IN THE HIGH COURT OF TANZANIA

(COMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 140 OF 2016

BANK OF AFRICA TANZANIA LIMITED .....PLAINTIFF

VERSUS

NAIF SALUM BALHABOU.....DEFENDANT

AND

NANCY GAGIC.....1ST THIRD PARTY

SALAH SALUM ALY.....2ND THIRD PARTY

05/11&14/12/2018

JUDGMENT

MWANDAMBO, J

This is a suit for recovery of TZS 314,290,629/11 balance on the loan extended to the defendant under a facility letter issued on 11th September 2012 In addition, the plaintiff claims for payment of contractual rate of interest both normal and penal plus damages and costs of the suit. The defendant denies liability on the alleged breach and prays for the dismissal of the suit with costs. Further, the defendant has filed a third party notice against Nancy Gagic and Salah Salum Aly and prays for judgment against them in the event he is found liable to the plaintiff

The facts giving rise to the suit are to a large extent are not in dispute. The plaintiff is a bank licenced to carry banking business in Tanzania who, on

10th September 2012 processed an application for an overdraft facility of TZS 250,000,000/= from the defendant and scaled it down to a sum of TZS.150, 000,000/= and made an offer in the form of a facility letter in that sum for twelve months with interest at the rate of 25.5% per annum and 38% penalty interest on an exceeded financial limit. The defendant accepted the offer on 11th September 2012. The facility letter (exhibit P1) constituted the agreement between the parties by which the tenor of the overdraft facility was 12 (twelve) months from the date of disbursement. As security for the overdraft facility, Nancy Gagic who was joined as a first third party executed a legal mortgage over a right of occupancy on her landed property on Plot No. 213, Mlimakola area, Morogoro Municipality comprised in certificate of title No.554985 for an unspecified amount but not in excess of the amount shown in the facility letter plus interest and other charges thereon (the mortgage debt).

Subsequently, the plaintiff made the overdraft amount available to the defendant's account for utilization towards the agreed purpose as evident from the statement of account (exhibit P5). Despite the agreed terms through the facility letter in relation to repayment, the defendant defaulted in repaying the overdraft amount plus interest accrued on expiry of the 12 months contracted for which prompted the plaintiff issuing a notice of default to the mortgagor (Nancy Gagic) requiring her to remedy the default by paying the amount outstanding against the defendants as of the date of the notice. However, the mortgagor did not comply with the notice and instead she instituted a case before the Land Division of the High Court to wit, Land Case No. 369 of 2013 against the plaintiff and the defendant simultaneous with an application for a temporary injunction restraining the plaintiff from enforcing its rights under the mortgage.

The Land Court granted a temporary injunction restraining the plaintiff from disposing the mortgaged property to recover the outstanding loan (overdraft facility) pending the determination of the main suit which was subsequently dismissed on 29th September 2016 for want of prosecution. A month before (24th August 2016), the plaintiff caused to be advertised for sale the mortgaged property through Mabunda Auctioneer Mart Limited (per exhibit P4A) by public auction set for 10th September 2016 at which the plaintiff realized TZS.150,000,000/= only leaving a balance of TZS 299,290,629/11. The balance prompted the plaintiff filing the suit for recovery plus auctioneer fees of TZS 15,000,000/= against the borrower (defendant) which he disputes.

It is the defendant's contention that he did not personally utilise the overdraft facility rather his account was used by Nancy Gagic (the First Third Party/ Mortgagor) and one Salah Salum Ali (Second Third Party). The defendant contends further that he had no notice of any suit filed before the Land Division but in any event, the plaintiff is to blame for selling the mortgaged property at a throw away price of TZS.150, 000,000/= compared to its forced market value of TZS 247,000,000/= according to a valuation report prepared in July 2012 two months prior to the approval of the overdraft facility on 11th September 2012. In addition to his defence, the defendant filed third party notices against Nancy Gagic and Salah Salum Ali (1st and 2nd third party respectively) for judgment against both of them for any amount that he may be adjudged against him as due and payable to the plaintiff together with any amount of costs. Both the 1st and 2nd 3rd party have distanced from the defendants claims praying for dismissal of the third party notice.

