

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM
COMMERCIAL CASE NO 68 OF 2010

BETWEEN

NATIONAL BANK OF COMMERCE LTD -----PLAINTIFF

VERSUS

GREEN ACRES INTERNATIONAL SCHOOL LTD-----1ST DEFENDANT
GREEN ACRES SCHOOL DAR ES SALAAM -----2ND DEFENDANT
JULIAN MARTIN BUJUGO RUSHAIGO-----3ND DEFENDANT

JUDGMENT

SONGORO, J

The National Bank of Commerce Ltd, the Plaintiff, filed a suit against, Green Acres International School Ltd, Green Acres School Dar es Salaam , and Julian Martin Bujugo Rushaigo, claiming for repayment of an outstanding loan of shs 59,270, 012.07.

In the Plaint, the Plaintiffs claims that, an outstanding loan is part of the money advanced to nominated staffs and teachers of the 1st and 2nd Defendant as a Group Loan which was guaranteed the Defendants.

In view, of his claim, Plaintiff in paragraph 15 (a) and (h) of the Plaint, prays for following orders, and reliefs ;

- 1) to order defendants to *Pay Shs 59, 270, 012 as an outstanding loan.*

- 2) Interests at 20% per annum from 1/5/2010 to the date of Judgment
- 3) interest on the Decretal amount at the rate of 12% per annum from the date of judgment to the date of full payment in full
- 4) Costs of the suit.
- 5) Any other relief(s) may this Honorable Court deem fit to grant.

In response, the Plaintiff claims, of outstanding loan, Defendants filed a Joint Written Statement of Defence, and firmly opposed all claims.

Further, Defendants contested that, the claim amount has been inflated because part of the loan, was re-paid by employees, directly to the bank, without involving Defendants.

Furthermore, Defendants complained that, the Plaintiff`s decision to collect and recover the loan, directly from employees, was irregular, brought confusions on recovery and accounting of loan and so far the remaining balance.

Also, Defendants contested that, their are not liable to pay the loans taken by their employees, because borrowers were solely responsible for repayment of their loan.

Next, Defendants denied all Plaintiff`s claim, and put the Plaintiff on strict proof.

In the light of the Plaintiff`s claim and Defendants denial to the claim, the court after consultation with the parties framed eight (8) issues for determination, being;-

1. *Whether the Defendants owe the Plaintiff Tshs. 59,270,012.70 as of 14th July, 2010 being an outstanding amount on account of loan agreement executed by the parties;*
2. *If issue number 1 is negative, whether the Defendants owe the plaintiff any outstanding sum;*
3. *Whether the 3rd Defendant was duty bound to ensure repayment of the loan taken by the Defendants;*
4. *Whether the Plaintiff violated any terms of the loan guarantee;*
5. *If the issue number 4 is in the affirmative, whether the Plaintiff acted reasonably;*
6. *Whether the Plaintiff after appointing its agents and after receiving debt collected failed to reconcile Defendants' accounts;*
7. *whether the Plaintiff tempered with the Defendants' accounts by force debiting any amount from Defendants' account without obtaining authorization/permit or informing the Defendants; and*
8. *To what reliefs are parties entitled.*

So, in the light agreed issues, the suit was heard, and concluded on the basis of the above-stated agreed issues.

During the hearing, Mr. Kalolo, Mr. Bethuel and then Mr. Nyika Learned Advocates represented the Plaintiff; while the Defendants were represented by Mr. Chambiri, Learned Advocates.

To start with Plaintiff's bank called Avitus Kyaruzi who testified as PW1, and he informed the court that, is the Legal Adviser to the Plaintiff Bank.

Further, PW1 informed the Court that, he knew the 1st Defendant as Green Acres International School and Julian Bujugo Rushaigo, the 2nd Defendant as Director of the School due to the loan which was advanced to teachers and staffs of the Defendants,

Regarding the loan which was advanced to Defendants PW1 briefed the court that, the Plaintiff Bank received loan application from

Green Acres through its "*Managing Director*" known as Martin Julian Bujugo, and processed it.

