

**IN THE HIGH COURT OF TANZANIA  
(COMMERCIAL DIVISION)  
AT DAR-ES-SALAAM  
COMMERCIAL CASE NO.134 OF 2018**

**ECO BANK TANZANIA LTD..... PLAINTIFF**

**VERSUS**

**GOGOGO SAVINGS & CREDIT CO-OPERATIVE  
SOCIETY LTD .....1<sup>ST</sup> DEFENDANT  
VEDASTO KIGWA.....2<sup>ND</sup> DEFENDANT  
SELEMAN SANDAR..... 3<sup>RD</sup> DEFENDANT  
MWANAMVUA KASIMU.....4<sup>TH</sup> DEFENDANT  
BLACKSON I BONABI.....5<sup>TH</sup> DEFENDANT  
NASUHI A. BYEMELWA.....6<sup>TH</sup> DEFENDANT  
VORISTER A. KULWA.....7<sup>TH</sup> DEFENDANT  
KIPANGA S. MBEGA.....8<sup>TH</sup> DEFENDANT  
PAULINA A. NKOMA.....9<sup>TH</sup> DEFENDANT  
RASHID MAVUNDE.....10<sup>TH</sup> DEFENDANT  
EDSON R. KAMKURU.....11<sup>TH</sup> DEFENDANT  
MWANAISHA MAKATA.....12<sup>TH</sup> DEFENDANT  
SHENUU MBARUKU ADBDALLAH.....13<sup>TH</sup> DEFENDANT**

**EX-PARTE JUDGEMENT**

16/3/2020 & 24/3/2020.

**NANGELA, J.:**

The Plaintiff herein is a limited liability company duly incorporated and licensed under the laws of the United Republic of Tanzania to

carry out the business of banking and provision of other ancillary services.

The 1<sup>st</sup> Defendant is a registered Savings and Credit Cooperative Society (SACCOS), with Reg. No. MZR 1431. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, and 9<sup>th</sup> Defendants are board members of the 1<sup>st</sup> Defendant. The 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, and 13<sup>th</sup> Defendants are natural persons.

The Plaintiff's claim against the Defendants, jointly and severally, is for a declaration, that:

- (i) failure by the 1<sup>st</sup> Defendant to pay the Plaintiff the whole of an outstanding amount of the loan advanced to the former by the latter, constitute a breach of the terms of the loan agreement;
- (ii) the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, and 9<sup>th</sup> Defendants in their capacity as board members of the 1<sup>st</sup> Defendant committed fraud by introducing the 10<sup>th</sup>, defendant, one **Rashid Mavunde** as **Mbaruku Abdallah Mbaruku** to the Plaintiff;
- (iii) the 11<sup>th</sup>, 12<sup>th</sup>, and 13<sup>th</sup> Defendants committed fraud in relation to the mortgaged property,
- (iv) the Defendants, jointly and severally be ordered to promptly pay the Plaintiff **TZS 252,404,774.8** as the entire outstanding amount of the loan (as of 31<sup>st</sup>

December 2015); interest, general damages to be assessed by the honourable court and costs of this suit.

The facts constituting this case are briefly stated, as follows:  
On 10<sup>th</sup> April 2013, the Plaintiff approved a loan amounting to **TZS 250,000,000/-** (*Tanzania Shillings Two Hundred and Fifty Million only*). The Loan was approved in favour of the 1<sup>st</sup> Defendant.

On the same day, the Management and Board of the 1<sup>st</sup> Defendant approved the terms and conditions of the loan facility. The purpose of the loan facility was to extend loans to small scale entrepreneurs, members of disadvantaged groups, as well as low income earners. The loan was to be repaid within 24 months in equal monthly instalments.

It was averred, in the Plaint filed in this Court, that, the facility was secured by, among others, first ranking legal mortgage in favour of the Plaintiff's Bank over the property located at Plot No.4, Block 65 Ngamiani Kati Area, Tanga City, with a Certificate of Title No.6358 Land Office No.104615, in the name of Mbaruku Abdallah Mbaruku, Valued (at a forced sale value) at TZS 340,000,000/-.