Before the commencement of hearing, my predecessor (Songoro, J) framed the following issues:

1. *Whether there was a loan facility agreement between the plaintiff and the defendant.*

2. *If the answer is yes, whether the loan was secured by any security or guarantee furnished by the defendant or third parties.*

3. *If the answer in issue 2 is in the affirmative whether there was any breach of the terms of the loan agreement or the terms of the guarantee communicated by the defendant or 3rd parties.*

4. *What reliefs are the parties entitled to.*

It is apparent from the record that the issues that the Court finally recorded emanated from proposed issues by the learned Advocates for the parties. However upon examination of the pleadings, the Court finds it necessary to invoke Order XIV rule 5 of the Civil Procedure Code by making amendment to issue number 2 and 3. It seems to me that issue number two does not arise for determination because, firstly, there is no dispute that the overdraft facility was secured by a third party legal mortgage created by Nancy Gagic (1st Third Party) and secondly there is no claim that the overdraft was secured by any guarantee over and above the legal mortgage. That being the case issue number 2 becomes redundant and is accordingly struck out. Having struck out issue number 2, issue number 3 now becomes issue number 2 with some modifications so as to read:

"If the answer to issue number 1 is in the affirmative, whether the defendant was in breach of the facility agreement".

It is plain from the defendant's written statement of defence, the defendant alleges that the plaintiff sold the mortgaged property below the forced market value which implies breach of duty resulting in a claim for the balance from the

defendant. Both parties have been heard on that contention and so framing an additional issue will not be prejudicial to any of them. I will thus add another issue to read:

> *"3 whether the plaintiff breached its duty by selling the mortgaged property below the forced market value."*

As required by rule 48 of the High Court (Commercial Division) Procedure Rules, 2012, all witnesses who testified before the Court had their respective witness statements filed prior to the commencement of the trial at which several documentary exhibits were tendered. The witnesses answered questions in cross examination and upon the conclusion of the trial the learned Advocates were ordered to file their respective closing submissions which they did on the set schedule. I will consider the submissions in the course of the discussion on the issues framed.

The first and the second issues shall be taken together. Mr. Salim Abubakar learned Advocate for the defendant had no difficulty in conceding to both of them. Indeed as seen earlier, there is no dispute whatsoever as to the facility agreement constituted by exhibit P1 tendered by Victor Paul Lewanga (PW1). Exhibit P1 is the basis on which the plaintiff extended a loan by way of an overdraft facility in favour of the defendant and so, as urged by Mr. Stephen Axwesso learned Advocate for the plaintiff and conceded by Mr. Salim, the first issue must be answered in the affirmative and I so hold.

With regard to the second issue, again, Mr. Salim conceded that his client was in breach of the terms of the facility agreement in that the overdraft facility was for a period of 12 months during which the defendant should have repaid the loan plus accrued interest but failed to do so on the date of its expiry to wit;

11th September 2013. Mr. Salim concedes too that by reason of the failure to pay the amount approved under the overdraft facility, the plaintiff issued a notice of default to the 1st Third Party (mortgagor) who nonetheless failed to remedy the breach. However, Mr. Salim contended that his client should not be held liable for the breach because the money was actually utilized by the First and Second Third Party who had requested him to use his account to obtain the loan from the plaintiff for mineral business but failed to service the overdraft facility by depositing money into the account. According to the learned Advocate, the defendant learnt later that the plaintiff was in communication with the Third Parties and therefore the Court should hold them liable on the amount claimed. That argument does not appear to have any merit as it will become apparent later.

The contention that the proceeds of the overdraft were utilized by the Third Parties and so they should alone be held liable is neither here nor there. The Third Parties were not privy to the Facility Agreement regardless of the fact that the First Third party happened to have executed a mortgage to secure the same. At any rate, no evidence whatsoever was adduced in the form of an agreement proving that the proceeds of overdraft facility were paid to the Third Parties as contended by the defendant. Equally baseless is the allegation that the defendant learnt that the Third Parties were in communication with the plaintiff thereby establishing the claim that it is the Third Parties rather than the defendant who should ultimately be held liable for the breach. I have already held that the Third Parties were not privy to the Facility Agreement and so whether or not they were in communication with the plaintiff does not change the position as the defendant would have the Court hold. PW1 stated so answering a question from the learned Advocate for the 1st Party. Responding to

a question from the learned Advocate for the 1st Third Party, the defendant (DW1) admitted that he was solely responsible for payment of the loan as a borrower regardless of the fact (which was not proved) that the proceeds thereof were utilized by the Third Parties.

The foregoing will be sufficient to dismiss the defendant's claim denying liability on the loan on the one hand and lack of credible evidence to prove that he had any agreement with the Third Parties on the utilisation of the proceeds of the overdraft facility. Without further ado, the answer to the second issue is likewise answered in the affirmative irrespective of the defendant's contentions denying liability. That said, I will now turn to issue number three as reframed in this judgment.

