IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 171 OF 2002

NATIONAL BANK OF COMMERCE LIMITED ..... PLAINTIFF

VERSUS

1. SYLVESTER LWEGINA BANDIO ..... 1st DEFENDANT
2. HILDA KARABARANGU BANDIO ..... 2nd DEFENDANT
(Both t/a Mwanza Textile Enterprises)

JUDGMENT

Date of the Last Order: 12/12/2017 *Date of the Judgment 16/02/2018*

SEHEL, J.

The present judgment concerns a dispute, between the Plaintiff and defendants, arose from a term loan agreement. The plaintiff alleged in her plaint that on 12th March, 1992 the Plaintiff granted a term loan agreement of Tshs. 16,050,000/= to the defendants that had to be repaid in 20 successive quarterly instalments of Tshs. 877,500 effective from September, 1992 and the last instalment to be paid by 30th June, 1997. By

the terms of the agreement, interest chargeable to the loan amount is 27.5% per annum and upon default a further penal interest of 1% per annum is chargeable. It is averred in the plaint that the loan agreement was secured by a chattel mortgage executed on 27th March, 1992 whereby the 1st defendant mortgage his marine vessel MZA 140; guarantee instrument executed by the 1st defendant on 13th April 1994; and pre-existing legal mortgage registered on 16th September, 1987 over the 1st defendant's property with the right of occupancy CT No. 033011/29 over Plot No. 166 Block D, Isamilo Mwanza City. The Plaintiff alleges that the defendants defaulted in repaying the loan despite repeatedly reminders and by 30th June, 2002 the outstanding sum of Tshs. 76,083,979 remained unpaid. She thus filed the present summary suit praying for judgment and decree against the defendants jointly and severally for:-

1) Payment of Tshs. 76,083,979/=;

2) Interest on the outstanding sum at the discounted rate of 26% per annum from 1st July, 2001 to the date of judgment;

3) Interest on the decretal amount at the Court's rate from the date of judgment to the date of final and full satisfaction; in the alternative, and/or

4) Sale and vacant possession of the property over CT No. 033011/29 Plot No. 166 Block D Isamilo, and

5) An order for sale of the property over CT No. 033011/29 Plot No. 166 Block D Isamilo;

6) An order for delivery and sale of Marine Vessel No. MZA 14 with engine no CESJ 0360;

7) Costs of the suit; and

8) Any other and further reliefs as may deem just to grant.

The defendants upon being served with the plaintiff's plaint, successfully obtained leave to defend and filed their joint written statement of defence and thereafter amended it. In their defence the defendants did not deny being advanced Tshs 10,212,440/= out of Tshs. 16,050,000/=. They averred that they could not repay the loan before receiving the full agreed amount. They allege that interest was to be repaid from the

earnings of the project which the plaintiff caused it not to make any earnings but not making the payment of full amount. The defendants therefore raised a counter claim seeking for an order of breach of contract by the Plaintiff and prayed for payment of Tshs. 100,000,000/= being general damages; compensation of Tshs. 156,592,000/= being loss of projected cumulative earnings; return of the title deed deposited as security with the plaintiff; interest on the decretal amount at the rate of 7% per annum from the date of judgment to the date of full payment; costs of the suit; and any other orders as may be deem fit to grant.

In terms of Rule 50 of the High Court Commercial Division Procedure Rules, GN 250 of 2012 ("the Rules") four issues were framed. The issues are:

1. Whether the plaintiff granted a term loan of Tshs. 16,050,000/= to the defendant in 1992. If the answer is in the affirmative, how much was disbursed?

2. Whether the defendant defaulted in paying the instalments agreed under the loan agreement?

3. Whether the plaintiff has breached the terms of loan agreement. If the answer is in affirmative, whether by such breach the defendants fishing project was frustrated?

