

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO 153 OF 2017

STEPHEN KYANDO T/A ASKY INTERTRADE.....PLAINTIFF

VRS

NATIONAL BANK OF COMMERCE.....DEFENDANT

JUDGMENT

B.K. PHILLIP, J.

In July 2009 the plaintiff obtained an over draft facility from the defendant to a tune of Tshs. 90,000,000/=, the same was to expiry in August 2010. The said overdraft facility was secured by two landed properties belonging to the plaintiff to wit; a house on plot No. 765, Block 'B' with title No 80538 situated in Morogoro and a house on plot No. 555 Block "A" with title No.82778 situated at Kinyerezi area, Dar Es Salaam. The plaint reveals that the plaintiff could not service the aforesaid credit facility as agreed , thus, in March 2011 the defendant served him with a default notice. By that time the amount due for repayment was Tshs. 96,400,067 including interests. In his endeavor to find means of repaying the amount due, in August 2011, the plaintiff wrote a letter to the defendant requesting for reduction of interest and leave to pay the amount due in installments. By that time the loan amount plus interest had increased to Tshs. 104,000,000/=. It is alleged in the plaint that the defendant accepted the plaintiff's request on condition that the plaintiff had to pay the interests which was Tshs. 15,000,000/=. It is alleged further that the plaintiff paid the said Tshs. 15,000,000/=, thus the amount due was reduced to Tshs. 89,000,000/=, thereafter the plaintiff and the defendant agreed under the

deed of undertaking that the payment of the remaining loan amount should be done by installments. Moreover, the plaint reveals that, since the plaintiff's business was not doing well, the plaintiff decided to sell his house on plot No.55 Block 'A' at Kinyerezi to Mr. Tito Ngajilo on understanding that Mr. Ngajilo would assist the plaintiff to service the loan to a tune of Tshs. 50,000,000/= for payment of the outstanding loan amount and when the house is discharged from the Mortgage, Mr. Ngajilo would pay the remaining amount of the agreed purchase price and the ownership of the house would be transferred to him. Mr Ngajilo paid the said Tshs. 50,000,000/= as agreed, but the whole of the outstanding amount could not be cleared, thus the plaintiff had to look for other means of raising enough fund to clear the remaining loan. The plaintiff decided to seek for a permission to sell the mortgaged property situated at Plot No 7645, Block B, Morogoro to enable him to clear the remaining outstanding amount. The defendant allowed the plaintiff to sell the aforesaid house in Morogoro and the same was sold for Tshs. 45,000,000/=. It is alleged in the plaint that all of the proceeds from the said transaction were deposited into the plaintiff's loan account to clear remaining the amount due. Thereafter the plaintiff requested for the release of his Right of Occupancies for the houses in Kinyerezi and Morogoro, however, the defendant agreed to release only one Right of Occupancy for the house in Morogoro and retained the Right of Occupancy for the house in Kinyerezi for the reason that ,there was still outstanding loan amount due for repayment.

The plaintiff prays for judgment and decree against the defendant as follows;

- (i) Payment of Tshs 170,000,000/= as specific damages.
- (ii) Payment of Tshs 30,000,000/=as compensation for denied use of the collateral for other facilities.
- (iii) Payment of general damages Tshs 15,000,000/=

- (iv) Payment of interests at the court rate of 12% from the date of filing the case to the date of judgment and thereafter at the rate of 7% up to payment in full.
- (v) Costs of the suit.

On the other side the defendant in its written statement of defence maintained the position that the loan amount was not cleared by the proceeds from the sale of the mortgaged property in Morogoro. The defendant alleged further that, the payment of Tshs. 15,000,000/= that was made by the plaintiff was not for clearing interest as alleged by the plaintiff, but it was a normal deposit for reducing the loan amount. The written statement of defence reveals that by October 2017, the outstanding amount was Tshs. 96,178,582.62

At the Final Pre –Trial Conference the following issue were framed for determination by the Court;

- (i) Whether there was an agreement to waive interests between the plaintiff and the defendant with regard to the loan facility granted to the plaintiff by the defendant.
- (ii) Whether the plaintiff paid all the outstanding debts owed to the defendant.
If issue No. (ii) is answered in the affirmative ,then,
- (iii) Whether retention of the plaintiff's certificate of title No. 82778 for Plot no 555, Block "A", Kinyerezi by the defendant is lawful.
- (iv) Whether there is any breach of Contract between the plaintiff and the defendant.
- (v) To what reliefs are the parties entitled to.

