

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)**

AT DAR ES SALAAM

COMMERCIAL CASE NO.100 OF 2018

NATIONAL BANK OF COMMERCE.....PLAINTIFF

VERSUS

DEOGRATIUS JOHN NDEJEMBI DEFENDANT

DEFAULT JUDGEMENT.

MAGOIGA, J.

The plaintiff, NATIONAL BANK OF COMMERCE LIMITED, by a plaint instituted the instant suit against the abovenamed defendant praying for judgement and decree in the following orders, namely: -

- a) A declaration that failure by the defendant to pay the plaintiff the whole of an outstanding amount of the personal loan facility amounts to breach of group personal loan agreement dated 25th April, 2015.
- b) That the defendant be ordered to immediately pay the plaintiff the outstanding amount of Tshs.89,732,945.00 (say Tanzania shilling Eight nine million, seven hundred thirty two thousand, nine hundred forty five shillings) being principal amount of the outstanding personal loan facility and interest as of 20th December 2016 arising

out of group personal loan agreement dated 20th April 2015 between the plaintiff and the defendant.

- c) Payment of default interest 24% annum charged from 20th December, 2016 when the account was written off to the date of judgment.
- d) Payment of interest of 12% per annum on the decretal sum from the date of judgment to the date of full payment.
- e) Payment of general demerages to cover the loss the plaintiff suffered for the for the defendant's failure to discharge his obligation under the agreement.
- f) The defendant pays plaintiff costs of the suit.
- g) Any other reliefs that the honourable court may deem fit to grant.

Upon being served with the plaint, the defendant through Mr. Samwel Pascal Magau, learned advocate, filed written statement of defence disputing the plaintiff's claims and prayed that the instant suit be dismissed with costs.

The facts of the instant suit as gathered from the plaint are that on 20th April 2015, the defendant applied for group personal loan which was approved by the plaintiff to the tune of Tshs.70,000,000/=. The facts go

that it was agreed that the loan was to be paid by equal monthly installments of Tshs.1,777,539.92 for sixty months. The facts further go that the defendant defaulted and failed to comply with payment schedule agreed in the group personal loan agreement, dated 29th April 2015. The plaintiff further alleged that failure by defendant to pay principal sum and interest as agreed in the loan agreement constitute breach of the personal loan facility agreement, and as such causing loss and considerable damage to the plaintiff despite several demands hence, this suit claiming reliefs as contained in the plaint.

This suit went on well between parties herein and the same was fixed for 1st pre trial conference on 12/12/2018. But on that date the learned counsel for defendant did not appear and the counsel for plaintiff prayed before Hon. Mwandambo, J (as he then was) under Rule 31 (1) (b) of the Rules to struck out the defence, which prayer was granted and the defence of the defendant was struck out from the record. Against this background, Mr. Charles Shija, learned advocate for plaintiff prayed to proceed with this matter under Rule 22 (1) of the Rules by filling an application for default judgment, which prayer was granted hence this default judgment. The learned counsel complied by filing form No.1 to the schedule and same was

accompanied by affidavit in proof of the claim. The relevant Rule 22 (1) now is couched in the following language: -

Rule 22 (1) Where any party required to file written statement of defence fails to do so within the specified period or where such period has been extended in accordance with sub rule (2) of Rule 20, within the period of such extension, the Court may, upon proof of service and on application by the plaintiff in Form No.1 set out in the schedule to these Rules accompanied by an affidavit in proof of the claim, enter judgement in favour of the plaintiff.(emphasis mine)

The task of this court now is to determine whether the affidavit filed sufficiently prove the claim as required by law. However, in determining this suit, I find it imperative to frame some issues which will assist this court in determination of the affidavit in proof in order to do justice to parties. These are, namely:-

- 1) Whether there was a loan agreement between the parties and to what tuned.
- 2) If issue number 1 is answered in the affirmative, whether there was breach of the terms of the agreement.