4. To what reliefs are parties entitled?

At the trial of the suit, the Plaintiff called one witness to establish her case while the defendants called two witnesses. The plaintiff's witness, Venant Laurent (PW1) told the Court through his witness statement admitted on 16th day of November, 2017 that he is employed by the plaintiff as Recovery Manager at head Office, Dar es salaam and that according to the information he obtained from his employer he is aware that on 12th day of March, 1992 the Plaintiff granted the defendants a Term Loan of Tshs. 16,050,000/= for part financing 34% of the total fixed costs of the fishing projects commissioned by the defendants. He said in terms of clause 3 (1) of the agreement, repayment was to be effected in 20 successive quarterly equal instalments of Tshs. 877,500/= effective from September, 1992 with the final instalments due by 30th June, 1997 and that in terms of Clauses 4 and 7 of the agreement, interest was chargeable at the rate of 27.5% per annum and upon default, a further

penal interest of 1 % per annum was chargeable. It was PW1's testimony that on 27th March, 1992 the 1st defendant executed chattels mortgage over his Marine Vessel MZA 140 as security for repayment of Tshs. 16,050,000/= plus accrued interest; on 13th April, 1994 the 1st defendant executed a guarantee instrument to guarantee the repayment of the loan, interest and costs; and the loan was further secured by pre-existing mortgage registered on 16th September, 1987 over the 1st defendant's property of the Right of Occupancy C.T. No. 033011/29 on Plot No. 166 Block "D" Isamilo, Mwanza. PW1 said it was a condition of the mortgage that in the event of default in payment obligation, the Bank would be entitled to exercise all statutory powers conferred by law onto mortgagees. PW1 further testified that the defendants failed to repay the principle amount borrowed plus interest as a result as at 30th June, 2002 the sum outstanding was Tshs. 76,083,979/=. The witness tendered the following exhibits loan agreement (Exhibit P1); Guarantee Instrument (Exhibit P2); Mortgage Deed (Exhibit P3); and Bank Statement (Exhibit P4).

During cross examination, PW1 said the first disbursement was made in April, 1993, a year after the signing of the agreement and that bank

guarantee was registered in April, 1994. PW1 also conceded in his cross examination that the defendants were granted a total amount of Tshs. 10m and not 16,050,000/=. He said the plaintiff does not have records that existed prior to 30th September during the restructuring of the bank. He said the interest which is claimed by the plaintiff is based on Tshs. 10m advanced to the defendants.

The testimony of the 1st defendant's witness one Sylvester Lwegira Bandio (DW1) whose witness statement was admitted on 12th day of December, 2017 was such that in 1989 the defendants made consultation with the plaintiff with a view of obtaining financial assistance in a fishing project after the defendants conducted a feasibility study. DW1 said the defendants made an application to the plaintiff for financial assistance and attached thereto a feasibility study. In 1990 the plaintiff approved the application and agreed to finance the project by disbursing Tshs. 16,050,000/=. He said on 20th April, 1993 the plaintiff made first disbursement of Tshs. 6,100,000/=; on 26th August, 1993 disbursed Tshs. 928,260/=; and on 2nd May, 1994 disbursed Tshs. 3,284,180/= leaving a balance of 5,837,560/= which had never been released despite repeated

demands thus frustrated the project. DW1 said the request for payment was done through a letter to the plaintiff on the 15th May 1994 but with no yield. He said he took efforts by reminding the plaintiff on her obligation through her Branch Manager at Mwanza to disburse the remaining funds for the project but plaintiff kept assuring the defendants to be patient and yet failed to make disbursement. DW1 said they suffered grief, embarrassment, anxiety, frustration, inconveniences, psychological effects of stress, and had to shy away from International suppliers. The witness tendered and admitted the following exhibits: Feasibility Study (Exhibit D1); Application letter for financial assistance of Term loan (Exhibit D2); A letter of offer from the bank (Exhibit D3); A letter from the bank on disbursement of Tshs. 828,260/= (Exhibit D4); Various Pro-forma invoices (Exhibit D5 collectively); a letter requesting for disbursement of Tshs 5,837,560/= (Exhibit D6); and Valuation report for mortgaged property (Exhibit D7).

In his cross examination, DW1 acknowledged that the defendants took Tshs. 10m and never repaid it back. On delay for disbursement, he said he

never complained in writing but he was following up with Mwanza regional branch where he was assured that funds would be released.

