IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT ARUSHA

COMMERCIAL CASE NO. 8 OF 2020

BANK OF BARODA (TANZANIA) LIMITED ..... PLAINTIFF

VERSUS

PULSES AND AGRO COMMODITIES

(TANZANIA) LIMITED..... DEFENDANT

Date of Last Order: 23/10/2020

Date of Judgement: 27/11/2020

JUDGEMENT

MAGOIGA, J.

The plaintiff, BANK OF BARODA (TANZANIA) LIMITED by way of plaint instituted the above suit against the above named defendant praying for judgement and decree in the following orders, namely:

a. Payment of the outstanding debt United State Dollars One Million Nine Hundred Seventeen Thousand Twenty Four and Eight Four Cents Only(USD. 1,917,024.84).
b. Interest on the outstanding Debt at commercial rate computed from 20th March 2020 to the date of judgement.
c. Interest on the decretal amount at the court's rate from the date of judgement till full and final satisfaction of the decree of the court.

d. Costs of and incidental to the suit; and

e. Any other relief that the honourable Court may deem fit.

Upon being served with the plaint, the defendant filed a written statement of defence disputing the entire claims of the plaintiff as unfounded following the sale of the all assets and debenture of the defendant through Charles Rwechungura- a Receiver Manager appointed to sell the assets and debenture of the defendant and consequently prayed for dismissal of the entire suit with costs.

The facts of this suit as depicted from the pleadings are simple and straight forward. That, on 10th December, 2008, the plaintiff approved and offered credit facility to the defendant to the tune of USD.1,700,000,000/= on the terms and conditions as contained in the Facility Agreement dated 15th December, 2008. According to the Facility Agreement, portion of the loan amounting to USD.200,000/= was intended for the purchase machinery and equipments for the establishing Dall-Mill industry and other machinery for purposes of running the defendant's business efficiently and the rest of the money was for working capital. Further facts in the facility agreement were that the loan was to attract an interest rate of 4% over 3 months-USD-LIBOR (floating) and the loan was to be repaid within a period of 36 months

including moratorium of 6 months with 1st to 35th monthly installments of UDS.5,556.00 and last installment of USD.5,540.00. And it was agreed that in case of default an additional rate of 2% per annum was to be charged. The facts went on that, the defendant committed and reaffirmed by letters to pay the money as agreed. More facts were that on 15th June 2011, the defendant requested further loan of USD.68,000.00 for a period of 90 days but whose request was denied because of his questionable outstanding balance. Sometimes in January 2013 the plaintiff discovered that the defendant had obtained other credit facility from **Bank- M Tanzania Limited** and **Bank ABC Tanzania Limited** and that the defendant's stock were managed by the agent of Audit Control & Expertise contrary to the defendant's covenants and undertakings in the Facility Agreement.

Further facts were that the efforts by the plaintiff to make arrangement with other banks to takeover former liability with the plaintiff proved futile. In the circumstances, the plaintiff appointed Mr. Charles Rwechungura as Receiver Manager in terms of Debenture Deed executed by the defendant in favour of the plaintiff but whose appointment was successfully challenged in court. It was against the above background, the plaintiff instituted the

instant suit claiming for payment of the outstanding debt, among others, hence, this judgement after hearing parties on merits.

Before hearing started, the following issues were framed, recorded and agreed between the parties for the determination of this suit, namely:

1. Whether the matter before this honourable court in law and equity is res subjudice and or res judicata.

2. Whether the plaintiff and defendant entered into Credit Facility Agreement in the form of term loan USD.200,000.00 and an Over Draft Facility of USD.1,500,000.00

3. If the answer to issue No.2 is in affirmative, what were the agreed terms to the said agreement.

4. Whether the defendant breached the agreed terms of the agreement

5. What reliefs are parties entitled to.

When the instant suit was called on for hearing, the plaintiff was enjoying the legal services of Mr. Zaharan Sinare, learned advocate; and the defendant had the legal services of Messrs. Omari Idd Omari and Innocent Mwanga, learned advocates.