It is averred that, on 2<sup>nd</sup> February 2013, the 1<sup>st</sup> Defendant entered into an agreement with the 10<sup>th</sup> Defendant. In that agreement, the 10<sup>th</sup> Defendant, who pretending to be Mr. Mbaruku Abdallah Mbaruku, agreed to pledge as security, his property referred herein above as Plot No.4, Block 65 Ngamiani Kati Area, Tanga City, with a Certificate of Title No.6358 Land Office No.104615, as security for the loan which was to be issued in favour of the 1<sup>st</sup> Defendant. As such, a Mortgage Deed was executed on 11<sup>th</sup> April 2013, in respect of Plot No.4, Block 65 Ngamiani Kati Area, Tanga City, in favour of the Plaintiff.

However, sometime in 2014, one Abdalla Mbaruku Abdulla, an administrator of the estate of the late Mbaruku Abdallah Mbaruku, filed a Land Case No.12 of 2014, High Court, Court Registry, against the Plaintiff and the 1<sup>st</sup> Defendant. He successfully contended that, the 10<sup>th</sup> Defendant, Rashid Mavunde, had impersonated the late Mbaruku Abdallah Mbaruku and unlawfully executed a Mortgage Deed in favour of the Plaintiff. As a result, the High Court (Masoud, J.,) declared that the mortgage deed in respect of the property referred herein as Plot No.4, Block 65

Ngamiani Kati Area, Tanga City, and executed in favour of the Plaintiff, was null and void.

It is from such eventualities that the Plaintiff brought this case alleging that, the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, and 9<sup>th</sup> Defendants, were well aware of the fraud perpetrated by the 10<sup>th</sup> Defendant, and the 11<sup>th</sup>, 12<sup>th</sup>, and 13<sup>th</sup> Defendants, as beneficiaries of the Mortgaged Property, played an instrumental role in enabling the perpetration of the said fraud, and, hence, the loss of 250,000,000 belonging to the Plaintiff.

In view of the above facts, on 18<sup>th</sup> October 2018, the Plaintiff instituted this suit praying for judgement and decree as follows:

- (a) A Declaration that the 1<sup>st</sup> Defendant is in breach of credit facility agreement by failing to discharge its duties and obligations in accordance with the loan facility agreement.
- (b) Declaration that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, and 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, and 13<sup>th</sup> Defendants were part of fraud perpetrated in respect of Plot No.4, Block 65, Ngamiani Kati Area, Tanga Cit, which was used as security in respect of the credit facility.
- (c) Declaration that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, and 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, and 13<sup>th</sup> Defendants are personally liable for the loan.

- (d) That, the defendants, jointly and severally be ordered to pay to the Plaintiff the outstanding amount of **TZS 252,404,774.8.**
- (e) Payment of Default interest (2% per month) charged from the date of breach of the terms and conditions of the credit facility Agreement, i.e., 31st December, 2015, to the date of judgement thereof.
- (f) Payment of general damages on the decretal amount from the date of judgement to the date of full payment thereof.
- (g) The defendants pay the Costs of this suit.
- (h) Any other relief(s) that the honourable Court may deem fit to grant.

On 22<sup>nd</sup> November 2018, through the services of E & M Legal Consultant, the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, and 9<sup>th</sup> Defendants filed their joint written statement of defence (WSD). In their WSD, they admitted that, indeed, on 2<sup>nd</sup> February 2013, the 1<sup>st</sup> Defendant executed an agreement with one Mbaruku Abdallah Mbaruku, and, that, the High Court declared that, the entire mortgage transaction in respect of the property referred herein as Plot No.4, Block 65 Ngamiani Kati Area, Tanga City, and executed in favour of the Plaintiff, was a nullity. However, save for such admission, they

disputed the rest of the averments in the Plaint putting the Plaintiff to strict proof.