The branch manager of the plaintiff, at Mwanza office, was the second witness for the defendants, Thomas Panda Rweyemamu (DW2). His witness statement was admitted on 12th day of December, 2017 and essentially it was his testimony that he was stationed in Mwanza branch in 1992 as Branch Manager, that is when he came to know the defendants and that the first disbursement of Tshs. 6,100,000/= was made by him after he received an approval from the headquarter. He however never left the plaintiff's bank in April, 1993. Therefore, he did not continue to deal with the defendants' loan. It was DW2's opinion that the bank was supposed to pay the final disbursement direct to the supplier as per the letter of offer. He did not see any reason as to why the bank refused to make final disbursement while defendants fulfilled all the pre disbursement conditions.

In his cross examination, DW2 acknowledged that he was terminated from his employment by the plaintiff in 1994 but denied that was not the reason for him to testify against the plaintiff.

The above are the evidences brought before the Court to prove the issues framed. Let me now determine the issues. **The first issue is whether the Plaintiff was granted a term loan of Tshs. 16,050,000 in 1992 and how much was disbursed.** This issue stems from Paragraph 4 of the Plaint wherein the plaintiff alleges:-

> *"4.By loan agreement dated 12th March, 1992 the Plaintiff granted a Term Loan of Tshs. 16,050,000/= to the Defendants jointly and severally trading as Mwanza Textile Enterprises. A copy of the loan agreement is annexed hereto and marked NBC 1."*

On the other hand, the defendants in their joint written statement of defence, at Paragraph 5, averred the following:-

> *"5. That, the contents of paragraph 4 of the plaint are disputed and the plaintiff is put to strict proof of actual payment of the agreed funds to the defendants, for the defendants assert that the plaintiff actually paid Tshs. 10,212,440 instead of the agreed funds of Tshs. 16,050,000/= and failed or refused or neglected to pay the remaining Tshs. 5,837,500/= which failure and/or refusal amounts to a total breach of contract."*

Submissions from the counsel for the plaintiff are such that the evidence from documents tendered and admitted in Court by PW1 and DW1 together with the fact that the defendants do not deny accessing the facility up to the sum of Tshs. 10,212,440/= then issue number one is answered in affirmative. Counsel for the defendants argued though the records show that the term loan which the parties agreed in 1992 was Tshs. 16,050,000/= and that the defendants do agree that Tshs. 10,212,440/= was granted to them but the plaintiff failed to prove that the defendants were granted the full loan amount of Tshs. 16,050,000/=. She therefore argued that issue number one should be resolved in the negative.

From the evidences adduced before the trial and from counsels' submissions it is not disputed by defendants through the testimony of DW1 that in 1992 the plaintiff and defendants agreed to a term loan of Tshs. 16,050,000/=. It is also not disputed by defendants through the testimony of DW1 that the plaintiff disbursed Tshs. 10,212,440/= instead of Tshs. 16,050,000/=. From the clear admissions by the defendants that the plaintiff granted the defendants a term loan agreement of Tshs.

16,050,000/= whereby Tshs. 10,212,440/= was disbursed, and from the clear evidences of Exhibit D1 and P1, issue number one is answered in the affirmative.

I now turn to the **second and third issues which can conveniently be discussed commonly in as much as they all are inter-dependent.** The findings on these issues would depend upon the fact as to which party has committed breach of the terms of the agreement and what are the consequences thereof. I will therefore start with the allegation fronted by the plaintiff in her pleadings. The plaintiff alleges under Paragraphs 3, 10 and 11 of the Plaint the following:

3. The plaintiff's claim against the defendants jointly and severally is for the repayment of Tshs. 76,083,979/= the sum due and owing as at June, 30 2001 comprised of Tshs. 9,212,440/= as principal and Tshs. 66,083,979/= as interest, plus accrued interest and costs, and or in the alternative for an order for sale and vacant possession of Plot No. 166 Block D, and sale of Marine Vessel MZA 140 with Engine Number C ESJ 0360.

10. In breach of the terms of the agreement, up to and by 30th June, 2002, the total sum of Tshs. 76,083,979/= remained due and payable to the plaintiff. A statement of balance from the plaintiff is annexed hereto and marked NBC 4.

11. Notwithstanding several demands and reminders for repayment of the debt, the defendants have either failed, neglected or refused to liquidate the debt."