The plaintiff in proof of her case called one witness, Mr. JOEL GEOFFREY KALUGENDO –who was christened as PW1 for the purposes of these proceedings. Through his witness statement, PW1 told the court that, he is the Branch Manager of the plaintiff based in Arusha and that he is aware of the circumstances of this suit between parties herein which was based on Facility Agreement in the form of term loan of USD.200,000.00 and Overdraft of USD.1,500,000.00. It was the testimony of PW1 that, on 10th December, 2009, the plaintiff approved and offered credit facilities to the defendant at her request through a letter dated 17th October, 2008 on the terms as contained in the Facility Agreement. The said amount was intended, among others, USD.200,000.00 for purchase of machinery and equipments for establishing Dall-Mill industry and other machinery for purposes of running the defendant's business efficiently while the rest of the amount was for working capital. Further PW1 testified that, the credit facility attracted interest rate of 4% over 3 months –USD-LIBOR (floating) per annum. The said loan amount was agreed to be paid within 36 months including moratorium of 6 months with 1-35 months installments of USD.5556.00 in each month and the last 36th month was to be USD.5540.00 after a moratorium of 6 months following first disbursement and that the

parties agreed that the defendant was to pay the interest separately on monthly basis and overdraft facility portion is for a period of 12 months renewable. PW1 tendered in evidence Facility Agreement dated 10/12/2008 dully executed by the parties which was admitted and marked as **exhibit P1.**

PW1 went on to testify that through a letter dated 17th December, 2008, the defendant committed to pay the Term Loan portion as agreed and that he was to pay 2% rate of interest on top of the agreed rate of interest in case of default. Further, PW1 told the court that through a letter dated 17th December, 2008, the defendant reaffirmed its demand promissory note in respect of the portion that he is bound by the terms therein and that they have to pay on demand.PW1 tendered in evidence Bank statement of the defendant maintained by the plaintiff dating from ranging from 1/1/2014 to 27/09/2018 and an affidavit verifying the electronic statement which were collectively admitted and marked as **exhibit P2a-b.** PW1 tendered letter of continuing security dated 17/12/2008 which was admitted in evidence and marked as **exhibit P3.**

PW1 told the court that, the second request for further loan of USD. 68,000.00 for period of 90 days was denied on the reasons that the

turnover in respect of the defendant's existing overdraft account was not satisfactory.

PW1 went on to tell the court that, contrary to terms of the Facility Agreement, the defendant obtained other credit facilities from Bank –M Tanzania Limited and ABC Tanzania Limited and allowed debenture stock to be managed by an agent by the name of Audit Control & Expertise. In the circumstances, the plaintiff on 23rd January, 2013 wrote the defendant requesting to rectify the discrepancies with an immediate effect. The defendant in response through letter dated 25th January 2013 confirmed its indebtness in the overdraft account and promised that the debt will be takenover by Bank ABC Tanzania Limited which is underway. PW1 tendered in evidence a letter of continuity security dated 17/12/2008 which was admitted and marked as **exhibit P3,** a letter dated 25/01/2013 as **exhibit P4**, and a letter dated 24/08/2011 as **exhibit P5.**

PW1 told the court in pursuits to accomplish the taking over arrangement, the then, Arusha Branch manager of the plaintiff met with Bank ABC Tanzania Limited branch manager and the plaintiff wrote a letter dated 07th March 2013 seeking confirmation from Bank ABC Tanzania Limited that it will take the liabilities of the defendant and by email the Bank ABC informed

the plaintiff that are working on the matter. According to PW1, on 13th April 2013 the plaintiff sent a reminder to Bank ABC Tanzania Limited but which was answered on 30th April 2013 indicating that they will commence credit review of the defendant around July 2013 for purposes of taking over the defendant' s liability. PW1 insisted that the plaintiff accommodated the taking over arrangement for over 9 months but it could not materialize. PW1 tendered in evidence a letter dated 24/08/2011 which was admitted in evidence and marked as **exhibit P5,** letter dated 23/01/2013 from the plaintiff to the defendant as **exhibit P6**, letter date 24/07/2013 from Bank ABC as **exhibit P7** and letter dated 29/04/2013 as **exhibit P8.**

In the circumstances, it was the testimony of PW1 that on 3rd October 2013 they gave final notice which was copied to Bank ABC Tanzania Limited but on 31st October,2013, plaintiff received a letter for Bank ABC Tanzania Limited expressing the defendant's proposal on different terms and advising that otherwise the defendant to look for another bank.PW1 tendered in evidence a letter dated 30/10/2013 as **exhibit P9** and a letter dated 31/10/2013 as **exhibit P10.**

In the circumstances, PW1 told the court that they appointed Mr. Charles Rwechungura as its Receiver Manager in the terms of the Debenture Deed

executed by the defendant in favour of the plaintiff, whereby he issued Notice of Enforcement of the Debenture dated 21st February 2014.