The 10<sup>th</sup> to 13<sup>th</sup> Defendants did not file their Written Statement of Defence (**WSD**) and, despite of service of the summons to them being made by way of publication, following the orders of this Court which were issued on 5<sup>th</sup> December 2018, they never filed their **WSD**. On 12<sup>th</sup> April 2019, this Court ordered the hearing of the plaintiff's case against these defendants to proceed *ex-parte*. The date for holding the first pre-trial conference (**FPTC**) was fixed to be 13<sup>th</sup> June 2019, at 3.00 pm.

When this case came before this Court for the **FPTC** on 13<sup>th</sup> June 2019, this Court noted that, although the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, and 9<sup>th</sup> defendants were duly informed of the holding of the FPTC, they were absent. Pursuant to Rule 31 (c) of the G.N.250 of 2012 (as amended by GN. 107 of 2019), this Court entered an order for *ex-parte* proof on the part of the Plaintiff's case. The Plaintiff was, therefore, directed to prove its case by way of filing witness statements, which were to be filed within 14 days from that date.

On 26<sup>th</sup> June 2019, the Plaintiff, through the services of Locus Attorneys, a law firm based in Dar-es-Salam, filed in this Court, under Rule 50 (1) and (2) of the High Court (Commercial Division) Procedure Rules, G.N.250 of 2012, (as amended by G.N.107 of 2019), a Witness Statement of one, Benedicto Maziku. The Statement contained a list of documents to be referred to as exhibits by the Plaintiff during the hearing of the case.

Furthermore, on 09<sup>th</sup> August 2019, through the services of the same legal firm, the Plaintiff filed an affidavit of one Benedicto Maziku, in respect of a bank statement printed out from the Plaintiff's system, and intended to be tendered as evidence before this Court.

On 3<sup>rd</sup> March 2020, when this case was called on for hearing, Dr. Onesmo Michael, learned Advocate, appeared for the Plaintiff. He reminded the Court about its order dated 13<sup>th</sup> August 2020, which extended the life span of the case to a period of six (6) months. He submitted that, such period expired on 13<sup>th</sup> February 2020. Following a prayer to have the time extended, this Court, acting under Rule 32 (3) of GN 250 of 2012 (as amended by

GN.107/2019), extended the life span of this case for a period of three months.

On the material date the Court drew up the following issues to guide it in the course of determining this case. The two issued agreed upon and drawn by the Court are as follows:

- 1. Whether the Defendants are jointly and severally liable for the outstanding amount of TZS 252,404,774.8.*
- 2. Whether the Plaintiff is entitled to the Reliefs he is seeking.*

At the hearing of the matter, the Plaintiff's sole witness, Mr. Benedicto Maziku, appeared as **PW1**, and testified. He prayed to adopt his statement, earlier filed in this Court, as his testimony in chief, and, the Court proceeded to grant that prayer. In his statement, **PW1** informed the Court that, he was the principal officer employed by and working for the Plaintiff, Eco Bank Tanzania Ltd, as a legal officer.

According to his statement, **PW1's** duties, among others, including drafting credit facility agreements, providing legal

opinions to the Management, litigation management and recovery of bad loans. He testified to have personal knowledge of the 1<sup>st</sup> to 9<sup>th</sup> Defendants, as the Customers of the Plaintiff bank, while the 10<sup>th</sup> Defendant was known to him through the 1<sup>st</sup>-9<sup>th</sup> Defendants. He also knew the 11<sup>th</sup> to 13<sup>th</sup> Defendants as these were involved in the Civil Case No.12 of 2014, which was filed to challenge the legality of a Mortgage Deed executed in connection with Plot No.4 Block 65, Ngamiani, Tanga.

In his evidence in chief, **PW1** stated that, the claim against the Defendants, is for the recovery of **TZS 252,404,774.8**, such being outstanding amount of monies advanced to the 1<sup>st</sup> Defendant under a credit facility agreement (plus interest thereon). In proof of the existence of such a credit facility agreement, **PW1** tendered before this Court, a *Credit Facility Letter*, Ref. No. ETZ/20/02/2013, dated 10<sup>th</sup> April, 2013, as an exhibit, and the same was admitted into evidence and marked as **Exh.P.1**.