The defendants denied the allegations and counter claimed that it was the plaintiff who breached the terms of the agreement, in particular clause 1 of the loan agreement, and Paragraph 2 page 1 of the letter of offer and clause 7 of the letter of offer by not disbursing funds to pay Rabtherm International Ltd for the cold storage machinery when asked to do so by the defendants on 15th May, 1994.

The evidences brought to court to establish the issues are that PW1 said the defendants failed to repay the principal amount borrowed plus interest as a result the debt continues to accrue interest and as of 30th September 2017 the total amount outstanding is Tshs. 3,948,204,017.38. On counter claim, PW1 said the disbursement was done in accordance with the

agreement and there was no agreement to finance fabricated cold rooms. PW1 further told this Court that in terms of clause 7 of the facility letter dated 17th December, 1990 the obligation to finance cold storage facilities was that of the defendants and that the bank was not obligated to disburse the full amount because the offer was not a committed offer. The bank was entitled to stop further disbursement if deem necessary.

The testimony of DW1 is such that it was the plaintiff who breached the agreement by failing to release the remaining balance of Tshs. 5,837,560/= thus frustrated the whole process of fishing project. DW1 further said despite for him seeking quotations three times from cold storage machinery suppliers within the country and abroad as stipulated in the letter of offer at Clause 12 (b) and which he got them from Rabtherm International Ltd from United Kingdom and despite the fact that Rabtherm was selected, still without any explanation the plaintiff refused to disburse funds to pay the supplier.

It was submitted by the counsel for the plaintiff that by clause 3 (1) of the term loan the repayment of the loan was to be effected in 20 successive quarterly equal instalments of Tshs. 877,500/= effective from

September 1992 and the last such instalment to be paid by June, 1997. He submitted the plaintiff's claim is based on the information contained in the bank statements Exhibit P4 which shows that the defendants account has an outstanding balance of Tshs. 3,948,204,017.38 comprised of Tshs. 9,212,440.00 as principal sums together with accrued interest of Tshs. 3,938,991,557.00 as at 30th September, 2017. With these facts and admission by defendants, the counsel for plaintiff argued that the defendants defaulted to repay the term loan.

For the counter claim, the counsel submitted that the defendants tendered no evidence to show that any follow up was made for the disbursement to be made in accordance with the loan agreement as the defendants remained mute from the time they wrote exhibit D6.

Counsel for the defendants began her submission by acknowledging the fact that the defendants do not dispute they did not repay the loan by instalment as agreed but she said the failure to pay was caused by the plaintiff's failure to disburse the money to the defendants on time since by September, 1992 the defendants had fulfilled all the pre-disbursement conditions as per Exhibit P1. However, the first disbursement was made in

April, 1993and not in March, 1992 as agreed upon. Regarding completion of repayment of instalments by 30th June, 1997, the counsel argued the plaintiff failed to complete disbursement of all loan funds by 30th June, 1997which fact is also not disputed by PW1. The counsel further pointed out that DW1 categorically stated in his cross examination that they could not have started paying because the plaintiff had not disbursed the last disbursement despite defendants fulfilling all conditions for completion of disbursement. It was then the counsel's submission that the failure to start making repayment was caused by the plaintiff's failure to honour the agreement for up to 30th September, 1992.

On counter claim, the counsel for defendants argued that the plaintiff breached the terms of the loan agreement in three ways. First, by not releasing the full agreed amount of Tshs. 16,050,000/= which was obtained from the feasibility study report Exhibit D1. She said Exhibit P1 clearly provides in Clause 1 that the amount of the credit is "to the maximum of Tshs. 16,050,000/=". Secondly, the plaintiff failed to pay for machinery despite the defendant's request made on 15th May, 1994. The counsel for defendants argued exhibit D3 clause 7 provides that the

plaintiff loan was to pay for machinery/equipment for a total of Tshs. 13,050,000/= however the plaintiff only disbursed Tshs. 7,212,440/= for machinery/equipment leaving unpaid balance of Tshs. 5,877,560/= which has not been paid to date. Lastly, the plaintiff breached Clause 3 (1) of Exhibit P1 by delaying in disbursing funds to the defendants for the project to commence despite the fact that DW1 testified to the effect that they fulfilled all conditions by 27th March, 1992 but plaintiff made first disbursement on 20th April, 1993, a year after completion of pre-disbursement conditions.