PW1 went on to tell the court that, the said appointment was successfully challenged in court and eventually declared a nullity and the defendant deposited USD.42,296.77. PW1 told the court despite all that efforts but the outstanding debt by 19th March 2020 was at USD.1,917,024.84

Under cross examination by Mr. Omari, learned advocate for the defendant, PW1 told the court that, he is the branch manager of the plaintiff's branch in Arusha since 2019 to date. PW1 when shown exhibit P1 and asked if when it was signed he was working with the plaintiff, he said he was not working and was not involved in its preparation. PW1 admitted to know of the case that was going on between plaintiff and defendant as Civil Case No. 24 of 2014 over the appointment of Mr. Charles Rwechungura as Receiver Manager. PW1 admitted knowing that Mr. Rwechungura took possession of the industry of the defendant which was the subject matter of the facility letter and further that, in that case Rwechungura's appointment was declared illegal and all that was done by the plaintiff and Rwechungura was illegal including any sale as well was illegal. PW1 pressed with questions admitted that he has no records that, the orders of the court

were complied with. PW1 told the court that he don't know who posses the industry as of now and neither does he know who is to execute the decision in Civil Case No. 24 of 2014. PW1 admitted to know another case No. 51 of 2017 which is pending in court but with no knowledge the stage it has reached.

PW1 shown exhibit P2 and says the outstanding balance is USD.1,169,417.18 but the claim of the plaintiff is USD.1,917,024.87 and admitted that the amount in these two exhibits are at variance. PW1 when pressed with questions admitted that the facility had a guarantors but were not sued in this suit.

Under re-examination by Mr. Sinare, PW1 told the court that the defendant was the plaintiff in Civil Case No. 24 of 2014 and that in that case they were challenging the receivership that was conducted by Rwechungura. PW1 admitted not knowing what the plaintiff in this suit did, in the circumstances.

PW1 through cross examination told the court that, there is another case, Land Case No. 51 of 2017 at Arusha registry and it was filed by the defendant against the plaintiff herein as defendant. As to paragraph 3 of

the plaint the amount indicated therein is USD.1,917,024.87 and is the same amount I stated in my witness statement.

This marked the end of the plaintiff's case and same was marked closed.

In defense, the defendant called one witness, Mr.RAKESH YOGINDER KUMAR VOHORA- who for purposes of these proceedings shall be referred as DW1. Through his witness statement which was admitted in evidence as his testimony in chief, DW1 told the court that, he is the Managing Director and shareholder of the defendant's company handling all affairs including financial affairs of the defendant, hence, aware of the Credit Facility which was sanctioned in December, 2008. DW1 reiterated the terms and the amount of the Facility Agreement and that the whole amount was USD.1,700,000.00 and was to be paid as stated by the PW1. DW1 went on to tell the court that, as security of the loan the defendant through its directors executed other bank documents which includes Bank Guarantee, Debenture, as well as Personal guarantees and a third party mortgage. According to DW1, the said Debenture created charge on all fixed and floating, present and future assets of the defendant company, in which the plaintiff had the first ranking charge over the said Debenture.DW1 prayed that **exhibit P1** be part of their defence in this suit.

DW1 went on to tell the court that, the defendant did pay the term loan in full and the over draft was being regularly serviced as required by the plaintiff until October, 2013 when they received a demand notice from the plaintiff to repay the Facility in full.

DW1 told the court that, they communicated with the plaintiff with view of looking for another bank to take over the facility, with a view of expansion of their business and the plaintiff's inability to expand the facility. DW1 went on to tell the court while the process was underway with the African Banking Corporation Tanzania Limited alias Bank ABC, the defendant received a notice dated February 2014 from the plaintiff's legal advisor namely CRB Legal Africa with an intention of appointing a Receiver Manager. On 17th April 2014, the defendant became aware of the Receiver Manager's appointment and on the same day, the plaintiff's Receiver Manager took physical possession of the defendant's factory and shut it down despite that it was in full operation.

