IN THE HIGH COURT OF TANZANIA

(COMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO 193 OF 2017

GROFIN AFRICA FUND.....PLAINTIFF

VERSUS

NAGOZ MINERAL .....1ST DEFENDANT

ANDERSON FRED TEMU .....2ND DEFENDANT

SARA TEMU.....3RD DEFENDANT

JUDGMENT

MWANDAMBO, J

This is an undefended suit for an assortment of reliefs amongst others, payment of TZS 361,319,169/=, interest and costs against the defendants jointly and severally. The suit is founded on two causes of action that is to say; breach of the loan facility agreement by the 1st defendants on the one hand and breach of the unconditional and irrevocable personal guarantees by the 2nd and 3rd defendants on the other.

The undisputed facts giving rise to the suit are as follows: On 11th September 2012, the plaintiff and the 1st defendant entered into a facility agreement (exhibit P1) by which the plaintiff agreed to extend a loan to the 1st defendant in an aggregate amount of TZS 500,000,000/=. The loan was payable with interest of 23% per annum and the 1st defendant agreed to repay the loan with interest on monthly installments of TZS 17,352,212/= each till full payment. To ensure repayment, the parties agreed on the securities for the loan namely; unconditional and irrevocable personal guarantees by the 2nd and 3rd defendants who are also signatories to exhibit P1. Other securities included a legal mortgage one landed property on plot No. 2049, Block E, Kimara Baruti and Kinondoni Municipality comprised in certificate of title No. 1062016 registered in the name of Anderson Fred Temu, the 2nd defendant. Later on, by an addendum dated 25th April

2014, (exhibit P1) the loan amount was enhanced by an increase in the aggregate amount of TZS 851,002,776/= as of that date. Despite the undertaking to make monthly repayments, the 1st defendant failed to honour its commitment thereby breaching the agreement resulting into an outstanding debt of TZS 1,361,619,169/= as of 31st January 2016 vide certificate of balance dated 11th December 2015 (exhibit P.7). As the amount stood unpaid, on 24th July 2017 the plaintiff's Advocates wrote a demand letter to the defendant (exhibit P6) and subsequently instituted the instant suit.

Initially, the defendants entered appearance on 21st February 2018 through an Advocate who successfully prayed for time to file a written statement of defence within fourteen days. However, until the expiry of the time granted by the Court, the defendants had not yet filed their defences and that resulted into order for ex parte proof in accordance with Order VIII rule 14 (2) (b) of the Civil Procedure Code, Cap 33 [R.E 2002].

To prove its case, the plaintiff called Daniel Maginga (PW1) whose evidence in chief was by way of witness statement in accordance with rule 49 (1) of the High Court (Commercial Division) Procedure Rules, 2012. PW1 produced several documents as exhibits notably; Facility Agreement dated 11th September, 2011 and the addendum thereto (Exhibit P1 collectively), mortgage of a right of occupancy on Plot No. 2049 (Exhibit P3), demand notice dated 24th July 2017 (Exhibit P6) and a certificate of balance (exhibit P8). As there was no questions in cross examination, the plaintiff rested its case praying for judgment for the reliefs set out in the plaint. After the closure of the trial, the learned Advocates for the plaintiff filed closing submissions whose substance was a summary of the contents of the plaint and the witness statement praying for judgment on the reliefs set out in the plaint.

Having gone through the plaint, the witness statement and the exhibits tendered, there is no dispute the 1st defendant was in breach of the facility agreement by its failure to repay the loan with the interest thereon as agreed. That default resulted into an outstanding balance of TZS 1,361,319,169/= as of 31st January 2016 per exhibit P7. It is equally not disputed that the 2nd and 3rd defendants executed personal guarantees as

security for the loan. This they did in the facility agreement (exhibit P1) incorporating the unconditional and irrevocable guarantee. Incorporating a guarantee in a facility agreement may be quite uncommon but if one looks at it in the light of section 78 of the Law of Contract Act, Cap 345 [R.E 2002] which stipulates that a contract of guarantee may be oral or written, I do not think the same is consequential to the guarantee in question. By clause 12.1.2 of the Facility Agreement, the 2nd and 3rd defendants made undertakings with the plaintiff to pay her any amount due in connection with the loan upon demand for that amount as if they were the principal obligors. Paragraph 12 and 13 of the plaint contend that the 2nd and 3rd defendants have failed to discharge their respective obligations despite several demands. The same averments are repeated in paras 12 and 13 of the witness statement.