**PW1** further stated that, the loan facility advanced to the 1<sup>st</sup> Defendant, was approved, on the same date, (10/4/2013) by the Board of Directors of the 1<sup>st</sup> Defendant. **PW1** sought to be admitted

into evidence, a *Resolution of the Board of Directors* of the 1<sup>st</sup> Defendant. This Court admitted the document tendered and marked it as **Exh.P.2**.

The admitted **Exhibit P.2** was signed by Board members of the 1<sup>st</sup> Defendant who are the 1<sup>st</sup> to 7<sup>th</sup> and 11<sup>th</sup> Defendants, while the 8<sup>th</sup> and 9<sup>th</sup> Defendants had issued a notice of absence at the respective meeting, held on 10<sup>th</sup> April 2017. The effect of **Exh. P. 2** was to accept, as binding upon the 1<sup>st</sup> Defendant, the terms of the Credit Facility Letter approved by the Plaintiff.

Furthermore, in his written statement, **PW1** stated that, the Credit Facility was secured by, among others, a first ranking legal mortgage in favour of the Plaintiff's Bank. The said Mortgage was in respect of a property registered as Plot No.4 Block "65" Ngamiani Kati, Tanga, City, with CT. No.6358 Land Office No.104615, in the name of Mbaruku Abdallah Mbaruku.

**PW1** stated that, on 11<sup>th</sup> April 2013 the 10<sup>th</sup> Defendant, who fraudulently posed as Mbaruku Abdallah Mbaruku, executed a Mortgage Deed with the Plaintiff. **PW1** tendered the said Mortgage

Deed as exhibit and the same was admitted into evidence and marked as **Exhibit P.3.**

In his statement, **PW1** stated further, that, the credit facility was approved after the 1<sup>st</sup> -10<sup>th</sup> Defendants had succeeded to deceive the Plaintiff to advance funds to the 1<sup>st</sup> Defendant. In particular, the funds were released after the 2<sup>nd</sup> to 9<sup>th</sup> Defendants, in their capacity as Board Members of the 1<sup>st</sup> Defendant, had introduced the 10<sup>th</sup> Defendant, Rashid Mavunde, as Mbaruku Abdallah Mbaruku, a fact which was later on discovered to be deceptive, since Mbaruku Abdallah Mbaruku was a deceased person.

Further, as regards the 12<sup>th</sup> Defendant, **PW1** stated, in his statement that, this defendant is a widow of the late Mbaruku Abdallah Mbaruku, the true owner of the purported mortgaged property, and that, she was involved in introducing the 10<sup>th</sup> defendant (Rashid Mavunde) as Mbaruku Abdallah Mbaruku, thus facilitating the fraudulent means of obtaining the credit facility from the Plaintiff.

Upon being led by his advocate, Dr. Onesmo, **PW1** sought to be admitted into evidence a Deed of Guarantee, (**Mkataba wa Dhamana**) executed between the 1<sup>st</sup> Defendant and the 10<sup>th</sup> Defendant, who posed as Mbaruku Abdallah Mbaruku. The said Deed of Guarantee was admitted into evidence as **Exhibit P.4**.

Essentially, the said deed, which was executed on 2<sup>nd</sup> February 2013, was to the effect that, "**Mr. Mbaruku Abdallah Mbaruku**", as a member of the 1<sup>st</sup> Defendant, had agreed to pledge a Title Deed (Certificate of Occupancy), CT. No.6358, Plot.4, Block 65, Location Na.104565, Ngamiani, Tanga, to secure the loan advanced to the 1<sup>st</sup> Defendant.

In his testimony in chief, **PW1** also stated, that, after the credit facility had been disbursed by the Plaintiff to the 1<sup>st</sup> Defendant, the latter failed to discharge its obligations of servicing the loan as per the terms of the credit facility agreement.

**PW1** tendered into evidence, as an exhibit, Minutes of a meeting in which the 10<sup>th</sup> Defendant had agreed to indemnify the 1<sup>st</sup> Defendant. The Minutes were admitted into evidence and Marked as **Exh.P.5**. However, as it turned out to be, when things

went awry, the loan was not repaid and the guarantor turned out to be a fraudster.