DW1 went on to testify that in the circumstances, the defendant instituted Civil Case No. 24 of 2014 and its subsequent Miscellaneous Civil Application No. 156 of 2014. While the cases were pending the plaintiff through the Receiver Manager sold/and disposed off all the assets, properties and even

the stocks financed by the Bank ABC. DW1 further told the court that, the Civil Case No. 24 of 2014 ended in their favour and the whole process by the plaintiff and the Receiver Manager were declared illegal. DW1 further testimony is that they opened Land Case No.51 of 2017 against the plaintiff for declaratory orders that the plaintiff's notice of intention to enforce a mortgage security over third party property on Plot No. 95, Block I, Kaunda Road, Arusha is but unlawful. Their attempts to Court of Appeal were in vain. DW1 tendered in evidence a ruling of this court in Misc. Civil Application No. 156 of 2014 which was admitted and marked as **exhibit D1,** Judgement and decree in Civil Case No 24 of 2014 which was admitted and marked as **exhibit D2a-b** and Ruling and order by the Court of Appeal in Civil Appeal No 32 of 2016 and Civil Application No. 128 of 2020 as **exhibit D3a-b.**

According to DW1, the plaintiff is deliberately hiding the illegal Receivership and its subsequent sale/disposition of the defendant's assets and properties and this suit, according to DW1, is calculated by the plaintiff to distort the facts and disrespect lawful judgement of the High Court over illegal, premature and fraudulent recovery of the same facility by its purported Receiver Manager. DW1 tendered Notice of Intention to enforce a mortgage

security dated 24/07/2017, admitted and marked as **exhibit D4** and advertise in Mwananchi Newspaper as **exhibit D5.** DW1 further tendered in evidence pleadings in Land case No. 51 of 2017 collectively which were admitted in evidence and marked as **exhibit D6a-b.** Other documents tendered by DW1 in evidence are letters dated 3/10/2013, 20/11/2013 and 31/12/2013 which were admitted and marked as **exhibit D7a-d.** Also a Debenture Deed dated 17th December, 2008 was admitted in evidence and marked as **exhibit D8.**

The above said and done, DW1 prayed that, this court find and hold that, the instant suit is res subjudice and order stay of the suit or res judicata in law and proceed to dismiss it with costs.

Under cross examination by Mr. Sinare, DW1 when shown exhibit P1, DW1 admitted that all conditions and terms of the facility in dispute are contained therein. When shown exhibit P8 and asked if it gives the plaintiff powers to appoint a Receiver Manager, DW1 admitted so but was quick to point out that the whole appointment of Rwechungura was illegal by virtues of the decision of this court in Civil Case No. 24 of 2014. However, further pressed with questions, DW1 admitted that in that case, he was not challenging the outstanding amount of debt or loan balance under the

Facility Agreement. DW1 told the court that the bank did not filed a counter claim in Civil Case No 24 of 2014. DW1 further quizzed admitted that the case was dealing with the debenture and subsequent actions by the Receiver Manager. DW1 insisted that, the appointment, the process and sale by Rwechungura in Civil Case No. 24 of 2014 was unlawful and prematurely made. DW1 told the court that, the correct position was for the bank to file a case and the court appoints a Receiver Manager and to date according to DW1, no such a case has never been filed. DW1 admitted as well that they have never executed the decree in Civil Case No. 24 of 2014. DW1 admitted that Civil Case No. 24 of 2014 was for declaratory orders and in Commercial Case No. 8 of 2020 the plaintiff is claiming an outstanding loan and not anymore to enforce debenture and mortgage. DW1 told the court that all cases between parties herein are interrelated but are not one. As to the loan taken, DW1 said that he is not aware if was paid in full because they took all assets and sold them all. Further, DW1 admitted that before the Receiver Manager took the assets, the loan was not fully paid. DW1 admitted to have signed the Debenture committing that in case of default the plaintiff may proceeds against the properties but subject to the process of the law. According to DW1, this loan had three securities

personal guarantees, third party mortgage and Debenture. DW1 told the court that the plaintiff and the Receiver Manager took the properties of the defendant and sold them but they never gave him report of the sale or proceeds. As to the amount in accordance to exhibit P2a is USD.1,169,417.18 and not the one claimed in the plaint.