As seen above, the 2nd and 3rd defendants undertook to pay the amount payable by the borrower (1st defendant) upon demand to them being made by the lender (plaintiff). The only demand on record is one dated 24th July 2017 (exhibit P6) addressed to the 1st defendant. However, it is plain from the record that he said letter was not copied to the 2nd and 3rd defendants. The question that arises then is whether there can be a sustainable claim that the 2nd and 3rd defendants breached their obligations under the guarantee. The learned Advocate for the plaintiff appeared to suggest in his submission that the 2nd and 3rd defendants are fully aware of the 1st defendant's breach of the loan facility agreement (exhibit P1) and so, regardless of the lack of evidence of any notices to them. However, the learned Advocate does not go further to substantiate the basis of his contention that is to say; in which way did the 2nd and 3rd defendants become fully aware of the 1st defendant's default of or the loan facility agreement?. In **Exim Bank (T) Ltd vs. Uniafrico Ltd and 2 Others,** Commercial Case No. 60 of 2004 (unreported) there was an issue as to whether the plaintiff sent demand notices sent to the borrower to the 2nd and 3rd defendants who, like in the instant suit were husband and wife and directors of the 1sr defendant(the borrower). The said defendants had signed documents for the rollover of the credit facility in their capacities as directors of the 1st defendant who defaulted in loan

repayment obligations and hence the institution of the suit jointly and severally with the guarantors upon notice to the 1st defendant copied on the latter.

This Court (speaking through Bwana, J as he then was) upheld the arguments by the plaintiff's Counsel and stated:

> *"...The two guarantors were at the same time the directors of the first defendant. They carried out all the correspondence and processes leading to the roll over. They cannot now disclaim that responsibility. It makes no senses to believe-even if it were arguable under the law- that the same personalities could shut themselves from knowing what was transpiring because they were guarantors but at the same time carry out some transactions leading to the rollover, acting in their capacities as directors! They did have knowledge and consented to the said rollover...." (At page 11)*

Unlike in the instant case, there was proof in Exim Bank's case that demand letters had been served on the borrower copied to the guarantors. That means that the plaintiff's argument that the 2nd and 3rd defendants were fully aware of the 1st defendant's default in the absence of the demand can hardly hold any water. In other words, despite the 1st defendant's default, the 2nd and 3rd defendants cannot be held liable prior to demands being made to them.

The plaintiff has asked the Court for an order to sell mortgaged properties on Plot No.2049, Block E, and Kimara Baruti area registered in the name of the 2nd defendant. However, it has neither pleaded nor did it lead evidence proving that a statutory notice under Section 127 (1) of the Land Act, 1999 as amended by the Land (Amendments) Act No. 2 of 2004 and Act No. 17 of 2008 was ever given to the mortgagor. That section imposes a duty to give notice of default on the lender/mortgagee upon occurrence of an event of default before the mortgagor enforces his rights under the mortgage. Sub-section (2) of the said section prescribes matters to be given in the notice of default including the length of such notice set at 30 days following its receipt. In the absence of

such notice, the Court cannot grant the relief sought allowing the plaintiff to sell the mortgaged property.

As regards sale of the 1st defendant's assets charged as security for the loan, I do not see any basis for that order because clause 5.2 of the debenture (exhibit P5A) gives automatic right to the lender to enforce the debenture without recourse to Court.

The above said, there will be judgment against the 1st defendant on the following reliefs:-

1) A declaration that the 1st defendant breached the Facility Agreement.
2) Payment of outstanding loan amounting to TZS 1,361,619,169/= by the 1st defendant.
3) Payment of the interest on the principal sum at the rate of 23% per annum from 31st January 2016 to the date of judgment.
4) Interest on the decretal sum at the Court's rate of 7% per annum from the date of judgment till final and full satisfaction.
5) Costs of the suit.

The rest of the reliefs are hereby rejected. Order accordingly.

Dated at Dar es Salaam this 27th day of February 2019.

THE HIGH COURT OF TANZANIA COMMERCIAL DIVISION

L.J.S. MWANDAMBO

JUDGE