To prove that the 1<sup>st</sup> Defendant failed to honour its obligations of repaying the loan to the Plaintiff, and, was thus in breach of the credit facility agreement, **PW1** prayed to tender into evidence, the 1<sup>st</sup> Defendant's bank statement. According to the affidavit of PW1 which was filed in this Court, the said Bank statements of the 1<sup>st</sup> Defendant were retrieved from the Plaintiff's Bank and were in full compliance with the requirements of the law. The Bank Statements were admitted as **Exhibit P.6**.

**PW1's** testimony in chief was also to the effect that, while the 1<sup>st</sup> Defendant had defaulted payment, in 2014, one Abdallah Mbaruku Abdulla, an administrator of the estate of the late **Mbaruku Abdallah Mbaruku**, the real owner of the house whose certificate of title was mortgaged to secure the credit facility advanced to the 1<sup>st</sup> Defendant by the Plaintiff, filed a **Land Case, No.12 of 2014**, before the High Court of Tanzania, Tanga Registry. The case was filed against the Plaintiff, the 1<sup>st</sup> Defendant and the 10<sup>th</sup> Defendant alleging, *inter alia*, that, the 10<sup>th</sup> Defendant

fraudulently impersonated the late **Mbaruku Abdallah Mbaruku**, and executed a mortgage deed.

According to **PW1**, the 12<sup>th</sup> and 13<sup>th</sup> defendants were primarily involved as beneficiaries of the estate of the late **Mbaruku Abdallah Mbaruku**, as the 13<sup>th</sup> Defendant was one of the witnesses in the Land case No.12 of 2014. Acting under section 59 (1) (a) of the Evidence Act, Cap.6 [R.E.2002], this Court took judicial notice of the High Court's judgement (Masoud, J.,) and decree in respect of the Land Case No.12 of 2014.

In that Land case No.12 of 2014, the 13<sup>th</sup> Defendant told the Court that, the 10<sup>th</sup> Defendant had been introduced to her by her uncle, one Omar Abdallah Bakari, and it was in that connection that the 10<sup>th</sup> Defendant was able to access the Title Deed - CT. No.6358, Block 65, Plot.4, Location Na.104565, Ngamiani, Tanga, to purportedly help them secure a contract for hosting a Zantel telecom tower. However, the same was used illegally by the 10<sup>th</sup> Defendant, and in full knowledge of the rest of the defendants, to fraudulently secure the loan advanced to the 1<sup>st</sup> Defendant.

The Plaintiff's case came to an end with only the testimony of **PW1** and the several exhibits which were tendered in Court and admitted into evidence as shown herein above.

As noted herein, the key issues which face this Court are mainly two, namely:

- 1. Whether the Defendants are jointly and severally liable for the outstanding amount of TZS 252,404,774.8; and,*
- 2. if the 1<sup>st</sup> issue is in the affirmative, whether the Plaintiff is entitled to the Reliefs he is seeking.*

It is a fundamental principle of law, that, he who alleges, must prove, and, that, the plaintiff has to succeed according to proved allegations. As it may be noted, in this case, the Plaintiff has endeavored to prove that a loan was advanced to and received by the 1<sup>st</sup> Defendant. The same was to be repaid within a period of 24 months. Such facts are undisputed and **Exh. P1** fully corroborates these facts.

In this case the evidence relied upon is mainly that of **Pw1**. Uncontroverted as it is, one tends to be carried by the proposition that was once given by a Court in Uganda, in the case of **Samwiri Massa v Rose Achieng [1978] HCB 297, (High Court of Uganda (Unreported))**, that, "*a story of the Plaintiff given in the absence of a defence to contradict it, ought to be accepted as the truth.*"

Nevertheless, I am aware that, although this case had to proceed *ex-parte*, initially, the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, and 9<sup>th</sup> Defendants had filed their written statement of defence (**WSD**). In that **WSD**, which still forms part of the record of the documents filed in this Court, they readily admitted that a loan was advanced to the 1<sup>st</sup> Defendant.