By following up the counsels submissions, the narrated facts can safely be put in the following manner: On 27th day of December, 1989 the defendants approached the plaintiff in order to secure funds for financing their fishing project, fishing processing (Exhibit D2). Together with their Exhibit D2, the defendants also had with them feasibility study (Exhibit D1) and attached it with Exhibit D2 so that the plaintiff can appraise and approve. The feasibility study outlined the economic viability of the project and defendants believed that the project is profitable such that they will make substantial earnings and pay back the loan with its interests. By a

letter of offer dated 17th day of December, 1990 (Exhibit D3) the plaintiff responded to the defendants request for financial assistance in the following manner:

> "we are pleased to advise that your recent application for financial assistance has been approved and have recorded the facilities shown below on your account subject to the conditions later mentioned; Type of Loan: Term Loan; Amount: Tshs. 16,050,000/=; Rate of Interest: 27.5%; Expiry Date: 6 years from date sanctioned...".

On 12th March, 1992 parties executed a loan agreement (Exhibit P1) whereby the plaintiff agreed to loan the defendants a term loan up to an aggregate amount of Tanzanian Shillings sixteen million and fifty thousand only for financing a maximum of 34% of the total fixed fishing project investment cost. By virtue of Clause 3 of Exhibit P1, the defendants agreed to repay the loan in 20 successive quarterly equal installments of Tshs. 877,500; the first of which shall be due and payable after six months from the date of signing the agreement and the last installment shall be due on the 30th day of June, 1997. The maximum term of the loan is six years from the date of letter of offer. Further the defendants agreed to pay

interest on the principal sum at the rate of 27.5% per annum which shall be payable on every March, June, September, and December and the first interest payments become due for payment when the defendants start using the term loan. It was further the terms of the agreement that the defendants undertook to procure machinery and equipment and hiring of contractors through tender after prior consultation with the Bank and consent obtained therefrom. Thus the request for financing together with the feasibility study; letter of offer; and term loan documents concluded the contract between the parties.

It is opportune to mention that the term loan had conditions precedent for disbursement where it provided that the Bank will not release the loan unless and until:

1. The defendants sign the loan agreement and the loan agreement is properly registered. The records show that defendants signed the loan agreement on 12th March, 1992 and it was registered on 19th March, 1992 by Assistant Registrar of Documents, Registry of Documents, Mwanza;

2. The bank receives security over a legal mortgage on C.T No. 033011/29 as guaranteed by Mr. Sylvester Lwegina Bandio on Plot No. 166 Block D, Isamilo, Mwanza; and chattel mortgage over the projects vessels. The records show that mortgage was created and registered on 13th August, 1993. Further according to the plaintiff, on 27th March, 1992 the defendants did create a chattel mortgage over Marine Vessel MZA 140; and

3. Insurance cover over the fishing vessels;

4. Bank obtains bank guarantee under the Credit Scheme from the Bank of Tanzania where necessary. The guarantee instrument was created on 13th April, 1994 as per the plaintiff's pleadings; and

5. Defendants to contribute the equity portion to the satisfaction of the Bank. It is not clear as to whether equity contribution was ever made.

Though it is not clear as to when exactly all the conditions precedent were fulfilled but by a letter dated 26th August, 1993 (Exhibit D4), the Bank notified the defendants that the Bank has authorized to disburse Tshs. 828,260/= to meet costs of 12 steel plates from ALAF Ltd; Electrodes 50

kgs; Round bars 33; half round bars 10; and angled bars 100. The said letter further notified the defendants that funds for steel plates have been paid directly to suppliers, i.e M/S Aluminium Africa Ltd, Mwanza Depot by Banker's cheque. This letter is a clear proof that the second tranche of disbursement was made on 26th August, 1993 and according to the testimony of DW1 the first tranche of disbursement was made on 20th April, 1993. It should be noted that though the agreement required the defendants to repay the loaned amount after expiry of six months from the signing of the agreement but the first tranche of disbursement was made faraway after expiry of six months. The agreement was signed on 12th March, 1992 therefore by September, 1992 the defendants were required to repay the loaned amount which loan by September, 1992 was yet to be advanced to them. This is the major complaint on part of the defendants.

