IN THE HIGH COURT OF TANZANIA

COMMERCIAL DIVISION

AT ARUSHA

COMMERCIAL CASE No. 13 OF 2014

BETWEEN

FBME BANK LIMITED.....PLAINTIFF

Versus

MAKUMIRA FILLING STATION LIMITED.....1st DEFENDANT

CHARLES AQUILINE MAKOI.....2nd DEFENDANT

CALISTER AQUILINE MAKOI.....3rd DEFENDANT

JUDGMENT

MRUMA, J.

The Plaintiff's bank FBME Bank Limited brought this action against the Defendants Makumira Filing Station, Charles Aquiline Makoi and Calister Aquiline Makoi for among other orders an order to recover T.shs 230,186,269.23, general damages for breach of contract and interest thereon.

The Plaintiff's suit is that on 30th July 2009, the Plaintiff entered into an Advance Payment Guarantee Agreement (the Facility) with the first Defendant. Under the said facility the Plaintiff issued Bank Guarantee in

favour of Chevron Tanzania Limited in the sum Tanzania shillings 200,000,000/=.The facility was granted on the first defendant's application.

The second and third defendants jointly and severally guaranteed the first defendant's compliance. As security, the second defendant offered to charge as mortgage his property on **Plot Number 92** Olosiva Area in Arumeru District with **Certificate of Title No. 25821-LRM.** As further security the first defendant also issued a letter of set off over credit balances in favour of the Plaintiff. The said guarantees were valid for a term of one year but before the expiry of the period the first defendant by a letter dated 24th May, 2010 requested for an extension of the facility for another one year. The Plaintiff accepted a renewal of the Facility to allow the Bank Guarantee validity in favour of Chevron Tanzania Limited to be extended up to 31st October 2010. The extension was communicated to the beneficiaries by a letter dated 12th August 2010.

The 1st Defendant's applications for renewal of the Facility and issuance of other types of facilities such as short term loan and overdraft were not accepted by the Plaintiff.

Pursuant to the terms of the Demand Agreement and during the validity of the Demand Guarantee and the validity of the Facility, Chevron Tanzania Limited vide its letter dated 28th October, 2010 demanded of the Plaintiff payment of the sum of T.shs 134,753,022.88 being the outstanding amount the 1st Defendant owed Chevron Tanzania Limited as at 28th October, 2010. The Plaintiff complied and effected the payment on first demand as per agreement.

The Plaintiff notified the Defendants that it made payments to Chevron Tanzania Limited on demand and advised them that the liability of the 1st defendant amounted to T.shs 134,517,877.95 and it requested the first Defendant to confirm repayment structure of the credit facility. The first defendant defaulted in liquidating its liability to the Plaintiff despite demands, meetings between the plaintiff and defendants and various promises to pay.

To prevent the Plaintiff from exercising any right over the mortgage the 2nd Defendant entered a caveat over the mortgaged property and through his lawyers demanded the Plaintiff to release the Certificate of Title of the mortgaged property purporting that the first Defendant had in relation to the guaranteed liability paid Chevron Tanzania Limited direct.

It is alleged that in total breach of the Payment Guarantee Agreement (i.e. the Facility), the defendants are in breach of the binding undertaking on the part of the defendants and the Plaintiff having complied with its obligations under the Facility, is entitled to reliefs claimed. The claim is therefore against the Defendants jointly and severally.

Summons to appear were issued and the Defendants entered appearance in person on 25th November, 2014. As they were unrepresented they sought an indulgence of the court to engage a lawyer. They engaged Mr. Fidelis Peter learned advocate who unsuccessfully applied for extension of time within which to file Written Statement of Defence.

On 4th March, 2015 the plaintiff applied for a default judgment but when the matter was called for orders on 6th March, 2015 court was requested to defer the application for default judgment as parties were negotiating an out of court settlement. The prayer was granted and the application was deferred. The story that parties were intending to settle was repeated on 12th October 2015 and several times thereafter. On 2nd December, 2017, court was informed that the Defendants were no longer willing to settle.

On 28th November, 2016 after perusing the application for default judgment I refrained from entering a default and directed the plaintiff to prove its case ex-parte.

From the Plaintiff's pleadings the following are issues were framed for determination:-

1. Whether the Defendants breached the Advance Payment Guarantee Agreement (the Facility) with the Plaintiff?
2. What remedies are available to the parties.

The Plaintiff called one witness Minesh Ghella (PW1) to prove its case. On the issue of whether the Defendant breached the Advance Payment Agreement with the Plaintiff? The Plaintiff's only witness **Minesh Ghella (PW1)** testified that on 30th July, 2009 the first defendant entered into an Advance Payment Guarantee Agreement (Exhibit P1). That as security for the Facility the second and third Defendants jointly and severally guaranteed the 1st Defendant compliance with the terms and conditions of the Facility, and the 2nd Defendant offered to charge as mortgage his

property on Plot No. 92 with Certificate of Title No 25821 LRM (Exhibit P3) Olosiva Area in Arumeru District. As further security the 1st Defendant also issued a letter of set off over credit balances in favour of the Plaintiff (Exhibit P4).