Their admission, however, was limited to that extent only. Even so, it is a settled principle of law that, facts agreed and or admitted, are no longer in dispute and need not be proved since they are put out of the scope of the parties' litigation. Section 60 of the Evidence Act, Cap.6 R.E. 2002 is clear on that.

In their **WSD**, the Defendants do not dispute that, on 2<sup>nd</sup> February 2013, the 1<sup>st</sup> Defendant executed an agreement with one **Mbaruku Abdallah Mbaruku**, and, that, the High Court declared the mortgage which was meant to secure the loan advanced to the 1<sup>st</sup> Defendant, as null and void.

As already stated, despite filing their **WSD**, the 2<sup>nd</sup> to 9<sup>th</sup> Defendants failed to enter an appearance in this Court to counteract the rest of the facts and allegations raised by the Plaintiff against them, and, by order of this Court, the case against them had to proceed *ex-parte*.

The 10<sup>th</sup> to 13<sup>th</sup> Defendants, likewise, did not appear in Court despite there being evidence that a summons by way of substituted service, was published in **Mwananchi News Paper** and **the Daily News**, both dated 17<sup>th</sup> December 2018. In the absence of any defence by these defendants, this Court passed an order that, the case against the Defendants, should proceed *ex-parte*.

At that juncture, it is worth noting, that, generally, a defendant who has been saddled with an order of *ex-parte* hearing stands at a loss. This is due to the fact that, being absent in court,

he cannot cross-examine the plaintiff's witnesses, cannot adduce evidence, not only in rebuttal of the plaintiff's case, but also, on the pleas in his written statement of defence and argue the case.

As observed herein, there is no dispute that the 1<sup>st</sup> Defendant, received a total of **TZ 250,000,000** /- as loan from the Plaintiff. **Exhibits P.1, P2** and **P5** (the minutes of a meeting with the directors of the 1<sup>st</sup> Defendant) clearly reveals that. According to **Exh. P6**, as of December 31<sup>st</sup>, 2015, the principal amount plus interest accrued, had soared to **TZS 252,404,774.8**.

It is also not disputed, that, the amount received was secured by a Mortgage Deed (**Exh.P.3**) which was created in favour of the Plaintiff-Bank, and, that, the Mortgagor was one "**Mbaruku Abdallah Mbaruku**". In this Court, there was submitted, as well, **Exh.P.4** which was a contract entered between the 1<sup>st</sup> Defendant and "**Mr. Mbaruku Abdallah Mbaruku**" (who turned out to be the 10<sup>th</sup> Defendant) to the effect that, the latter would be acting as a guarantor. This, to me, was a further proof, that, the directors of the 1<sup>st</sup> Defendant knew the impostor, the 10<sup>th</sup> Defendant, who

posed as "**Mbaruku Abdallah Mbaruku**", and, therefore, had full knowledge of the conduct that facilitated the fraudulent transaction.

I tend to hold so because, had it not been the introductory posture of the 10<sup>th</sup> defendant which was made to the Plaintiff by the 2<sup>nd</sup> to 9<sup>th</sup> Defendants, who are the Directors of the 1<sup>st</sup> Defendant, there would not have been a security to guarantee the release of the funds sought by the 1<sup>st</sup> Defendant.

It is also clear to me, that, the acts of the 1<sup>st</sup> to 10<sup>th</sup> Defendants have the requisite proximate relation to the Plaintiff's harm or loss suffered. I find it to be so, because, such pretentious acts were consistently relied upon by the Plaintiff, to the extent of believing that, a lawful mortgage transaction had been created and proceeded to release the funds constituting the loan facility to the 1<sup>st</sup> Defendant. As a result, these Defendants cannot escape liability.

It is also an undisputed fact, that, the purported Mortgage Deed and the entire transactions leading to its creation, were declared by the High Court, (Masoud, J.,) **in Land Case No.12 of 2014**, as being null and void for having been fraudulently obtained.