PW1 told the court that, in the light of the Loan Application which was forwarded to the Bank, he prepared Agreement for Provision of Personal Loans to Employees, and the parties were Green Acres School, and the National Bank of Commerce Limited.

On details of the loan, the witness said the Defendants applied for unsecured group loan of shs 200,000,000 to be borrowed by "Nominated employees who were teachers, and staff of Green Acres international schools. After the loan application was accepted, the Plaintiffs bank signed the Agreement with the Defendants.

The Guarantor of the loan, was "*Managing Director*" of Green Acres international schools, and the Plaintiffs bank opened a special account known as "*Plura account*" which a sum of shs 200,000,000 was deposited, and then transferred to another account known as "*Cruiser Account*" and from that, account the borrowed sum was distributed to the individuals account.

He also explained that, borrowers were supposed to deposit their monthly remittances into their account, and the paid up sum, was to be transferred into cruise account, and the deposited monies were supposed to be transferred to the loan deposit account.

The witness said repayment of loan first went smoothly, but in 2010 there was problems in re-payment of outstanding loan, because some of Defendants employees, defaulted to make monthly remittances, and re-pay the loan.

Due to persistent default in payment of loan, PW1 said the bank was compelled to hire private debt collectors to collect an outstanding loan, but entire debt was not fully recovered.

Bearing in mind there was remaining balance to be paid, the Plaintiff instituted the present suit for recovery of all outstanding debts. The witness said by the moment the suit, was filed the outstanding loan was shs 59,270,012.07.

To substantiate his point that, Defendants were indebted PW1 tendered the Loan Agreement, and bank statement which were admitted as Exhibit P1 and P2 respectively. The bank statement shows the remaining unpaid loan was shs 59,270,012.07

On recovery of loan, the witness said the Plaintiff's bank decided to recover the loan from Defendants employees, because, the Agreement allowed them to make recovery of the loan in case of default from employer. He insisted that, even collection from employers account was in accordance with the agreement.

On reconciliation of paid amount and outstanding loan, PW1 said that, was done regularly, and the remaining balance is easily visible in the Defendant's bank accounts, which is computer generated.

Finally, PW1 insisted that, going by Exhibit P2- the Defendants bank Account Statement, it is clear that, there is an outstanding un paid loan and he prayed to the court to give judgment in their favour as per plaint.

After PW1 testified the Plaintiff Bank called Justin Butogwa who testified as PW2.

In his testimony, PW2 told the court that,he is a Recovery **officer** with the Bank.

Then the witness said, he knew Green Acres because were bank debtors, who were not paying their staff loans.

On repayment of the loan, PW2 said Defendants including the 3rd Defendant as employer were supposed to make monthly deductions from salaries of employees who took the loan and remit deducted sum plus the interest to the Plaintiff.

He enlightened the court that, going by the Loan Agreement repayment period was 60 months, or 5 years but to-date Defendants have defaulted to make full payment

Relying on Bank statement of Dar es Salaam Green Acres **Exhibit P2 rested his testimony by informing the court that, , by 31/7/2010** Defendants were in-debited to the sum of shs 57, 650,000/= and he closed his testimony. After PW2 testified the Plaintiff case was closed.

Following closure of the Plaintiff's case, and **Defendants** called **Scarion Benedict Katalyeba, who testified as DW1 ,and Julian Martin Bujugo who testified as PW2.**

In her testimony, DW1 informed the court that, she is working, as Managing Director of Dar es Salaam Green Acres International School Limited

She then clarified to the court that, Dar es Salaam Green Acres International School Limited is registered entity, but she is not aware of any entity called Green Acres International School.

Further DW1, explained to the court that, Green Acres International School limited is not the owner and proprietor Dar es Salaam Green Acres International School Limited.