Under re-examination by Mr. Omari, DW1 told the court that, the defendant successfully challenged the whole process of the Receiver Manager and the plaintiff which were declared unlawful and illegal and which have never been challenged. As to why the defendant has not executed the decision of the High Court, DW1 told the court that, they were waiting the outcome of the appeal which the plaintiff filed but was unsuccessful and the chain of events could not allow them to execute the same as other cases were instituted including this one. According to DW1, the other cases are Land Case No. 51 of 2017 and 08 of 2020 were not different because they are dealing with the same issue of loan, hence, interlinked. DW1 replied that in all cases no counter claim was ever raised by either of the parties.

This marked the end of hearing of the defendant's case.

The learned advocates for the parties prayed that, they be allowed to file final closing submissions relating to this suit. I granted their prayer. I have had time to read their respective rival arguments in support of their respective stances. I truly commend them for their industrious and insightful inputs on this suit. In the course of determining this suit, I will here and there refers to their points raised and argued, however, I will not be able to take everything argued for avoidance of having long and boring judgement.

Having carefully gone through pleadings, testimonies of the witnesses and final submissions of the parties', I find out that, there are some facts which I noted in these very contentious proceedings not in dispute. **One,** there is no dispute that the parties herein in December, 2008 entered into loan facilities which was categorized as term loan of USD.200,000.00 and overdraft of USD.1,500,000.00 on terms and conditions as evidenced in **exhibit P1. Two,** there is no dispute that the relationship between the parties went on well but in April 2014 to date parties have been into legal wrangles following the appointment of Receiver Manager, vide Civil Case No.24 of 2014, Land Case No. 51 of 2017 and now Commercial Case No.08 of 2020 all revolving on issues pertaining to **exhibit P1. Three,** equally

there is no dispute that none of the parties to these cases raised counter claim whenever a suit was opened against one another.

The above noted undisputed facts will help this court in dealing with this suit to its finality and in fair manner.

The task of this court now is to determine the issue as recorded and proved in the light of evidence on record. The first issue was thus couched; whether the matter before this honourable court is in law and equity res subjudice and/or res judicata. At the outset I wish point out that the principle of res judicata generally is that a cause of action may not be relitigated once it has been judged on the merits. This principle is captured under the provisions of section 9 of the Civil Procedure Code, [Cap R.E.2019]. The said section provides:

Section 9- No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between same parties or between parties under whom they or any of them claim litigating under the same title in a court of competent to try such subsequent suit or the suit which such issue has been subsequently raised and has been heard and finally decided by such court.

My reading of the above provisions I gathered that the whole purpose of this section is to assure efficient judicial system by creating a repose and finality in litigation. That being the case, therefore, in my considered opinion where this principle can be successfully be argued, its effect is to cause the suit to be dismissed, hence, a pure pint of law. Equally important I wish to point out that, res judicata applies to a matter that has been adjudicated or arbitrated and whereas res sub judice applied to matter pending for trial. In other words the principle of res sub judice cannot apply to a pending judgement, like in the instant suit now.

The learned advocates for the defendants argued forcefully that, this suit is res judicata to Civil Case No.24 of 2014 and cited the case of GEORGE SHAMBWE v. TANZANIA ITALIAN PETROLEUM CO.LIMITED [1995] TLR 20 in which it was held that 'for res judicata to apply not only must be shown that the matter directly and substantially in issue in the contemplated suit is the same as that involved in the former suit between the same parties but also it must be shown that the matter was finally heard and determined by a competent court. On that note the learned advocate for the defendant prayed that, this court be pleased to dismiss this suit with costs. In the alternative and without prejudice, on the res subjudice issue, the learned

advocates for the defendant equally and forcefully argued that, since there is Land Case No. 51 of 2017 pending before High Court (Arusha District Registry) as evidenced in **exhibit D6a-b,** then, this suit falls within the ambits of the doctrine of res subjudice as provided for under section 8 of the Civil Procedure Code [Cap 33 R.E 2019] and as such the proceedings in this suit should be stayed for the former suit was instituted prior to this suit.

On the other hand, the learned advocate for the plaintiff diametrically argued that this issue was not pleaded and was wrongly framed in this suit. The learned advocate took it that, so long as no such facts are pleaded, then, parties are bound by their pleadings and no way can such an issue be entertained at this stage as parties are bound by their pleadings. In support of this he cited the case of ASTEPRO INVESTMENT CO LIMITED v. JAWINGA COMPANY LIMITED, CIVIL APPEAL NO. 08OF 2015 (CAT) DSM (UNREPORTED).