3) What relief(s) parties are entitled to

This Court, in its recent decision faced with similar prayer of default judgement following the amendment of Rule 22(1) of this Court's Rules, in the case of NITRO EXPLOSIVE LIMITED v. TANZANITE ONE MINING LIMITED, COMMERCIAL CASE NO 118 OF 2018, (HC) ARUSHA (Unreported) observed that following the amendment of the Rules of this Court by GN.107 of 2019, in particular, Rule 22 (1) default judgment now is not an automatic prayer **but same may only be granted upon proof of the claim by affidavit.**(emphasis mine)

The Court further pointed out and held that there are three ingredients that under the new Rule of 22(1) of the Rules that one has to consider seriously when dealing with Rule 22, namely:-

- a. The plaintiff must prove service to the defendant who has failed to file a defence or if defence was filed same has been struck out from the record, so basically no defence at all.
- b. The plaintiff must make an application by filing Form no.1 in the First Schedule to the Rules.
- c. The said Form No.1 must be accompanied by affidavit in proof of the claim.

Further the Court observed and held that several points must be considered and be given paramount in the affidavit in proof of the claim, to wit: **One**, affidavit being a substitute of oral evidence, is to prove every claim in the plaint regardless of the same not undergoing the rigour huddles of its admission and weight it carries. **Two**, the affidavit in proof must be self- explanatory, containing all details of the claim and where it is to be accompanied by exhibits, same must comply with the law of evidence in admissibility of documentary evidence. Authenticity of all documentary evidence cannot be compromised, simply because is proof by affidavit.

Now back into the instant suit, the plaintiff's affidavit stated to have entered into group person loan application and agreement with the defendant to the tune of Tshs.70,000.000/=. The said amount is stated to have been credited to the personal account of the defendant called CASA Account product 205 no 018205013342 according to the uncertified copy of the Group Personal Loan Application and Agreement form attached. The plaintiff annexed to the affidavit an unauthenticated and uncertified photocopy of the bank statement account No.018450010569 in the name of the defendant. The demand notice stated as NBC 2 in the affidavit in proof of the claim was not annexed at all in the affidavit.

The above stated documentary evidence are the only evidence attached in support of proof of the claim by the affidavit. This court upon traversing through the entire affidavit together with the accompanied exhibits, I find the exhibit annexed are inadmissible in evidence: **One**, they are photocopies and even when the court orally prayed to be given originals from the learned counsel for plaintiff, the one supplied are scanned documents and copy of the downloaded bank statement which is stamped but with no signature of the bank official who down loaded or certification to authenticate its accuracy. Section 18 of the Electronic Transactions Act, no.13 of 2015 is speak volumenously and loud how to deal with electronic data message. This was not done to the bank statement annexed.

Two, the number of account of the defendant which is said to have been disbursed with the loan amount is different from the one which is in the group personal loan application and agreement. These two accounts are account No.018205013342 in the group personal loan Application and agreement and Account No.018450010569 in the statement of account sought to prove the disbursement. Further scrutiny revealed that there is another account No.018213008029 named salary account number. Nevertheless, there is no single paragraph in the affidavit which state any

clarification of the three accounts, as to which one was the proper and genuine which was disbursed with the money. In normal practice one would expect the account number in the Group Personal Loan Application and Agreement to be the number that was disbursed with the amount in question. The variance between the bank statement and the Group Personal Loan Application and Agreement was not resolved in the affidavit in proof of the claim. This created doubts as to whether the plaintiff, indeed, disbursed the money, and if it did, why to different account number from the one in the application and agreement!

Three, proof by affidavit do not exempt parties to abide with Rules of evidence in the production of documents in secondary form. At least certified copies could make sense. The photocopied documentary evidence tendered leaves a lot to be desired. So, on the totality of the reasons given above, the plaintiff utterly failed to proof whether there was a loan agreement between plaintiff and defendant and to what tune. The plaintiff, being the custodian of all loan agreements documents, utterly failed to state as to why she didn't want to produce the original documents in prove of her claim leave a lot to be desired.

Therefore, issue number one is to be answered in the negative. The answering of issue number one in the negative automatically extinguishes issue number two in the circumstances.

Not only issue 2 but also issue number 3 dies a natural death in the circumstances. Therefore, that said and done, the entire suit stands to fail and same is hereby dismissed with no order as to costs.

It is so ordered.

Dated in Dar es Salaam this 13th day of September 2019.




S.M. MAGOIGA

JUDGE

13/9/2019