The witness then added that, her entity Dar es Salaam Green Acres International School Limited was not involved in taking the loan and is not associated with the 3rd Defendant Martin Bujugo.

To support her statement on entity which took the loan, DW 1 referred the court to Exhibit P1 which single out Green Acres School Dar es Salaam as the entity which took the loan.

Regarding the Bank Statement Account No 018103000330, DW1 admitted before the court, that it belong to Dar es Salaam Green Acres International School Limited, which is her entity and its *"Business Current Account"* of the school but it was used without their consent.

She also denied that, Dar es Salaam Green Acres International School limited did not enter into loan agreement with the Plaintiff`s bank, and their staffs who took the loan were solely responsible to pay the loan directly to the bank.

Next DW1 admitted that, there staffs who did not pay their loans because they ceased to be their employees. Finally, she closed her testimony by maintaining that, they were not liable to pay the outstanding loan.

After DW1 closed her testimony, and Defendants called Julian Martin who testified as DW 2.

In his testimony DW1 told the court that, he knows Green Acres International School Ltd as Non Governmental Organization (NGO), and added that, he don't know Green Acres Dar es Salaam.

On the loan advanced to their employees, DW2 said their entity Dar es Salaam Green Acres International School applied for the loan from the Plaintiff's bank, but were not successful. Instead the Plaintiff bank entered into loan agreement with Green Acres School and offered loan to employers.

Then witness stated that, the bank account which was used on loan business was of Dar es Salaam Green Acres International School, but there was no authority to use the Bank Account. The witness complained that, the plaintiff bank just tempered with school account.

Regarding re-payment of loan, DW2 told the court that, its their employees who were under obligation to re- pay their loans straight to the Plaintiff's bank and not Defendants.

On deductions of employees salaries and remittance of deducted sum to the Plaintiff bank, the witness said that, it was done by Green

Acres International School, by good faith after being requested by their workers to facilitate payments to the Bank. He then said a sum of shs 67, 000,000 was deducted from their employers and remitted to bank account.

On his involvement in signing the loan agreement, DW2 during cross examination admitted that, he signed, the agreement because his workers of Dar es Salaam Green Acres International School were also involved as borrowers.

On modalities of re-payment of the loan, DW1 said there was deductions salaries from their employers, by his company which were remitted to the Plaintiff's bank. He also briefed the court that, other payments were made to collecting agents, and there has been no reconciliation on the amount paid by borrowers, and the outstanding loan. So, the witness pointed to the court that, the claimed sum in the Plaint is not authentic.

Finally, DW2 brief the court that, since the responsibility to pay the loan were on individual borrowers that, Defendants are not liable to pay the outstanding loan, because the loan was supposed to be recovered from the borrowers themselves. After DW2 testified the Defendants closed their defence.

Following the closure of the Plaintiff`s and Defendants case Counsels from both sides with the leave of the Court made their final submissions and greater extent supported their clients cases.

The Plaintiff`s Counsel in his submission, stated that, from the testimony of PW1, Defendant's staffs and employees were granted group loan of shs 200,000,000 and then additional loan of shs 150,000,000 was advanced to them.

Plaintiff`s Counsel then submitted that, going by testimony PW1 it is certain that, a sum of shs 59,270,012.07 was still outstanding by 59,270,012.07 as to July, 2010.

He then submitted that, since the entire loan was guaranteed by the Defendants then they were under the contractual obligation to pay the outstanding loan by virtue of their capacity as guarantors of the loan.

The Counsel then insisted to the Court, that, Clause 7 of the Loan Agreement- Exhibit P1 bind Green Acres School Dar es Salaam as ***suretys of*** paying any outstanding loan. He maintained that, that, Defendants liability of paying outstanding loan arises from clause 7 of Exhibit P1.

On whether Defendants breached the terms, and conditions of the Loan Agreement, the Counsel submitted that, the Defendants defaulted to deduct and remit to deductible sum to the Plaintiff bank as per agreed schedule.