On the Civil Case No. 24 of 2014 and its consequential effect, it was argued by Mr. Sinare that is not res judicata. In support of his stance, the learned counsel cited the case of PENIEL LOTTA v.GABRIEL TANAKI AND OTHERS[2003] TLR 312 in which it was held and set out five ingredients which must co-exists for the principle to apply, namely:

(a) The matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit

(b) The former suit must have been between the same parties or privies claiming under them

(c) The parties must have litigated under the same title in the former suit

(d) The court which decided the former suit must have been a competent to try the subsequent suit, and

(e) The matter in issue must have been heard and finally decided in the former suit .

According to the learned advocate for the plaintiff, the issue in Civil Case No.14 of 2014 was the appointment of Receiver Manager and not the outstanding loan which is the issue now in the instant suit which have never been heard and determined by any competent court. On that note Mr. Sinare concluded that, this suit is not res judicata at all.

On the issue of res subjudice, it was the arguments of Mr. Sinare that, the ingredients as held in the two cases of EXIM BANK (T) LIMITED v. DEOGRATIUS KATUNZI PETRO t/a GEITA UPENDO DISPENSARY, COMMERCIAL CASE NO.20 OF 2020 AND EXIM BANK (T) LIMITED v. Ms.

ACE DISTRIBUTORS (T) LIMITED AND OTHERS, COMMERCIAL CASE NO. 83 OF 2019 were not met in this suit. These are; (i) that the matter in issue in the second suit is also directly and substantially in issue in the first issue, (ii) that the parties in the second suit are the same or parties under whom they or any of them litigating under the same title, (iii) that the court in which the first suit is instituted is competent to grant the reliefs claimed in the subsequent suit and (iv) that the previous instituted suit is pending.

The learned advocate for the plaintiff discussed all the above ingredients and concluded that this suit is not res subjudice and invited this court to find this issue in the negative.

I have dispassionately considered the rival arguments and cases cited in support of this point and facts pertaining to this suit but with respect to the learned advocates for the defendant, I am inclined to find and hold the first issue in the negative. The reasons I am taking this stance are not far to fetch. **One,** as rightly argued by Mr. Sinare, and rightly so in my respective opinion, in Civil Case No. 14 of 2014 the only issue determined was the procedure of appointment of Receiver Manager and not otherwise as loudly borne out in **exhibits D1 and D2a. Two,** for the principle of res judicata to apply all ingredients as stated in the case of PENEIL LOTTA (supra) and

as submitted and enumerated in the submissions by the learned advocates for the defendant at page 4 of their submissions must co exists to for the principle to stand but that is not the case here. **Three,** the issue of res subjudice can only apply before the suit is heard but not at this stage of judgement, and even if, I were to consider the same still same lacks some ingredients as pointed out in the cases cited by Mr. Sinare. **Four,** the impugned decision in Civil Case No.24 of 2014 was a declaratory judgement which did not determine the rights of the parties, in particular, their business relationship relating to the loan granted by the plaintiff to the defendant.

In the totality of the above reasons, I find that first issue must be and is hereby answered in the negative.

The second issue for consideration is whether the plaintiff and defendant entered into credit facility agreement in the form of term loan of the United States Two Hundred(USD.200,000.00) and an Overdraft of United States Dollars One Million, Five Hundred Thousand Only (USD.1,500,000.00). This issue will not detain this court much. It is one of the undisputed facts as pointed out at the outset and is proved by the contents of **exhibit P1** dully executed by the parties. It was an exhibit that was admitted without

objection and was intended to be used by both parties. Without much ado this issue is answered in the positive that parties entered into credit agreement as exhibited above.

