

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO 42 OF 2019

BETWEEN

DIAMOND TRUST BANK TANZANIA LIMITED.....PLAINTIFF

Versus

MWIKABE CHALICHO MATIKO.....DEFENDANT

Last Order: 16th Mar, 2020

Date of Default Judgment: 23rd Apr, 2020

DEFAULT JUDGMENT

FIKIRINI, J.

The plaintiff, Diamond Trust Bank Tanzania Limited is a limited liability company engaged in banking business while the defendant as a plaintiff's customer in the plaintiff's bank is a natural person engaged in his own business.

As indicated in the plaint, the defendant was granted two loan facilities, Tzs. 70,000,000/= (Tanzanian Shillings Seventy Million Only), on 31st October 2015, and Tzs. 50,000,000/= (Tanzanian Shillings Fifty Million Only), on 06th April, 2017.

The defendant defaulted servicing the loan facilities, and by the 19th June, 2017, the amount outstanding was Tzs. 35,000,000/= for the first loan facility and Tzs. 48,620,000/= for the second loan facility. Amalgamation of the two loans into one New Term Loan facility which amounted to Tzs. 83, 620, 000/= (Tanzania Shillings Eighty Three Million Six Hundred Twenty Thousand only), was done and a new repayment plan was agreed, but still the defendant would not honour its obligation despite of the notification of the default and demand note.

The plaintiff is suing the defendant for recovery of a sum of Tzs. 89,232,153.35, plus accrued interests, damages and other costs for breach of the contract.

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At the hearing, Mr. Pascal Mshanga learned counsel appearing for the plaintiff, informed the Court that despite several attempts to serve the defendant, the efforts

did not bear any fruits. He therefore prayed for substituted service under Order V Rule 29 (1) (2) & (3) of the Civil Procedure Code, Cap 33 R.E 2002 (the CPC) as amended. The application was granted and the copy of HabariLeo newspaper dated 12th August, 2019, filed in Court, to prove substituted service by way of publication. Up to 16th March 2020, the defendant had neither filed the written statement of defence nor made appearance before the Court.

This prompted the plaintiff to move the Court pursuant to Rule 22(1) of the High Court (Commercial Division) Procedure Rules, 2012 (the Rules) applying for default judgment. The application was supported by the affidavit of Ms. Betty Rupia, the Principal Officer of the plaintiff, who said that for being an employee was conversant with facts of the matter deponed on.

Aside from the averments, the following documents were annexed in support and proof of the claim to wit: a copy of the Habari Leo newspaper-P₁; Account opening documents-P₂, dated 31st October 2015; Copies of the letter of credit facilities dated 31st October 2015 -P₃; Facility letter dated 6th April 2017-P₄; Facility letter dated 7th June 2017-P₅; Loan repayment schedule-P₆; Bank statement-P₇; Demand notice and notification of default dated 12th April 2018 & 13th April 2018-P₈.

It was the plaintiff's claim that she has suffered financial losses and damages against the defendant for the breach of the contract and thus was praying for the following orders:

process server, the service which failed and once again duly served by way of substituted service by publication in the widely circulated Habari Leo newspaper. From the service it is reasonable and proper to conclude that the defendant was dully served.

Despite service the defendant has neither filed the written statement of defence nor entered appearance. By failing to appear and file his defence, the defendant has forfeited his right to be heard. Therefore, the plaintiff accordingly and properly moved the Court pursuant to Rule 22(1) of the High Court (Commercial Division) Procedure Rules and filing Form No. 1 praying for default Judgment.

Rule 22(1) clearly provides that;

“Where a 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 a period of such extension, the court may upon proof of service and on application by the Plaintiff in form No.1 set out the schedule to these Rules accompanied by an affidavit in proof of claim, enter judgment in favour of the Plaintiff.”[Emphasis mine]

Whereas, it should be borne in mind that after the amendment of Rule 22 (1) of the Rules by GN. No. 107 of 2019 which came into effect on 18th January, 2019, the grant of default judgment is no more automatic, nowadays evidence produced has to support the case for a default judgment to be won. Aside from proof of service and filing of Form No. 1, the plaintiff has to file an affidavit in proof of each and every claim put forward in the plaint.

In addition to that, an affidavit which is deponed on oath, being a substitute of oral evidence, should not be treated lightly. This includes observing all other relevant provisions related to proving of one's case such as rules of evidence. Otherwise the affidavit deponed, should be detailed with facts relevant in proving the case at hand. Equally, it should be borne in mind that, all the documents annexed will undergo rigorous process of admissibility as provided in the Tanzania Evidence Act, Cap. 6 R.E. 2002 (the Evidence Act) and Electronic Transaction Act, 2015, as the case may be. Proof by primary rather than secondary evidence has to be adhered to, including filing of an affidavit in proof of the authenticity of the document, in case of an electronic generated document. It is the cardinal rule of evidence, that "one who alleges must prove", be observed in particularly sections 110, 111 and 112 of the Evidence Act.

Coming to the present suit, the plaintiff has indeed complied to the two basic requirements of Rule 22 (1), by proving service to the defendant and filing of Form No. 1 accompanied by an affidavit of Ms. Betty Rupia, the plaintiff's Principal Officer, annexed to it are number of documents. All the documents annexed are uncertified photocopies. Unless there is a valid and compelling reason as to why should the Court admit such incomplete documentary evidence.

Generally, contents of a document are to be proved by primary evidence except when there are exceptional circumstances. Under those situation proof may by secondary evidence, but upon compliance to section 67 of the Evidence Act. Any document whose whereabouts of its original has not been established or the document has not been certified, such documents will certainly encounter the wrath of rejection as far as admissibility is concerned. Likewise, the electronically generated documents not accompanied by an affidavit of authenticity, should anticipate the same consequences. In the case of **Engen Petroleum Tanzania Limited v Wilfred Lucas Tarimo t/a Sango Petrol Station, Commercial Case No. 75 Of 2010**, faced with the like issue the Court held that:

“The reason why the document was held to be inadmissible was that the document was secondary evidence and the same was supposed to be at the hands of the Plaintiff.”

In the present suit all the documents annexed in proving the claim are uncertified photocopies and the Court has not been appraised on the whereabouts of the originals. Considering the colossal amount claimed, it was crucial that the plaintiff in proving her case rely on original documents or certified but with reasons stated rather than uncertified photocopies. Reliance on the original documents places the Court in a better and safer position to assess the evidence placed before it. Ordinarily, affidavit does not require being accompanied by original documents, however, the affidavit required in this circumstance is different.

The affidavit required in default judgment is for **proof of claim**. Therefore, same standard of proof held in inter-parties or *ex parte* hearings, is the same standard observed in documents annexed to the affidavit in **proof of the claim**. And that is the rationale behind amendment brought by GN. No. 107 of 2019. Previously, proof of service alone was sufficient for the default judgment to be entered in favour of the plaintiff, regardless of whether the claim has been proved or not, or documents annexed to the plaint were uncertified photocopies. Honestly and logically, there must be a number of default judgment procured which were not deserving. The claim contained in most plaints before the Commercial Court are on

specific claim, which by and large require the claim to be both pleaded and strictly proved. It is only through authentic primary evidence, that can be done. The evidence and documents to be relied on must be those even with the opposite party's presence they will stand test and challenge posed. Unfortunately, that was not the case at hand.

In light of the above I find the Plaintiff has failed to prove her claim to warrant this court to enter a default judgment prayed in her favour. The suit is dismissed with no order as to costs. It is so ordered.



A handwritten signature in black ink, appearing to read "P.S. FIKIRINI".

P.S FIKIRINI

JUDGE

23rd APRIL, 2020