During the hearing of this case the learned advocates Huruma Ntahena and Sabato Ngongo appeared for the plaintiff and defendant respectively. The plaintiff brought two witnesses, the first witness was the plaintiff

himself who testified as PW1 and the second witness was Tito Onia Ngajilo who testified as PW2. The defendant brought one witness only namely Harold Ngololo.

Now, let me proceed with the determine the issues framed as per the evidence adduced by the witnesses, starting with first issue that is **Whether there was an agreement to waive interests between the plaintiff and the defendant with regard to the loan facility granted to the plaintiff by the defendant**, in his testimony PW1 stated that he obtained an overdraft facility from the defendant to a tune of Tshs 90,000,000/= vide an overdraft facility letter dated 20th July 2009 (Exhibit-P1). That as security to the said credit facility he mortgaged his house situated on plot No 555 Block "A" Kinyerezi Area, in Ilala Municipality (Exhibit-P2) and the another one situated on plot No 765,Block "B" Morogoro. PW1 testified further that he could not manage to pay back money granted unto him under the overdraft facility because he fell sick and the person who was managing the business failed to repay the overdraft amount as agreed, consequently the defendant wrote him a notice of default (Exhibit-P3). Furthermore, PW1 testified that upon his recovery, he wrote a letter to the bank (the defendant herein), requesting for payment of the outstanding amount in installment (Exhibit-P5). After that the defendant gave him one condition that he had to clear the accrued interests which was Tshs. 15,000,000/=. PW1 testified that he paid the said interests as directed by the defendant, thereafter he signed a deed of undertaking with the bank (Exhibit-P6) whereby the repayment of the loan was restructured into seventeen equal installments of Tshs. 5,000,000/= each and one final installment of Tshs. 4,000,000/=PW1 testified that by using the money he obtained from PW2 (Mr. Ngajilo) after agreeing to sell his house situated in Kinyerezi to him, he managed to pay the installment as per the deed of undertaking. PW1 testified further that, when debt remained at a tune of Tshs. 45,000,000/= he requested a permission from the bank to sell his mortgaged house situated in Morogoro, so as to clear the remaining balance. In his testimony in chief

PW1 stated that the defendant accepted his request, so he proceeded to sell the house in Morogoro for Tshs 45,000,000/= and the whole amount was deposited to the bank to clear the outstanding amount.

PW2 testified that he assisted PW1 to pay part of the outstanding amount in his overdraft facility to a tune of Tshs 50,000,000/= after entering into an agreement that PW1 would sell his house situated on plot No.555,Block "B" CT No.82778 in Kinyerezi Area Ilala Municipality to him.

On the other side DW1 testified that the plaintiff obtained an overdraft facility from the defendant but he failed to repay the amount granted unto him as agreed, thus the defendant had to write him a demand notice for payment of a sum of Tshs. 96,400,067.40. In his testimony DW1 admitted that the defendant allowed the plaintiff to sell his mortgaged house situated in Morogoro at a price of Tshs 45,000,000/= and the whole of the sale proceeds was deposited into the plaintiff's loan account to reduce the outstanding amount. DW1 testified further that by the time the plaintiff sold his house situated in Morogoro, interests on the overdraft loan had capitalized to Tshs. 75,554,992.90, thus a balance of Tshs. 30,554,992.90 remained unpaid. Furthermore, DW1 testified that after the deposit of the said Tshs. 45,000,000/=, the plaintiff did not service his overdraft loan and by 30th November 2014 debt interests had capitalized to a tune of Tshs. 54,828,516.50 (Exhibit-D1). upon being cross examined by the plaintiff's advocate DW1, said that interests was charged on the loan before and after the deed of undertaking (Exhibit-P6) since the defendant never agreed to waive interests.