In claiming its due amount, the plaintiff is heavily rely upon the clear terms of Clause 3 (i) of Exhibit P1 that The defendants are liable to pay the first instalment of Tshs. 877, 500/= in September, 1992. In a face value, the plaintiff was entitled to repayment of interest after expiry of 6 months from the date of signing of the agreement. However, it will be an absurdity

to hold such position because a mere signing of the loan agreement does not entitle the plaintiff to claim what is not yet due to her. There must be something that the law recognises it as a debt for the defendants to repay. Even though parties concluded the loan agreement, there is great possibility that the debt could not have arisen since either party might change their mind or gone into liquation. With these facts, can it then be said that the defendants defaulted in repaying the instalment agreed under the term loan agreement.

Even though there is no proof from the plaintiff, there is admission by the defendants through DW1 that the first disbursement of the loan of Tshs. 6,100,000/= was made on 20th April, 1993. The amount is acknowledged to have been received by the defendants. By that time, that is, on 20th April, 1993, which is after the lapse of one year and some months, none of the parties raised any issue concerning either delay in releasing the funds or failure by the defendants not making any repayment as agreed in the agreement. There is no evidence to suggest that any party complained on the failure of strict compliance with Clause 3 (i) of Exhibit P1. Furthermore, after a lapse of almost four months from the date

of first disbursement another amount of Tshs. 828,260 as evidenced by Exhibit D4 was disbursed to the defendants which amount is also conceded by DW1 to have been received. Again there was no complaint either from the defendants or from the plaintiff as to why the defendants failed to make any instalments. As testified by DW1 on 2nd May, 1994 the plaintiff disbursed to the defendants another amount of Tshs. 3,284,180/=. Making the total loan amount received by the defendants to be Tshs. 10,212,440/= out of Tshs. 16,050,000/= agreed upon. Despite receipt of Tshs. 10,212,440/= the defendants failed or neglected to repay the loan. Failure to repay is acknowledged by the defendants.

The contention of the defendants that the loan was repayable from the operations of the project is in complete contradiction to clause 3 (i) of Exhibit P1. Such interpretation is no-where to be found in the clear wording of the terms of Exhibit P1. The agreement required the defendants to make successive quarterly equal installments of Tshs. 877,500/= after expiry of six months from the date of signing the agreement. I fully understand that by the time the repayment was due the loan was yet to be disbursed but as I said the defendants did receive the loan of Tshs. 10,212,440/=.

Therefore failure to disburse the loan in time, does not relief the defendants from their obligation of repaying back the loaned amount. It was in in the meetings of the minds of the parties that the defendants have to repay the loan in equal quarterly successive instalments. I thus take that the defendants are obligated to repay the received loan amount in equal quarterly instalments from the last date of final disbursement, that is, from 2nd May, 1994. Failure of which makes the defendants in default of their obligation.

On the other hand, the defendants are complaining that the plaintiff failed to release the remaining balance of Tshs. 5,837,560/= as such frustrated their fishing project. Exhibit D6 proves that defendants did request for final disbursement of Tshs. 5,837,560/= but plaintiff remained numb. Further Exhibit P1 establishes that the plaintiff agreed to part finance the project by erecting buildings and purchasing machinery and equipment as per Clause (i) of Exhibit P1 to the tune of Tshs. 16,050,000/=. Notwithstanding such undertaking, the plaintiff failed to release Tshs. 5,837,560/=.

In view of my above discussion, all these prove that both plaintiff and defendants breached the terms of the loan agreement. Therefore issue number two is answered in favour of the plaintiff and issue number three is answered in favour of the defendants.

I now turn to the last issue that is **to what reliefs are parties entitled.** Each party itemized the kind of reliefs they want. I will deal one after the other: The plaintiff has itemized the following claims:-

First, the Plaintiff prays for payment of outstanding amount of Tshs. 76,083,979/= comprised of Tshs. 9,212,440/= as principal and Tshs. 66,083,979/= as interest as at 30th June, 2002. The claim of Tshs. 76,083,979/= is specific damage. Specific damages have to be specifically pleaded and proved, as held in the cases of **Mtali Vs. Mtali [2008] 2 EA 229; Kiptoo Vs. Attorney General [2010] 1 EA 200; Zuberi Augustino Vs. Anicet Mugabe [1992] TLR 137; and Masole General Agencies Vs. African Inland Church Tanzania [1994] 192**. For instance in **Masolele** (Supra) the Court of Appeal of Tanzania held:

"Once a claim for specific item is made, that claim must be strictly proved, else there would be no difference between specific claim and

general one. The trial judge rightly dismissed the claim for loss of profit because it was not proved."

