

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM.**

COMMERCIAL CASE NO. 32 OF 2019

**STANDARD CHARTERED BANK TANZANIA
LIMITED.....PLAINTIFF**

VERSUS

**TESTA LIMITED1ST DEFENDANT
JOHN JOHN MNYIKA2ND DEFENDANT
LAZARO OBADIA MTANI.....3RD DEFENDANT**

JUDGEMENT

B.K. PHILLIP, J

This case arises from a credit facility agreement between the 1st defendant and the plaintiff. The plaintiff's claims as revealed in the plaint are as follow; That by way of facility letters dated 4th May 2017 and 7th August 2012 the plaintiff granted to the 1st defendant a term loan to a tune of Tshs. 300,000,000/= which was supposed to be repaid within forty eight (48) months in monthly installments of Tshs 9,124,108.70/= inclusive of interests, charged at twenty percent (20%). The loan was secured by the following securities ;

- i. A mortgage over residential property located on C.T. No. 71797 Plot Number 34 Block 2, Bunju Area, Kinondoni Dar es Salaam in the

- name of Erasto Kichamo Tumbo - to cover Tanzanian Shillings One Hundred Sixty Million (TZS 160,000,000/=)
- ii. A Mortgage over residential property located on CT. No. 118459 Plot Number 227, Block 4, Mbweni JKT Area, Area Dar es Salaam in the name of Charles Tumaini Chanyika-to cover Tanzanian Shillings One Hundred Forty Million (TZS 140,000,000/=)
 - iii. Personal guarantee from the 2nd Defendant for Tanzanian Shillings Three Hundred Million (TZS 300,000,000/=).
 - iv. Personal guarantee from the 3rd defendant for Tanzanian Shillings Three Hundred Million (TZS 300,000,000/=)
 - v. Personal guarantee from Charles Tumaini Chanyika for Tanzanian Shillings One Hundred Forty Million (TZS 140,000,000/=).
 - vi. Personal guarantee from Erasto Kichamo Tumbo for Tanzanian Shillings One Hundred Sixty Million (TZS 160,000,000/=).

The 1st defendant defaulted to repay the loan as agreed, consequently the plaintiff issued formal demand letter to him for repayment of Tshs. 219,800,933.94 being the outstanding amount as at 19th May 2014.

The 1st defendant did not heed to the demand letter. On 4th February 2019, the plaintiff issued formal demand letters to the 2nd and 3rd defendants for payment of Tshs 259,964,990.98/=. Both, the 2nd and 3rd defendants did not heed to the demand letter too. Finally, the plaintiff resorted to lodging this case in Court. The plaintiff prays for judgment and decree against the defendants as follow;

- i. Payment of the sum of Tanzanian Shillings Two Hundred Fifty Nine Million Nine Hundred Sixty Four Thousand Nine Hundred Ninety Cents

Ninety Eight (TZS 259,964,990.98) as on 22nd January 2019 being the outstanding amount on account of the Credit facility.

- ii. Interest on the outstanding amount specified at item (i) above at the rate of twenty three percent (23%) from 22nd January, 2019 to the date of judgment.
- iii. Interest on the decretal amount at the court's rate of seven percent (7%) from the date of judgment until full and final payment.
- iv. Costs of the suit.
- v. Any other reliefs which this honourable court may deem just to grant in favour of the plaintiff.

All defendants were duly served with the plaint and summons to defend the suit. However, the 1st and 3rd defendants neither entered appearance in court nor filed any defence. Consequently, the advocates for the plaintiff filed an application for default judgment and this court entered a default judgment against the 1st and 3rd defendants. The 2nd defendant filed his written statement of defence, in which he conceded that he was a guarantor to the term loan granted to the 1st defendant, but stated that there were other guarantors namely Charles Tumaini Chanyika and Erasto Kichamo Tumbo apart from him and the 3rd defendant who was a guarantor too. That the loan was also secured by properties located on CT No. 71797, Plot No. 34 Block 2, Bunju area, Kinondoni Dar es Salaam in the name of Erasto Kichamo Tumbo, registered charge for Tshs. 140,000,000/= and a property on CT. No. 118459, plot No. 227, Block 4, Mbweni JKT area, Dar es Salaam in the name of Charles Tumaini Chanyika.

