalment basis. The defendant-bank never replied, and continued to charge interest on the outstanding amount... the plaintiffs avers further that they were informed by the Bank Officers on 24th June 2011 the interest increased to THz 132,214,414.47, and the bank officer asked the 2nd plaintiff to submit another proposal of paying 30% of the amount due. Again the defendant bank ignored the plaintiffs' request.

The plaintiffs then filed a suit praying for the following reliefs:

1. A declaration that the defendant's action of levying interest after being advised of the 1st plaintiff collapsed of its business was illegal;
2. A declaration that the interest due from the 1st plaintiff ceased upon full payment of the loan and the overdraft

facility i.e. on 3rd August 2010 for the Term Loan and 25th August 2010 for the overdraft;

3. The defendants be ordered to provide separate accounts for interest as it stands at the date of expiry of the loan and the overdraft facility;
4. That the 27% which the defendant claims by way of interest rate per month be declared illegal and of no legal force;
5. To order for release of the Certificate of Titles to the 2nd and 3rd plaintiffs;
6. Costs of the suit;
7. Any other reliefs deemed fit.

The bank filed its defense in which it stated that the plaintiff as the borrower and guarantors have breached the Terms of the Term Facility as well as the Terms of the Overdraft facility in which they failed to repay the loan amount and the overdraft facility on the agreed installments, and that there was an outstanding amount of THz 308,434,317.04 as at 22 September 2014, and that the

plaintiffs are in default. The Defendant bank avers that it never agreed to waive the penal interests as alleged by the plaintiff, the penal interest were to be waived only if the plaintiffs could have fulfilled the conditions set out in the bank letter dated 24th November 2010 (admitted as Exh ID1. The defendant- bank avers that clearly the plaintiffs had agreed under the Agreement (Exh P1) that in case of default penal interest would be charged, and the rate agreed was 27% per annum. The Defendant bank thus raised a counterclaim and demanded for payment of all moneys owed and interest thereto as per the Term of the Credit Facility Agreement, interest on the outstanding at the rate of 31% from the date the cause of action arose till the date of filing the suit, interest at 12% from the date of judgement until payment in full, and costs of the suit.

The issues framed after the completion of the pleadings were:

1. Whether the defendant was charging interest on the loan and overdraft facility as per the terms of the loan agreement;
2. Whether the plaintiff paid in full the principal sum on the loan as well as on the overdraft;
3. To what reliefs are the parties entitled.

I have had an opportuning of readings through the pleadings and its annexures, the proceedings as well as the closing submissions of the parties, and d I must say that I have given due considerations of the facts and legal arguments presented by the parties in their respective pleadings, evidences and submissions.

I noted that the defendant bank did not issue default notice demanding the payment of the entire amount before this suit was filed by the plaintiffs, for the recovery of the entire loan amount. I have noted that it is the plaintiffs who have initiated the suit and the defendant bank have filed a counterclaim, the bank was yet to issue the default notice. I agree as submitted by the plaintiffs' counsel in his closing submissions that that

section 127 of the land Act, Cap 113 of 1999 gives a requirement to the bank that it must issue a written notice of default, and the period set thereby is 30 days. As I stated earlier however, this suit was commenced by the plaintiffs not the bank, and the bank was yet to demand the payments of the outstanding due.

The Counsel for the plaintiff referred me to the case of Exim Bank (Tanzania) Limited vs Dascar Limited Commercial Case No. 51 of 2008 (unreported), by Werema J, in which the Hon Judge had held that a reasonable bank was supposed to take steps to mitigate the escalation of interest having been made aware of the difficulties facing the client. He continued holding that since the bank did not take any steps to mitigate the escalated interest for no apparent reasons, the court held that interest so accrued is not due to the bank and be forfeited. The Hon Judge continued saying that the bank breached its duty to exercise reasonable care and skills to its customers thus the bank cannot be entitled to interest which appear to result

from its own manipulation of failure to take prompt steps to mitigate the escalation of interest.

The plaintiff's Counsel in his final submissions also referred me to the case of Hemed Said vs Mohamed Mbilu TLR (he did not mention the year the case was reported), and also the case of Njake enterprises & Oil Transport limited vs Impala Hotel Limited, Comm Case No. 38 of 2012 (unreported) where Makaramba J had held that when the plaintiff fails to call a material witness the courts are invited to draw an adverse inference on such failure. the Counsel submitted that Mr. Dinesh Arora the Managing Directors of the bank is the bank officer who was conversant with the transactions between the bank and the plaintiffs, an d with whom they had several communications and conducted meetings with, was the key witness of the defendant bank, and ought to have appeared in court to put forward the defense case. Since the key witness did not give evidence then the court should make an adverse interest towards the defendant's case.

The plaintiff insisted that they paid the entire amount of the Term Loan and the Overdraft Facility as evidenced in the deposit slips admitted in court as evidence and marked as Exh P7, which shows that the amount paid was THz 405,155,044.23, thus the plaints says that the Term loan of THz 100,000,000 was paid, and an overdraft facility of THz 60,000,000 was paid, and the balance thereof covered the interests accrued as at the dates of payments.