In the matter at hand, there is no evidence to support the claim of specific damage of Tshs. 76,083,979/= apart from Exhibit P4 a mere bank statement that run from 30th September, 2001 to 30th September, 2017. The bank statement start with an opening balance of Tshs. 64,243,738/= comprised of principal amount of Tshs. 9,212,440/= and outstanding interest of Tshs. 55,031,298/=. Exhibit P4 does not show as when the principal and interest amount start to run especially taken into account that disbursement was not done immediately after signing the loan agreement. There being no concrete evidence to establish the claim I decline to order the repayment of the full amount claimed. However since it is acknowledged by the defendants that a total sum of Tshs. 10,212,441/= was granted to them then I will award that amount to the plaintiff.

Secondly the plaintiff is claiming for payment of interest on the outstanding sum at the discounted rate of 26% per annum from 1st July, 2001 to the date of judgment. I have shown herein that the defendants do not deny to have been advanced Tshs. 10, 212,440/= and the last

disbursement was made on 2nd May, 1994 then I will proceed to award the plaintiff 26% simple interest rate per annum on the outstanding amount of Tshs. 10,212,440/= from 2nd May, 1994 to the date of judgment.

Further the plaintiff is claiming for payment of interest on the decretal amount at the Court's rate from the date of judgment to the date of final and full satisfaction. Order XX rule 21 of the Civil Procedure Act, Cap.33 provides for a rate of interest to be chargeable on every judgment debt from the date of delivery of the judgment until full satisfaction. The rate is seven per centum per annum or such other rate not exceeding twelve per centum, as the parties may expressly agree in writing before or after the delivery of judgment or as may be adjudged by consent. In **Fredrick Wanjara and Another Vs Zawadi Juma Mruma**, Civil Appeal No. 80 of 2009 (Unreported-CAT) the Court Appeal of Tanzania while interpreting Order XX Rule 12 of CPC stated:

> *"The way the provision is couched, especially the use of the term "shall" and the phrase "or such other rate, not exceeding twelve per centum per annum, as the parties may expressly agree in writing" enjoins a court to impose a 7% interest unless the parties agree to a*

higher rate, but which must not exceed 12%. As there was no agreement between the parties for the imposition of a higher interest rate, the trial court was duty bound to impose a 7% interest on the decreed sum."

Consequently, as there was no agreement between the parties for the imposition of a higher rate then I award the plaintiff interest rate of 7% per annum on decretal amount from the date of judgment to the date of final and full satisfaction.

On the other hand the defendants prayed for an order that the plaintiff breached the contract. I have held in issue number three that the plaintiff breached the contract therefore I proceed to declare that the plaintiff breached the terms and conditions of the contract.

The defendants are also claiming for both general and specific damages. The defendants claim for general damages of Tshs. 100,000,000/= due to emotional suffering. They are also claiming for various cumulative projected loss of profits which could have been realized from the fishing project. The projected loss of profits are specific in that they request for payment of Tshs. 156,592,000/= being cumulative

retained earnings as shown in the feasibility study Exhibit D1; Tshs. 244,821,000/= being projected cumulative retained earnings during the project's life as per Exhibit D1; and Tshs. 46,976,000/= being projected cumulative retained earnings from 1st January, 2005 to the date of judgment as per Exhibit D1.

It is trite law that specific damages must be specifically pleaded and proved as correctly submitted by the counsel for the plaintiff. The defendants did plead these losses in their pleadings. The defendants tendered Exhibit D1 to be the proof of earnings that the defendants could have fetched had the fishing project been smoothly operating. The question that follows is whether these projected earnings should be granted as prayed.