In his final submission the learned advocate Huruma Ntahena submitted that Exhibit -P6 (the deed of undertaking) shows the amount that was supposed to be paid by the plaintiff and the same was prepared by the defendant. Mr Ntahena contended that the testimony of PW1 was to the effect that Exhibit -P6 was prepared by the defendant after the Plaintiff

had paid Interests to a tune of Tshs. 15,000,000/=. Mr. Ntahena submitted further that the balance of Tshs. 89,609,763.40 included the principal sum and interests as stipulated in Item No.1 of the deed of Undertaking. Mr. Ntahena contended further that the plaintiff was obliged to pay the amount indicated in the deed of settlement only. He invited this court to answer this issue in affirmative.

On the other hand, in his final submission the learned Advocated Sabato Ngongo submitted that , the answer to the first issue should be in the negative because there is no any piece of evidence that was adduced to prove the existence of an agreement to waive interests. Mr. Ngongo submitted further that in paragraph 1.6 of PW1's witness statement it is stated that through Exhibit P5, PW1 requested the defendant to waive interest and his requested was accepted, with a condition that he had to pay the interests that had accrued to tune of Tshs. 15,000,000/=. Mr Ngongo contended that looking at the pay-in-slip relied upon by the plaintiff (Exhibit P4 collectively) the said amount of Tshs. 15,000,000/= was paid before Exhibit P5 was served to the defendant. Furthermore, Mr. Ngongo submitted that the deed of undertaking (Exhibit-P6) states clearly that the amount of Tshs 89,609,763.40 included the principal sum and accrued interests, therefore, that was enough to draw an inference that there was no waiver of interests.

After analysis of the evidence adduced by the parties herein, it is my settled opinion that, the determination of this issue involves Exhibits P4, P5 and P6. Looking at Exhibit P4 collectively, (the pay-in-slips) and Exhibit P5 (the plaintiff's letter) and PW1's testimony in chief in paragraph 1.6 of his witness statement, the plaintiff's allegation that the defendant gave him a condition to pay the accrued interests to a tune of Tshs. 15,000,000/= first before considering his request for waiver of interests is not supported by the evidence adduced at the hearing, because as correctly submitted by Mr. Ngongo, the said sum of Tshs. 15,000,000/= was deposited before

Exhibit P5 was served into the defendant. In paragraph 1.6 of the PW1's testimony in Chief it is stated as follows;

*"1.6 The loan and interest went up to Tshs. 104,000,000/= I then requested the bank to waive interest and that I be allowed to pay only the principal amount. **This was done through a letter dated 19th August, 2011.** The Defendant made a condition that she would only consider the proposal if I pay the whole interest which stood at Tshs. 15,000,000/=. **I paid the said amount of Tshs. 15,000,000/= after which the principal amount was Tshs. 89,000,000.** I refer to the letter dated 19th August, and deposit slips dated 15th July, 2011 for Tshs 2,000,000/= , 30th July 2011 for Tshs. 5,000,000/= and 15th August, 2011 for Tshs. 8,000,000/= marked as Exhibit P3 collectively".*

(Emphasis is mine)

I have read Exhibit- P5 between the lines, honestly by whatever stretch of imagination Exhibit P5 does not have any element or hint for request for waiver of interests. What I have understood is that the plaintiff was requesting for reduction of interests accrued to the date of the letter as it can be seen in the title of Exhibit P5 itself. For easy of reference let me reproduce it hereunder;

"RE: APPLICATION FOR BEING CONSIDERED REPAYMENT OF MY OVERDRAFT IN INSTALLMENTS OF TSHS. 5.0 (TSHS. FIVE MILLION ONLY) PER MONTH AND REDUCTION OF THE ELEMENT OF INTEREST ACCRUED TODATE:"

From the heading of the letter as quoted herein above, it is my settled opinion that "*reduction*" of interests is not the same as "*waiver*" of interests. Exhibit P5 is very clear that the request was for reduction of interests accrued to the date of the letter. To my understanding "*Waiver of interests*" means that no interest is charged on the loan/overdraft facility

while "*reduction of interest*" means either lowering the interests accrued or the interest rate chargeable. In this case Exhibit P5 specifically talks about "*the reduction of the accrued interests to the date of the letter*", hence there is no any ambiguity , the plaintiff did not request for waiver of interests.