Next issue is, if issue number two is answered in the affirmative, what were the agreed terms of the said agreement. The learned advocates for the defendant consolidated issues numbers 2,3 and 4 and argued them jointly that the amount of USD.200,000.00 was duly paid as agreed in accordance with the terms and conditions of the facility letter. However, the learned advocates for defendant argued that these issues which hinges on breach of the terms and conditions of the agreement for non-payment of USD.1,500,000.00 should be answered in the negative because surety were not sued because their liability co-exists with that of the principal as provided for under section 80 of the Law of Contract Act, [Cap345 R.E. 2019], the plaintiff has not issued a demand notice or default notice to either to the principal or to the guarantors as provided under section 92 of the Law of Contract Act, [Cap345 R.E.2019] and that the plaintiff did not issue a default notice in writing to the defendant as required under section 127 of the Land Act [Cap 113 R.E 2002] . In support of their stance the learned advocates cited the case of EXIM BANK (T) LIMITED v. DASCAR

LIMITED AND JOHN HALARD CHRISTER ABRAHAMSON, CIVIL APPEAL NO.92 OF 2009(CAT) DSM (UNREPORTED). In the totality, they urged this court to find that this suit was prematurely instituted without due regards to the provisions of the law above. On issue number four it was their brief submission that the whole claim was wrongly claimed as held in Civil Case NO. 14 of 2014.

On the other hand, the learned advocate for the plaintiff pointed out that, the second issue is not in issue between parties because the pleadings and witness statements are obvious to that effect. The learned advocate for plaintiff pointed out further that, since the contents of exhibit P1 are not dispute, then, he pointed three notorious terms that; one, the overdraft was for a period of 12 moths renewable; two, the agreed interest was 4.0% over 3months-USDLIBOR (floating) with monthly rest calculated based on 360 days a year basis; and three, that it is an event of default, if any, indebtness of the borrower becomes due and payable prior to its stated maturity by reason of default of the borrower or is not paid when due. In conclusion, the learned advocate for the plaintiff urged this court to find that all issues numbers 2, 3 and 4 be answered in the affirmative.

Having considered the rival arguments by both trained legal minds of the parties, and having equally revisited the pleading, with dues respect to the learned advocates for the defendant, the arguments that failure to sue guarantors is fatal is coming from the bar and this being a point of law if they wanted to raise it and argue it they could have done so in the earlier possible opportunity of the suit and not now. As to the arguments that no notice was issued hence the suit cannot be maintained, with due respect to the learned advocates for the defendant, this argument was raised and argued out of ignorance because in paragraph 11(f) of written statement of defence, they categorically stated that a notice was issued on 24th July 2017, which was admitted as **exhibit D4** , hence, negating that argument.

Nevertheless, the argument that failure to join guarantor is fatal in this suit cannot hold water because it is raised when is too late and the provisions of Order I Rule 9 of the Civil Procedure Code, [Cap 33 R.E 2019], are clear for they provides as follows:

9. Misjoinder and non-joinder of parties

No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the right and interests of the parties actually before it.

Therefore, guided by the above provision of the law, I am inclined to find and hold that, by the way, the guarantor in dispute is DW1 who testified and I don't think he had different testimony which he could bring any other evidence than what he testified as director of the defendant. So, all the arguments by the learned advocates for the defendant are rejected for being misplaced and misconceived.

In the fine, I find the arguments by the learned advocate for the plaintiff convincing this court to find and hold that all three issues must be and are hereby answered in the affirmative.

This trickles down to the last issue that what reliefs parties' are entitled to. The learned advocates for the defendant prayed that this suit be dismissed with costs. This cannot be because of what I have held above on issue numbers 1, 2, 3 and 4. The plaintiff on the other hand prayed for judgement and decree in the following; one payment of the outstanding debt of USD.1,917,024.84 being overdraft the defendant had and enjoyed but remain unpaid. This is specific damage in nature and should therefore be strictly proved. I have gone through the testimony of the plaintiff's witness and exhibit tendered and I am certain that the plaintiff managed to prove only USD. 1,169,417.19 and not USD.1,917,024,84 claimed. To this

end and without much ado the plaintiff is entitled to USD.1,169,417.19 and no more being proved outstanding debt as epr exhibit P2b.

The plaintiff equally prayed for payment of interest at commercial rate computed from 20th March 2020 to the date of date of judgement. This limb of claim was not provided for in exhibit P1. The parties agreement did not anticipate payment of interest at commercial rate, hence, this claim is rejected.

On the claim of interest on decretal amount at the court's rate from the date of judgement to the date of full satisfaction of the decree of the court, I am inclined to grant this prayer and the plaintiff shall be entitled to rate of 7% of the decretal amount to the date of full satisfaction.

In the final analysis the plaintiff suit is allowed with costs.

It is so ordered.

Dated in Arusha this 27th day of November, 2020

S.M MAGOIGA

JUDGE

27/11/2020