My starting point in dealing with the prayer of damages is to revisit the principles governing the assessment of quantum of damages for breach of Contract, be it general or specific damages. The assessment of quantum of damages is covered under Section 73 (1) and (2) of the Law of Contract Act, Cap. 345. Section 73 (1) of the Law of Contract, Cap. 345 stipulates that compensation for any loss or damage caused by breach of

contract must be naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. Section 73 (2) of the Law of Contract, Cap. 345 stipulates that compensation is not to be given for any remote and indirect loss or damage. The doctrine aims at restoring an innocent party claiming damages for breach of Contract to the position he would have been if the breach had not occurred. It restores him to his prior position and it is not intended to place him in a far better financial position than he was immediately before the breach of Contract. Certainly, the defendants are entitled to claim compensation for the loss of future earnings but such compensation should not be for purposes of putting the defendants in a far better position than they would have been before the breach had occurred. The projected earnings enumerated in the feasibility study are estimates which had not taken into account other factors such as change of Governmental policy. They are just estimates and do not carry any certainty that they would have been fetched had the business run smoothly. As correctly submitted by the counsel for plaintiff there is no guarantee that the defendants would have earned the amount claimed. Keeping in mind the limited chance of fetching the whole claimed amount,

it would be just and fair to sum up the amount claimed and apportion it by 10%. In the end I will proceed to award the defendants a total sum of Tshs 50 million being compensation for all losses arising from all projected earnings.

While I agree that defendants suffered emotionally but as I said the purpose of awarding damages is to place the injured party in a same position as far as money can do, as if his rights have not been violated which is not an easy task. The court have therefore to do its best and come out with a reasonable figure in awarding general damages, considering that the court's duty in civil case is not to punish the wrong doer but to compensate the victim. Having said that I award the defendants a total sum of Tshs. 5 m as general damages since the claim of Tshs. 100,000,000/= is on the higher side.

The defendants are also claiming for payment of Tshs. 15,000,000/= being loss of earnings from other finances to have been secured by title deed. On this claim no evidence has been adduced by the defendants that they did secure other finances but due to the holding of title by the plaintiff

then such facility was not availed to them. Since there is no such evidence then I decline this prayer.

The defendants are further claiming for the return of the title deed that used as a mortgage to secure the loan from the plaintiff. I have held herein that the defendants do not dispute the fact that Tshs. 10,212,440/= was disbursed to them and it has not been paid. I have also stated in the facts of this case that the title deed was placed by the defendant in order to secure the loan. Since part of the loan which is almost more than ½ of the loan amount was availed to the defendants then the prayer is hereby declined.

Defendants are also claiming for interest of the decretal amount at the court's rate of 7% per annum form the date of judgment till payment in full. Given the principles I stated herein above then the prayer is granted as prayed.

In the end, for the main suit, judgement and decree is hereby entered in favour of the plaintiff. It is hereby declared that the defendants breached the contractual terms as such the defendants should pay the plaintiff the following:-

1) Tshs. 10,212,440/= being outstanding amount on account of the term loan facility as of 2nd May, 1994;

2) Interest on Tshs. 10,212,440/= at the discounted rate of 26% simple interest rate per annum from 2nd May, 1994 to the date of judgment;

3) Interest on the decretal amount at the Court's rate of 7% per annum from the date of judgment to the date of final and full satisfaction;

For the Counter Claim, judgement and decree is hereby entered in favour of the Defendants. It is hereby declared that the plaintiff breached the contractual terms as such the plaintiff should pay the defendants the following:-

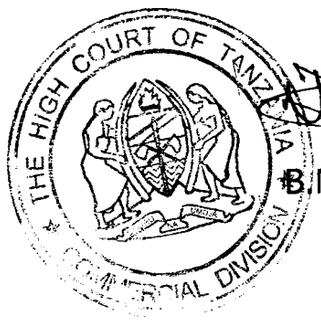
1) Tshs. 50,000,000/= being compensation for all losses arising from all projected earnings;

2) Tshs. 5,000,000/= being compensation for general damages suffered by the defendants; and

3) Interest on the decretal amount at the Court's rate of 7% per annum from the date of judgment to the date of final and full satisfaction.

Given the circumstances of this case then each party shall bear its own costs. For avoidance of doubt other prayers made by the plaintiff are declined. It is so ordered.

DATED at Dar es Salaam this 16th day of February, 2018.



B.M.A Sehel

JUDGE

16th day of February, 2018.