In addition to the above, Exhibit P6 (the deed of undertaking) was signed by the plaintiff himself to show his commitment to repay the outstanding amount and acknowledgement of the same. This is confirmed by item 1,2 and 3 of Exhibit P6 which provides as follows:-

1. *"By this Deed we confirm and acknowledge that (I/We) am/are indebted to the Bank in the sum of Tzs. 89,609,763.40 (Tanzania Shillings Eighty Nine Million Six Hundred Nine Thousand Seven Hundred Sixty Three and Forty Cents) being the principal and accrued interest.*
2. *I/We acknowledge that I/We are in default in repaying the debt as was agreed in the loan agreement/facility letter referred to herein and that the Bank is entitled to exercise the remedies provided for under the said agreement.*
3. *Cognizant of the default in the repayment, I/We have agreed with the Bank to restructure the loan wherein will abide with the following repayment schedule/arrangement..."*

Having said the above, I am of settled view that Exhibit P6 cannot be termed as a agreement between the plaintiff and the defendant for waive interests as contended by the plaintiff, since the defendant is not a signatory to the same. In the instant case Exhibit P6 is signed by the plaintiff only. I have taken into consideration Mr. Ntehena's argument that Exhibit P6 was prepared by the Bank, unfortunately the deed of undertaking does not indicate who prepared it, but whatever the case, even if it was prepared by the defendant, that fact cannot change its status, that, is a document evidencing the plaintiff's commitment to repay

the outstanding amount as I have explained herein above. For the sake of argument even if Exhibit P6 would have been signed by the defendant, still the issue of waiver of interests would not sailed through since Exhibit P6 does not provide for waiver of Interests. I have also noted that during cross examination PW1 admitted that on 30th April 2012 and 30th May 2012 he did not deposit any amount to the Bank as it is stipulated in Exhibit P6.

From the foregoing, my finding is that there was no any agreement for waiver of interest unto the loan facility granted to the plaintiff.

As regard the second issue, that is **Whether the plaintiff paid all the outstanding debts owed to the defendant**, In proving that he paid all the outstanding amount, PW 1 tendered in court Exhibit P4 (the pay-in-slips) and contended that after selling his house situated in Morogoro for Tshs. 45,000,000/= he cleared all the outstanding amount indicated in Exhibit P6. In his final submission Mr. Ntahena submitted that since the outstanding amount as per the deed of undertaking (Exhibit P6) was 89,609763.40, then the plaintiff paid in full the outstanding amount and interests in January 2013 when the proceeds from the sales of PW1's house in Morogoro were deposited in the Bank.(defendant herein). Ntahena submitted further that Exhibit P6 stipulated that in case of failure to honour the terms therein, then, the defendant was entitled to commence recovery measures after the expiry of seven days from the date of default. He contended that the defendant did not take any recovery measures despite the fact that the plaintiff did not make deposits every month as per Exhibit P4 since what was important was to pay the whole outstanding amount by 28th February 2013 and the plaintiff managed to pay the whole of the aforesaid outstanding amount in January 2013.

On the other side Mr. Ngongo submitted that, the testimony in chief of PW1 shows that PW1 did not make deposits as agreed in Exhibit P6 thus, by 8th January 2013 when the sum of Tshs 45,000,000/= was paid from

the proceeds of the sale of the house in Morogoro, the whole of the outstanding amount was Tshs. 75,554,992.90. Ngongo contended that after payment of the said sum of Tshs 45,000,000/=, a sum of Tshs. 30,554,992.90 remained as an outstanding balance which was never paid and on 16th December, 2014 when the defendant decided to write off the plaintiff's debt, the outstanding amount had increased to a tune of Tshs. 54,828,516.50 due to interests charged thereon. Mr. Ngongo invited this court to hold that the plaintiff still owes the defendant a sum of Tshs. 54,828,616.50