According to PW1, the sale of the mortgaged property fetched TZS 150,000,000/= only leaving an outstanding balance of 299, 290,629/11. Mr. Salim submits that the sale of the mortgaged property at that price has to be blamed on no other person than the plaintiff herself because according to the valuation report carried out before the execution of the mortgage, the forced market value of the mortgaged property was TZS 247,000,000/= and so there was no reason for the plaintiff to allow the sale of the mortgaged property at such low price and go for the defendant for the balance. To fortify his argument, the learned Advocate referred the Court to a decision of this very Court in **Bank of Africa Tanzania Limited Vs. Rose Miyago Assea**, Commercial Case No.139 of 2017 (unreported) in which Mruma, J held that a lender who sells a mortgaged property at a price less than its value failing to recover the loan should blame himself for accepting an inferior security for he cannot be allowed to pursue the balance against the borrower. Armed with that decision, the learned Advocate urged me to adopt it in this case as the facts in the two cases

are similar. On that basis, the learned Advocate arged me to dismiss the suit with costs.

Mr. Axwesso took the view that there was no proof that the forced market value of the mortgaged property was the amount alluded to by the defendant's learned Advocate on the date of sale. Further, the learned Advocate argued that neither the defendant nor the third parties adduced any evidence to prove that there was any foul play during the sale of the mortgaged property which could justify making a finding that the said property was sold at a throw away price. Otherwise, the learned Advocate urged the Court to find and hold that since the sale was conducted by public auction, the price obtained was the best the plaintiff could obtain in the absence of foul play in line with the decision of the Court of Appeal in **Juma Jaffer Juma vs. Manager PBZ Limited and 2 Others,** CAT (ZNZ) Civil Appeal No.7 of 2007 (unreported) binding on this Court.

From the record, there is hardly any dispute that the sale of the mortgaged property was advertised on 24th August 2016 in Uhuru News Paper at the instance of the plaintiff through Mabunda Auctioneer Mart Limited per exhibit P4A. According to PW1, the sale was conducted on 10th September 2016 by public auction at which one Godluck Solomon Mwasa was declared the purchaser of the said property at TZS 150,000,000/=. There is nothing in DW1's evidence that the sale was not conducted by public auction as a result of which it fetched a price lower than the forced market value. Again, much as PW1 acknowledged the valuation report on the basis of which the plaintiff accepted the mortgaged property as security for the loan, the report was not tendered in evidence and so it is not part of the Court's record in terms of Order XIII rule 7 of the Civil Procedure Code. It is unfortunate that the Court has been robbed of the

opportunity to examine the report and make its appropriate finding on the defendant's contention.

At any rate, as submitted by Mr. Axwesso learned Advocate and correctly so in my view no evidence has been led to prove market values of comparable properties immediately before, at or after the sale. Even if one was to accept that the forced market value of the property was TZS. 247,000,000/= in 2012, that value could not have been the same in 2016 in the absence of evidence to that effect. Consistent with the decision of the Court of Appeal in **Juma Jaffer Juma Versus PBZ Bank Limited** (supra) a price obtained at a public auction is taken to be the best price in the absence of any foul play. That being the case, I am afraid that the decision of this Court in **Bank of Africa Tanzania Limited's case** (supra) may not be helpful to the defendant as it is clear that the attention of my brother was not drawn to the decision of the Court of Appeal binding on this Court. I cannot say with certainty what would my brother have said had that decision referred to him and so with respect I will not follow it. That aside, it is my view that there must be evidence of negligence or breach of duty in conducting sale resulting into obtaining a price lower than the market value which will preclude the lender from pursuing the borrower for the balance. Furthermore, I take the view that the position taken by my learned brother would apply to cases where the lender pursues the mortgagor for other properties for the balance following sale not fetching adequate price to realize the debt. With respect, it is doubtful that the position the learned Advocate for the defendant urges me to take will extend to cases as this one where the plaintiff (lender) is not pursuing the mortgagor but the borrower for the balance upon failure to obtain full recovery of the outstanding loan through sale of the mortgaged property.

I appreciate that the lender (plaintiff) had a duty to the defendant (borrower) to sell the mortgaged property under section 132(1) of the Land Act, Cap. 113 (R.E. 2002) to obtain the best price reasonably obtainable at the time of sale. However, that duty is not absolute for section 132(2) of Cap. 113 states that there shall be a rebuttable presumption that the lender breached his duty if he sells the mortgaged property at 25% or more below the average price at which comparable interests in land of the same character and quality are sold in the open market. Going by Mr. Salim's contention that the mortgaged property was sold below the forced market value of 247,000,000/= that argument shall fall on the face of section 132(1) of Cap. 113 because there is no evidence that TZS. 150,000,000/= is 25% below the market value at the time of sale. On the contrary, by simple calculations TZS. 150,000,000/= is equivalent to 60.73% of the forced market value in 2012. Accordingly, even if that was the value at the time of sale, TZS. 150,000,000/= would still be far above 25% of the said value. A similar complaint cropped up way back in 2004 before this very Court in **Tanzania Investment Bank Versus Ilabila Industries Limited and 2 Others**, Commercial Case No. 27 of 2002 (unreported). A mortgaged property of the guarantor of the loan extended to the 1st defendant was sold by public auction in execution of a decree. Attempt was made to set aside the sale on the ground that the decree holder had breached her statutory duty under Section 132(1) and (2) of Cap. 113 Rejecting the complaint, Kalegeya, J (as he then was) stated:

> *"I do appreciate that the valuation report of 2001, indicated that the estimated value of TZS. 391,000, 0000/= then. However, if the applicants wanted to establish that the value has now appreciated or otherwise they were bound to repeat the same exercise of valuation. In other words, they had to come up with the current valuation report. As rightly submitted by Mr. Chipeta, valuations are*

not static. They would reflect the value of the property as at the time of valuation...". (at page 14).

Later in the ruling the learned judge held that the respondents had rebutted the presumption of breach of the mortgagee's (decree holder) duty and refused to set aside the sale. The position is more or less same in this case and so I would likewise reject the argument that the plaintiff breached her duty not only to the borrower but also to the mortgagor. Furthermore, even if I was to accept that the Plaintiff was in breach of her duty, I would not go further and set aside the sale because I am not dealing with an application for setting aside a sale at the instance of the mortgagor. Any breach of duty could not have constituted a cause of action against the plaintiff by the defendant borrower independent of the mortgagor.

For the foregoing reasons, I am constrained to answer the third issue negatively and hold that the defendant has not proved any breach of duty in the sale of the mortgaged property by the plaintiff and even if there was such proof, it could not have absolved the defendant from his loan contractual obligations. That means that the arguments canvassed about the amount secured by the mortgage are of no avail to the defendant. Those arguments could only be relevant had the defendant been a mortgagor. The defendant who is not a party to the mortgage (Exhibit P.2) can not avail himself of any of the provisions in the mortgage deed and so I will not find any merit in the submissions canvassed by the learned Advocate for the defendant aimed at seeking refuge from clause 3.0 of exhibit P2. I would thus reject the learned Advocate's submissions in that regard. Having so held I now turn my attention to the fourth issue dedicated to reliefs.

Having answered the first, second and third issues in favour of the plaintiff there will be judgment for the plaintiff subject to what I will explain shortly. It has been shown through the evidence of PW1 and PW2 read together with exhibit P5 that the defendant's overdraft account had a balance of TZS 299,290,629/11 after the sale of the mortgaged property. Accordingly, the defendant must be held liable for that amount. The Plaintiff has also claimed payment of TZS 15,000,000/= as auctioneer's fees for the sale of the mortgaged property. I disallow that amount for lack of basis. That amount represents a claim for specific damages which must be specifically pleaded and strictly proved. The plaintiff has not surmounted that hurdle and so she cannot succeed on that sum. As to general damages, once again I see no basis for that claim. The purpose of general damages is to reinstate an injured party as far as money can do in the same position he was immediately before the breach. The breach in the suit was default to pay the loan by way of overdraft facility plus interest accrued both normal and penalty at as high as 38% on the latter. There is no dispute that interest on the unpaid amount can be the only way of reinstating the plaintiff for the breach complained of unless it can be shown that interest cannot do. There is no material before the Court establishing that the award of contractual interest will not reinstate the plaintiff in the position she was before the occurrence of the breach. I would accordingly reject the claim for general damages.

The Plaintiff has also claimed interest on the decretal sum at the rate of 12% per annum which is inconsistent with Order XXI rule 21(1) of the Civil Procedure Code which prescribes interest on judgment debts at 7% per annum unless there is an express agreement for payment of a higher rate. The plaintiff has not furnished any proof of written agreement with the defendant to justify a

higher rate of interest than what is prescribed by the law. I would thus disallow that amount and substitute it with 7% per annum.

As to the third party notice, as shown when discussing the second issue, the evidence to sustain the same is far below the threshold and so I would not allow the third party notice. In the event and for the foregoing reasons, I enter judgment for the plaintiff and grant the reliefs to the parties under rule 67 (3) of the Rules as follows:

1. The defendant is declared to have breached the facility letter agreement.
2. An order against the defendant for payment to the plaintiff a sum 299,290,629/11.
3. Payment of interest on TZS 299,290,629/11 from the date of filing the suit till date of judgment at the rate of 38% per annum.
4. Interest on the decretal sum at the rate of 7% per annum from the date of judgment till date of full satisfaction.
5. The defendant's Third Party notice is dismissed with costs.
6. The defendant is ordered to pay the plaintiff's costs in the suit.

Order accordingly.

Dated at Dar es salaam this 14th day of December 2108

L.J.S MWANDAMBO

JUDGE