The Judgement of the High Court, for which this Court took judicial notice of it, is self explanatory.

The effect of the above noted judgement of the Court was that, the Plaintiff was left without cover and lost all rights which could have been exercised over the purported mortgaged property, so as to obtain remedies against the 1<sup>st</sup> Defendant, in case of any default.

In the pleadings, the Plaintiff has also raised the issue of fraud. In law, when there is an allegation regarding fraud, the same must have been pleaded and particularized. In this case, the same is pleaded in paragraphs 5, 16, 17 and 18. The particulars of the alleged fraud are connected with the 10<sup>th</sup> Defendant's acts of signing **Exh. P3** and **4** as one "**Mbaruku Abdallah Mbaruku**", and pledging as a security, a house in Block 65, Plot.4, Land Office Na.104565, Ngamiani, Tanga.

It is also clear to me that, such a fraudulent act which was perpetrated by the 10<sup>th</sup> Defendant, constituted a scheme well known to all defendants. This is clear, because, the 11<sup>th</sup> and 13<sup>th</sup> Defendants were well connected to the 10<sup>th</sup> Defendant who, having

obtained the Title Deed from the 13<sup>th</sup> Defendant, was able to mastermind the fraudulent scheme, and, in connection with the Directors of the 1<sup>st</sup> Defendant, obtained the said **TZS 250,000,000/=** from the Plaintiff. Worst still, he did so while knowing that the creation of the purported mortgage on the property in Block 65, Plot.4, Location Na.104565, Ngamiani, Tanga was nothing but a fraudulent scheme.

As pointed out herein above, this Court is faced with two issues; namely: *Whether the Defendants are jointly and severally liable for the outstanding amount of TZS 252,404,774.8; and, if the 1<sup>st</sup> issue is in the affirmative, whether the Plaintiff is entitled to the Reliefs he is seeking.*

Looking at the available evidence and the testimony of **PW1**, this Court finds that the Plaintiff has established and proved its case within the standard required in civil cases, i.e., on the balance or the preponderance of probability. In particular, the Plaintiff has established with concrete proof that, it extended a credit facility to the 1<sup>st</sup> Defendant amounting to **TZS 250,000,000/-** which was payable within 24 months.

It has also been demonstrated that, this loan was duly approved by the 1<sup>st</sup> Defendant's Board. Further that, the loan, as per **Exh.P6**, has never been repaid. Such a default was an outright breach of the terms of the facility agreement between the Plaintiff and the 1<sup>st</sup> Defendant.

Moreover, it has been proved that, it was the directors of the 1<sup>st</sup> Defendants, i.e., the 2<sup>nd</sup> to 9<sup>th</sup> Defendants, who introduced the 10<sup>th</sup> Defendant to the Plaintiff, as a guarantor who secured the loan by way of mortgaging of his property (which property turned out to be not belonging to him and that he was just an impostor.)

As pointed out earlier, the 11<sup>th</sup> to 13<sup>th</sup> Defendants, being well connected to the 10<sup>th</sup> Defendant who masterminded the fraudulent scheme, are also part and parcel of the scheme and cannot escape liability for the losses suffered by the Plaintiff.

In view of all these, I find that the first issue regarding '*whether the Defendants are jointly and severally liable for the outstanding amount of TZS 252,404,774.8*', is answered in the affirmative. I find it to be so because, in essence, where there is reliance by the plaintiff upon a defendant's deceptive acts, and, in

such reliance, the requisite causal connection between a defendant's fraudulent misrepresentation and the plaintiff's suffering of loss is established, liability arises, and, the defendants cannot escape it. The Defendants are, therefore, jointly and severally liable to pay the whole of the outstanding amount of **TZS 252,404,774.8.**

It follows, therefore, that, because the second issue is predicated on the first issue being responded to in the affirmative, such second issue is also affirmatively answered, that is to say, having found that the Defendants are liable to the plaintiff, it goes without saying, that, the latter is entitled to the reliefs sought.