Finally Plaintiff counsel prayed that, since Defendants are liable to pay the remaining sum by virtue of Clause 7 of Exhibit P1, and they have not done so, they were praying to the court to grant the orders and reliefs sought in the plaint.

In response to Plaintiff's claims and submissions, the Defendant's Counsel submitted that, the 1st Defendant is not a registered entity, the 2nd Defendant is Non Government Organization (NGO), and 3rd Defendant was at onetime an employee of the 2nd Defendant, but none of them is liable.

On the role played by Dar Green Acres International School the Counsel submitted that, the school was not involved in the loan agreement, and it is the Plaintiff bank which forced to debit it Account No 0181030003300 without consents of the owner . For that, matter the school may not be held liable.

On the claim of shs 59,270,012.70, filed by Plaintiff bank, the Counsel submitted that, the testimonies of DW1 and DW2 established that, the loan was supposed to be paid by employers

directly to the bank. In a nutshell the Counsel submitted that, borrowers were solely responsible for repayment of the loan

He then added that, since there has been no bank reconciliations of the outstanding sum, which Defendants were involved, then it is obvious that, the claim amount in the plaint is not authenticated, and due to that, the Plaintiff has even failed to prove his claim.

Relying on the testimonies of DW1, DW2 and his submission, , Defence Counsel submitted that, the Plaintiff claims on the demanded sum was not proved on the balance of probability and the suit is supposed to be dismissed with costs in favour of Defendants.

The court has considered the Plaintiff's claims on outstanding loan, in line with Defendants defence that, the are not liable to pay the outstanding loan, and find the key issue for the determination is whether the Defendants or any of them is contractual liable to pay outstanding loan plus the interest. Therefore for the proper determination of the abovementioned issue, the court will consider all seven agreed issue.

To start with the court would like to make an observation which has a bearing to this decision by saying under Section 110 (1) of the Evidence Act, Cap 6, R.E 2002 who alleges certain claim or fact must prove it. In deed the Section 110(1) states that;

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that, those facts exist.

Next, Subsection 2 of the same Section states

When a person is bound to prove the existence of any fact, it is said that, the burden of proof lies on that, person.

Thus in view of Section 110 (1) and (2) of the Evidence Act, it certain that, then burden of proof is on the Plaintiff to prove that, that Defendants are liable to pay the outstanding loan.

With that legal position in mind, I revisited the first issue whether three Defendants were bound by the terms and conditions of *Agreement for Provision of Personal Loans to Employees* and the presented evidence provides two lines of arguments, honestly I am aware that, only parties to the Agreement are the ones who are bound by that agreement.

Upon carefully perusing the *Agreement for Provision of Personal Loans to Employees between Green Acres School and the National Bank of Commerce Limited* Exhibit P1, I noted that, the signatory of the Agreement were the Plaintiff bank and Green Acres School Dar es Salaam and Julian Martin Bujugo Rushago the 3rd Defendant as the ones who signed the Agreement. The 3rd Defendant signed the Agreement as the Managing Director of Green Acres School Dar es Salaam of P.O.Box 105177 Dar es Salaam impliedly he understood

the terms, so he and other are bound by terms and conditions, of the loan agreement.

On the parties to the Agreement again, I find Clause 1 of Exhibit P1 mention NBC Limited the Bank, and Green Acres School Dar es Salaam the employer which was represented with its Managing Directors who is the 3rd Defendants.

Furthermore the Court found in clause 2.1.16 of the Loan Agreement Green Acres School Dar es Salaam issued a Guarantee in a form of *"suretyship"* on repayment of the loan.

Clause 3.1.1 states that, by *"suretyship"* it means the Employer agreed to bind himself as surety and *"co-principal debtor in sodium to the bank for repayment of any personal loan granted by nominated employee"*.