In determining this issue, the starting point is to know the outstanding amount, so the question here is what was the outstanding amount?. Since I have held the first issue in a negative, that is there was no waiver of interests, then the outstanding amount includes interests and therefore it cannot be the one indicated in Exhibit P6. As submitted by Mr. Ngongo since it is not in dispute that the plaintiff did not adhere to the schedule for making deposits indicated in Exhibit P 6, more interests accrued and the outstanding amount increased. Exhibit D1 shows that the sum of Tshs. 45,000,000/= was deposited on 8th January 2013 and on that date the outstanding amount was Tshs. 75,554,992.90, thus a sum of Tshs. 30,554,992.90 remained unpaid. Also, Exhibit D1 shows that by 30th November 2014 there was a balance of Tshs. 54,828,516.50 which was written-off on 16th December 2014, thus Exhibit D1 shows that there is no outstanding amount. From the foregoing it is my finding that the plaintiff did not pay all the debt he owed to the defendant, however, on 16th December 2014 the defendant decided to write-off the outstanding amount to avoid affecting their financial books.

Coming to the third Issue that is, **if the 2nd issue is answered in the affirmative, Whether retention of the plaintiff's certificate of title No. 82778 for Plot no 555, Block 'A', Kinyerezi by the defendant is lawful.** Since the second issue has been answered in the negative, this

issue becomes redundant. As regards the fourth issue, that is **whether there is any breach of contract by the defendant**, In his final Mr. Ntahena submitted that the defendant breached the terms agreed in the deed of undertaking by charging interests contrary to what was agreed. Mr. Ntehana contended that the deed of undertaking took precedence and according to clause 8 of the same, it was agreed to be exclusive evidence between the parties. On his side Mr. Ngongo, submitted that, the plaintiff is the one who breached the agreement ,since he admitted in evidence that he defaulted to service the overdraft facility and after signing the deed of under taking he failed to adhere to the repayment schedule shown therein.

Looking at the evidence adduced, I am inclined to agree with Mr. Ngongo that it is the plaintiff who breached the contract between him and the defendant. According to Exhibit P1 (Overdraft facility agreement at enhanced level of Tshs. 90,000,000/=), Exhibit P3 (Notice of default), Exhibit P6 (Deed of Undertaking) and Exhibit D1 (The bank statement for the plaintiff's bank account), it is the plaintiff who defaulted to pay back the amount granted unto him by way of overdraft facility as agreed. As I have pointed out herein above, the defendant had to write-off the outstanding amount to a tune of Tshs. 54, 828,516.50.

Now, the last issue that is **to what reliefs are the parties entitled to**; Despite the fact that I have determined all the issues against the plaintiff, I really see that, there is a unique scenario in this case which is worthy the attention of this court, as I have point out herein above, In his testimony in chief, PW1 testified that the defendant decided to write-off the outstanding amount to avoid affecting their financial books because the plaintiff was unable to pay that amount. The outstanding amount was written -off in December 2014. I have noted that when the plaintiff was demanding for the release of his right of occupancy the defendant had not yet written-off the outstanding amount and I think that is why it refused

to release Plaintiff's right of occupancy in respect of the house at Kinyerezi. However, the pertinent question now is what will happen to the plaintiff's right of occupancy in respect of his house at Kinyerezi, after the defendant's decision to written-off the outstanding amount and the Bank statement (Exhibit D1) now shows zero balance. The defendant has retained the right of occupancy for Kinyerezi house for more than four years now after writing-off the outstanding amount. To my understanding, when a debt is written-off, it means that the bank accepts it to be a loss and does not continue with any recovery process, that is why, no wonder the defendant has not done any process to auction the plaintiff's property at Kinyerezi for all those years. Having said the above, I am of a settled view, that the defendant cannot continue retaining the plaintiff's right of occupancy in respect of the house at Kinyerezi, it is obliged to release it, since it is now legally barred to take any recovery measures as the Plaintiff's account under which the overdraft facility was obtained does not show any outstanding amount.

I wish also to state here clearly that the plaintiff is not entitled to any payment of damages as claimed in the plaint, since he failed to discharge his responsibility of repayment of the credit facility advanced to him, thus he cannot benefit from his own wrongs which pushed the defendant to write-off the outstanding amount.

In the upshot, I hereby dismiss the plaintiff's claims and order the immediate release of the right of Occupancy in respect of plot No.555, Block "A" Kinyerezi with CT No.82778, the same to be handed over to the plaintiff. I give no order as to costs.

Date at Dar es Salaam this 24th day of April, 2019



B.K.PHILLIP

JUDGE