The facts which have been briefly narrated above and the findings recorded by the cases cited by the Judges in the cases cited by the Counsel for the plaintiffs would show that the suit was filed, not on the basis of the default on the part of the plaintiffs to pay the loan amount and interest but on the basis that the entire loan amount and overdraft and interest have been paid, and that now the plaintiffs wants this court to declare that the entire amount of the loans and overdraft have been paid, interest have been paid but the penal interest of 27% as agreed in the agreement be waived.

Now, the agreement provided that the amount of loan advanced by the bank should be payable in 36 equal monthly instalments ending on June, 2010, and the period for paying the overdraft ended on 29th June 2008. The plaintiffs admittedly failed to pay the instalments due to the mishap on its business. Now, the Agreement prescribed or set the period of time for making the payments by instalments. The meaning of the provisions of the Agreement is not at all obscure. It lays down that the entire amount payable as agreed between the parties and as secured by the guarantors and securers given thereunder for securing the loan amount and payable by the plaintiff's first and single act of default committed. Such default was committed in this case since 29th June 208 for the overdraft and 29th June 2010 for the tem Loan, by not paying the instalments as agreed. It has not been established to the satisfaction of the Court that the bank which is the defendant before me had agreed to waive the interests. The letter dated 24th November 2010 from the Bank to the 1st Plaintiff is self-explanatory. It agreed to reschedule the outstanding balance of THz 115,059,590.88 which stood outstanding as at 24th

November 2010, and it would only waive the penal interest of THz 12,997,452.76 till 29th October 2010, if the plaintiffs would have paid into the term loan 12 monthly instalments of THz 3,000,000 every month. The bank had taken steps to mitigate the accrued interest, but it has not been shown or proved by the plaintiff as to whether or not they had fulfilled the conditions set out in the letter dated 24th November 2010. To me it is the plaintiffs who have failed to take steps to mitigate the amount of interest which were escalating having duly agreed to sign the Agreement for the Loan which clearly indicated that in the event of default the bank would be entitled to charge penal interest of 27% per annum. It is argued by the bank and I agree that by then i.e. by 24th November 2010, the plaintiffs had committed subsequent defaults in their obligation to pay the instalments for the years 2007, 2008, 2009 and 2010 and that, therefore, those defaults had given the bank the right to charge interest and penal interest as agreed in the Agreement. It may be mentioned that the counter claim in this case says that the cause of action as having arisen in favor of the bank, and the bank is suing for

the entire amount as at the date of filing the suit, when the plaintiffs had committed the default and the bank is entitled for the recovery of the entire amount of the loan plus interest as at the date of default. The allegations that the bank had waived the interest or is obliged to waive the interest due to the loss suffered by the 1st plaintiff is clearly inconsistent with the Agreement. The Bank does not lend money to customers anticipating that the customer would always succeed in business, and the bank takes security to cover the risks of failure of the borrowers to make payments of the loan taken. It is clear that the bank had not waived the interest and is not obliged t do so unless successfully negotiated by the parties to the loan agreement. If the plaintiff had waived the interest, the bank would not have demanded the payment of the entire amount on the basis of the default committed by the plaintiffs. If there was a waiver of interest, no amount could have been demanded as due and payable.

It may also be mentioned that the suit/ counterclaim filed on25th January 2012, for the recovery of the entire amount

can be maintained only on the basis that the entire suit amount had become due and payable by reason of the first default committed by the plaintiff. It has been established that the plaintiff have committed default and there are amounts still outstanding. The amounts outstanding as at 22 September 2014 was THz 308,434, 317.04.

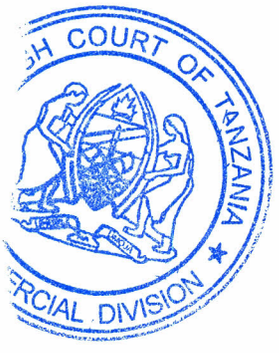
In view of the above, I am clearly of the opinion that there is default of payment of instalments as clearly admitted by the plaintiffs and as per Clause 16 of the Agreement the entire amount plus interest became due on the date the first instalment became due, the creditor/ bank is at liberty either to sue for the whole amount as soon as a default is made or to waive the provision and bring a suit for recovery of each instalment as it falls due or for the recovery of the entire amount.

I therefore answer all the issues in favour of the bank that the defendant bank was charging interest on the loan and the overdraft facility as agreed in the Loan Agreement dated 29th June 2009 (Exh P1). The plaintiff paid the principal amount as

exhibited by Exh P7, but still there were some amounts outstanding as interest, for which the plaintiffs are liable to pay. The plaintiff's case is dismissed with costs and the banks prayers as contained in the counter claim are all granted.

It is so ordered.

DATED at DAR ES SALAAM this 23th day of OCTOBER, 2015



MANSOOR
JUDGE
23RD OCTOBER 2015