So, taking into account that, Green Acres School Dar es Salaam of P.O.Box 105177, Dar es Salaam and 3rd Defendant were signatory to the Loan Agreement Exhibit P1, I am find and decide the 1st issue by deciding that, , the Defendants are bound with the terms and conditions of *Agreement* for Provision of Personal Loans to Employees-Exhibit P1.

By Exhibit P1, I find the Plaintiff's Bank has proved that, the Defendants were bound by the terms and conditions of the Loan Agreement.

Moving to the 2nd issue, of whether the Defendants owe the Plaintiff any outstanding sum, honestly I find that, depends on what was agreed upon by the parties on repayment of the loan.

In addressing the second issue I revisited Bank Account Statement of Dar es Salaam Green Acres International School, Account No 0181030003300 which was admitted as Exhibit P2 and find there is an entry which reads that, by 31/7/2010 there is an outstanding loan to the sum of 57, 765, 199,02. Also, PW1 and PW2 testified before this court that, the amount is unpaid loan.

Thus taking into account Clause 7.1 of Exhibit P1 the School which was the employer agreed to be a surety, and guaranteed repayment of any outstanding loan, honestly, I find the Defendants as "surety" owe the Plaintiff for any outstanding loan.

The court finding on surety of the Defendants takes into account that, it is tripartite transactions, which involves the debtor who in this agreement were staffs of the school, who borrowed money, " as well as the "creditor who in this case is the Plaintiff bank " and the "surety or guarantors who in this case is the school which was

represented by its directors including the 3rd Defendant to sign the Agreement.

So, in the said tripartite transaction surety, or guarantor as the case may be, the surety put up frank, and binding pledge, and enforceable under the indemnity contract, that, if all means of recovering the loan from "debtor/borrower has failed, like in the present case where DW1 and DW2 said some borrower has left their employments without paying their loan, then the guarantor or surety will pay any outstanding loan plus interests and whatever charges and costs.

So the absence of any credible evidence that, the entire loan has been paid, then surety who in this case are Green Acres School Dar es Salaam and 3rd Defendant it is obvious Defendants owe the Plaintiff unpaid loan stated in the Bank Statement -Exhibit P2.

On the DW1 and DW2 testimonies that, , their bank account was forcibly used by the Plaintiff, is not convincing at all for reasons, because there is no credible evidence before the court if the Defendants protested to the Plaintiff bank on the use of the said bank account. It is in this regard, I find the Defendants argument that, they did not authorize the use of the said Bank Account to be not credible at all.

Moving to the 3rd Issue whether 3rd Defendant was duty bound to ensure repayment of the loan, honestly, I find that, depends on whether he was contractual liable to pay the outstanding loan. In addressing the above I find the 3rd Defendant is the one who was the signatory of the Loan Agreement and the Managing Director of the School.

It seems to me that, 3rd Defendant had a contractual obligation under clauses 6.11, 6.12 and 6.13 of Exhibit P1 the Loan Agreement, of ensuring that, all personal loan of "Nominated Employers" whether those staffs were in employment or not is duly re-paid to the bank . To conclude, I find the 3rd Defendants being Managing Director and two Defendants being sureties were under the obligation to re-pay an outstanding amount and their obligation arises on their capacity as sureties and clauses 6.11. 6.12 and 6.13 which required the employer to indemnify the Plaintiff bank repay any outstanding amount. So, I answer issue No 3, in affirmative that, 3rd Defendant was and is still under contractual obligation to repayment any outstanding the loan.

Moving to the issue No 4 whether the Plaintiff bank violated the terms and condition by collecting and receiving money straight from the Defendant employees without involving Defendants, I find Clause 17 of Exhibit P1 of the Loan Agreement allows the Plaintiff` to

take whatever measures or action he may decide, where there is a breach to remedy the breach .

So going by the wording of Clause 17 of Exhibit P1, I find, the Plaintiff`s action of collecting and receiving money from borrowers was not a breach of violations of the Loan Agreement.