It is further evidence of PW1 that pursuant to terms and Demand Guarantee and during the validity of the Facility, Chevron Tanzania Limited through their letter dated 28th October, 2010 demanded the payment of sum of **T.shs 134,753,022.88** being the outstanding amount the 1st Defendant owed Chevron Tanzania Limited. The payment was done and the defendants were advised accordingly. The defendants defaulted in liquidating their liabilities despite making various promises (**Exhibit P11).**

Further to that it is the evidence of the Plaintiff that in order to prevent the Plaintiff from exercising any right over the mortgage, the 2nd Defendant entered a caveat over the mortgaged property and through his lawyers demanded the plaintiff to release the Certificate of Title of the mortgaged property purporting that the first Defendant had paid Chevron Tanzania Limited directly (Exhibit P12) which turned to be untrue.

From this piece of evidence and in absence of evidence to the contrary, this court finds that there was a breach by the Defendants by failure to pay the outstanding amounts and interests which are established by **exhibit P14** to be Tanzania shillings **230,186,269.23** The loan was secured by a personal guarantee of the 2nd and 3rd Defendants and a chattel mortgage of the second defendant. The first Defendant therefore was in breach of the contract to make good of the payments in the loan agreement while

the second and third Defendants are in breach for failure to make good the amount they guarantee and secured.

As far as remedies are concerned the Plaintiff seeks to recover Tanzania shillings **230,186,269.23** against Defendants together with commercial interest at the rate of 24% from 1st August, 2014 to the date of judgment and further interest on the decretal sum until payment in full; general damages and costs of the suit.

The primary liability for the loan is that of the first Defendant and her indebtedness is proved by the testimony of PW1 and the documentary evidence adduced. Exhibit P1 is an offer letter relating to the Advance Payment Guarantee (Facility) which the Plaintiff had extended to the first Defendant. The amount extended was T.shs 200,000,000/=. Exhibit P3 is mortgage deed Certificate of Title and spouse consent of the 3rd Defendant. To that extent the Plaintiff has proved as against the Defendants amounts claimed in the suit.

Secondly under exhibit P3 the 2nd Defendant executed a mortgage pledging his Property on Plot No 92 with Certificate of Title No. 25821 LRM and the 3rd Defendant gave consent. I duly determined that the Defendants are jointly and severally liable to pay the Plaintiff the **T.shs 230,186,269.23** which includes the principal sum plus the accrued interest.

As far as the claim for general damages is concerned, the Plaintiff is not entitled to an award of general damages under the principle of *restitutio in integrum* for money due from the Defendants on the following grounds; in

the usual suit a claim for damages flows under the doctrine established in East Africa in the East African Court of Appeal case of **Dharamshi vs. Karsan [1974] 1 EA 41** that general damages are awarded to fulfil the common law remedy of *restitutio in integrum* which is to the effect that the Plaintiff has to be restored as nearly as possible and as money can do to a position he or she would have been in had the breach complained of not occurred. This principle is well laid out in **Halsbury's laws of England Fourth Edition Re-issue volume 12** (1) paragraph 812 where it is stated that general damages are those losses, usually but not exclusively non-pecuniary, which are not capable of precise quantification in monetary terms. They are presumed to be the natural or probable consequence of the wrong complained of with the result that the Plaintiff is required only to assert that such damage has been suffered. In **Johnson and another v Agnew [1979] 1 All ER 883** Lord Wilberforce held that the award of general damages is compensatory:

> " i.e. that the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed."

In the case at hand because the award on the plaintiff's claim on the outstanding amount which the Plaintiff has been awarded is compensatory, if general damages is awarded it will fulfil the same purpose and therefore amount to double compensation.

Regarding claim of interest the principle is that where money is due and owing to another but withheld and made unavailable to the him an award

of interest compensates the deprivation. Interest may be awarded as compensation for keeping the Plaintiff out of his money at the discretion of the court under section 29 of the Civil Procedure Code. The rate must however, be reasonable. What is a reasonable rate of interest has been considered in **Riches v Westminster Bank Ltd [1947] 1 All ER 469 HL at page 472** where Lord Wright explained the essence of an interest award in the following words:

> "...It may be regarded either as representing the profit he might have made if he had had the use of the money, or, conversely, the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation...."

What is the quantum for deprivation for non use of the money? The award proceeds from an assumption that the Plaintiff would have borrowed to replace that which had been deprived by the Defendant. According to **Halsbury's Laws of England Fourth Edition Re-issue volume 12** (1) paragraph 850:

> "it is assumed that the Plaintiff would have borrowed to replace the assets of which he has been deprived..."

An award of interest also falls under the doctrine of *restitutio in integrum* and is meant to reflect the rate at which the Plaintiff would have had to borrow what was withheld. This is the holding of Forbes J in **Tate & Lyle**

Food and Distribution Ltd v Greater London Council and another [1981] 3 All ER 716 at page 722:

> "I think the principle now recognised is that it is all part of the attempt to achieve restitutio in integrum. ... I feel satisfied that in commercial cases the interest is intended to reflect the rate at which the Plaintiff would have had to borrow money to supply the place of that which was withheld."

In the premises of this case the Plaintiff will be awarded reasonable interest which I fix at the rate the 16% per annum from 1st August 2014 to the date of Judgment. Secondly in terms of Section 30 (3) of the Civil Procedure Code the Plaintiff is awarded further interest at the court's rate of 7% per annum from the date of judgment till the date of judgment of full payment of the decretal sum. Under section 30 (1) of the Civil Procedure Code, costs follow the event unless the judge for good reason orders otherwise. I see no good reason to deny the Plaintiff the costs of the suit as against the Defendants. The Plaintiff's suit succeeds with costs as against the Defendants to the extent explained above.

A.R. Mruma,

Judge.

Dated at Dar Es Salaam, this 6th Day of October, 2017.