According to the Plaintiff, reliefs sought by the Plaintiff include payment of general damages for the loss of profit. In the case of **Maweni Limestone Ltd v DAMATICO General Supply**, Civil Appeal No.28 of 2018, (Unreported), the Court of Appeal of Tanzania made it clear that an award of general damages is at the discretion of the Court, after it had considered the evidence on record to justify such an award.

Essentially, in this case, the **Exh.P 1 and P6** which were tendered by **Pw1** and admitted into evidence, reveal that the 1<sup>st</sup> Defendant was granted a loan amounting to **TZS 250,000,000** by the Plaintiff and, that, the same has not been repaid. There is no doubt that the Plaintiff had expectations of gaining profits from the transaction and could have invested the monies in other business ventures and reap from such investments.

Such expectations, however, were dashed away by the fact that, the 1<sup>st</sup> Defendant breached the terms of the loan facility. In view of this, I find that the Plaintiff must be awarded damages because of the said breach of the terms of the loan facility. The time from when the loan was supposed to have been paid until the time when this judgment is being entered in favour of the Plaintiff, it is almost 5 years. All that time the Plaintiff has been pursuing its rights to be fully refunded. On such grounds, I find that an award of general damages equal to **TZS 10,000,000/=** will be fair.

In the upshot, an *ex-parte* judgment is hereby entered in favour of the Plaintiff and against the Defendants jointly and

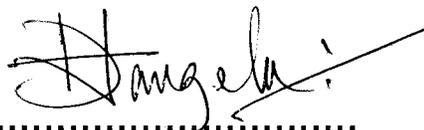
severally, and the Court proceeds to make orders and declare as follows:

- (i) That, the failure by the 1<sup>st</sup> Defendant to repay the Plaintiff the whole of an outstanding amount of the loan advanced to the former by the latter, constituted a clear breach of the terms of the loan agreement;
- (ii) That, the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, and 9<sup>th</sup> Defendants in their capacity as board members of the 1<sup>st</sup> Defendant, who introducing the 10<sup>th</sup> defendant, one **Rashid Mavunde**, to the Plaintiff, as "**Mbaruku Abdallah Mbaruku**", and, thus making it possible for the Plaintiff to approve the loan facility and release funds to the 1<sup>st</sup> Defendant, were part and parcel of the fraudulent scheme which led to loss of **TZS 250,000,000** advanced as loan to the 1<sup>st</sup> Defendant, and, are therefore liable for such losses;
- (iii) That, the 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, and 13<sup>th</sup> Defendants were part and parcel of the fraudulent scheme in relation to the mortgaging of the Mortgaged property which, according to the judgment of the High Court in Land Case No.12 of 2014 was later declared as null and void. As such they are also liable to the Plaintiff for the losses suffered by the latter.
- (iv) That, all Defendants, are hereby jointly and severally ordered to promptly pay the Plaintiff **TZS 252,404,774.8**

as the entire outstanding amount of the loan (as of 31<sup>st</sup> December 2015);

- (v) That, Plaintiff is entitled to default interest at a rate of 2% from the date of breach of the terms and condition of the credit facility agreement, that is, from 31<sup>st</sup> December 2015 to the date of this judgement.
- (vi) That, Plaintiff is entitled to interest on the above decretal sum at a rate of 7% from the day of this judgement until full payment thereof.
- (vii) That, the Defendants shall jointly and severally be liable to pay the Plaintiff general damages amounting to TZS **10,000,000/=**.
- (viii) That, since costs follow the event unless for good causes the court determines otherwise, the Plaintiff is entitled to costs of this suit as shall be assessed by the taxing master.

**It is so ordered.**



.....  
**DEO JOHN NANGELA**  
**JUDGE,**

**High Court of Tanzania (Commercial Division)**  
**24 / 03 / 2020**

Ex-parte Judgement, delivered on this 24<sup>th</sup> day of March 2020, in the presence of the Ms Hamisa Nkya, Advocate for the Plaintiff, and in the absence of the Defendants.



**DEO JOHN NANGELA  
JUDGE,  
High Court of Tanzania (Commercial Division)  
24/ 03 /2020**