Taking in account that, there are testimonies from DW1 and DW2 who admitted that, there are employees who were not paying the loan as per agreed scheduled, that, is a clear evidence that, there were series of defaults on the part of borrowers and Defendants in re-paying the loan .

On the foregoing reasons, I find and decide that, Plaintiff bank action of collecting the outstanding loan directly from employees was sanction by clause 17 of Exhibit therefore is not a breach of the terms of the Loan Agreement.

Turning to another issue raised by the Defendants that, the claimed amount is not authentic because there was no reconciliation, on payments made, honestly I find that, argument has no basis because there is a Bank Account Statement of Dar es Salaam Green Acres International School, of Account No 0181030003300, Exhibit P2 which shows the amount of loan which was borrowed, the amount of money which was re paid, and the outstanding loan. In addition, to

that, the fact that, part of the loan has not been paid, has even supported by DW1 in her testimony who plainly briefed the court that, part of the loan was paid, and there is remaining sum which is unpaid because some of the employees left their employment.

On the issue whether the Plaintiff bank tempered with the Defendants bank account, honestly I did not find any credible evidence from the Defendants to support that, assertion. It seems to me if it is true the Plaintiff Bank trespassed into Defendant's Accounts as claimed one would have expect series of correspondences from Defendants protesting and opposing the use of the Bank Account. And if there such evidence is there then it was never brought to the court.

So on the point of whether the Defendants bank Account was forcibly tempered it is my decision that, I did not find any dot of evidence to substantiate that point. Even the bank rule which is subject of the complaint was not presented to the court. I find that, complaint has no basis and dismiss it.

Going into the last, and final issue of what, reliefs are parties entitled too, I find defendants through their "*guarantee*" and "*suretyship*" on the Loan Agreement -Exhibit P1 are contractual liable to pay for any outstanding loan as co principal debtor in sodium with each individual nominated employee.

Further, the Court find in Exhibit P2, the Bank Statements that, there is outstanding loan which has not been unpaid. The Plaintiff claim of unpaid loan was even supported by DW1 and DW2 who said some of the borrowers did not pay their loans, and they left their employment without paying their loan. In view of that, evidence from both the Plaintiff and Defendants as I have explained above, I am satisfied that the Plaintiff bank has proved its claim of shs 59,270,012 on balance of probability.

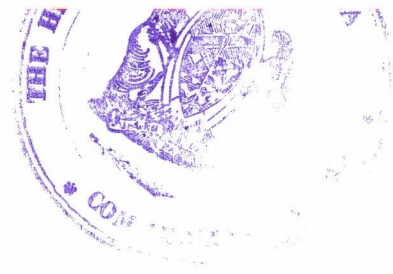
For the reasons, I hereby grant judgment with costs in favour of the plaintiff bank and orders that;

1. The Defendants are ordered to pay the Plaintiff a sum of shs 59,270,012 as an outstanding loan.
2. The Defendants are ordered to pay the Plaintiff an interest of 12 % per annum from 1/5/2010 to the date of Judgment. The above - mentioned interest rate takes into account part of the loan was paid.
3. The Defendant is ordered to pay interests on the Decretal amount at the rate of 12% per annum from the date of the Judgment to the date of payment in full
4. The Defendants are ordered to pay costs of the suit.

In view of the above, the Plaintiff's suit succeeds. The right of Appeal is fully explained to the parties.

Dated at Dar es Salaam this 4th day of September, 2015

H.T.SONGORO
JUDGE



Delivered at Dar es Salaam this 4th day of September, 2015

H.T.SONGORO
JUDGE

A handwritten signature in black ink, consisting of a stylized 'S' followed by a horizontal line, is written over the judge's name.



The Judgment was delivered in the presence of Mr. Mlawi, Learned Advocate for the Plaintiff and Mr. Chambiri, Learned Advocate for the Defendants.