Moreover, the 2nd defendant stated as follows; that the obligation to repay the outstanding loan amount has to be undertaken by all guarantors mentioned in the credit facility letter. The plaintiff was obliged to exercise his rights over the mortgaged properties before compelling the guarantors to pay the outstanding amount. The plaintiff is obliged to sue all guarantors. The increase of the unpaid interests was caused by plaintiff's failure to take the necessary steps for recovery of the outstanding amount timely. He was never served with any demand letter for payments of the outstanding loan amount.

During the Final Pre-trial Conference the following issues were framed for determination by the Court.

- i. Whether the plaintiff is entitled to sue the 2nd defendant under the contract of guarantee dated 16/5/2012 independent of other guarantors.
- ii. If the 1st issue is answered in the affirmative, then, whether the plaintiff is entitled to claim the outstanding amount and interests from the 2nd defendant if any.
- iii. Whether the 2nd defendant was issued with a demand notice.
- iv. To what reliefs are the parties entitled to.

At the hearing of this case, the learned advocate Miriam Bachuba appeared for the plaintiff whereas the learned advocate Gaston Chundo Garubindi appeared for the 2nd defendant. The 2nd defendant, Mr. John John Mnyika testified as DW1, whereas Ms. Lolitha Eugene Mallya testified for the plaintiff as PW1.

In her testimony PW1 reiterated the contents of the plaint which I have already summarized at the beginning of this judgment and went on to submit that the 2nd and 3rd defendants signed the contracts of guarantee whose terms are to the effect that they committed themselves to pay on demand all monies that would be due and outstanding on the credit facility advanced to the 1st defendant. Furthermore, PW1 testified that as of 22nd January 2019 there was an outstanding amount to a tune of Tshs. 259,964,990.98/=, comprised of the principal (Tshs 204,184,841.10/=) and interests (Tshs 117,156,895/=) He tendered in court the following exhibits:-

- i. Facility letters (Exhibit P1 collectively).
- ii. Guarantee documents for the 1st 2nd and 3rd defendants- (Exhibits P2 collectively).
- iii. Bank Statement-(Exhibit P3).
- iv. Demand letter for payment of Tshs. 219,800,933.94 as at 17th May 2014 addressed to the 1st defendant -(Exhibit P4).
- v. Demand letter, addressed to the 2nd defendant-(Exhibit P5).
- vi. Demand letter addressed to the 3rd defendant-(Exhibit 6).

During cross examination and re-examination, PW1 told this court the following; That the plaintiff decided to start the recovery for the outstanding loan amount by dealing with the personal guarantors first. Testa Ltd (1st defendant) is not operating any more. The address used to send the demand letter to the 2nd defendant is the one indicated in the

guarantee documents for the credit facility granted to the 1st defendant. In case of default the bank normally communicates with the clients, before issuing any demand letter just to remind them in a polite way. The plaintiff had been communicating with the 2nd defendant too. The plaintiff has not contributed to the increase of interests.

On the other hand, in his testimony DW1 reiterated his averment in his written statement of defence, which I have summarized earlier in this judgment, thus I do not need to reproduce the same here again.

Moreover, DW1 stated the following; that plaintiff has a right of lien over the mortgaged properties in respect of the loan facility at issue. The plaintiff ought to exercise the right of lien over the properties secured before he can exercise the same right over the personal guarantors of the said loan facility. 23% interests claimed by the plaintiff is a result of negligence on part of the plaintiff for failure to take measures for recovery of the outstanding loan amount at early stage, thus the 2nd defendant should not be forced to shoulder that burden. He resigned from the 1st defendant since 2013, thus he was not aware of what was going on in the 1st defendant's company and was not served with a demand letter for repayment of the outstanding loan amount.

During cross examination and re-examination, DW1 told this court the following; that his address is the one indicated in the credit facility letters (Exhibit 1). He never received any demand letter. His last known address was the one he used as the member of parliament not the one indicated in

the guarantee documents. The bank was obliged to start the recovery process of the outstanding loan amount by auctioning the mortgaged property first, if the outstanding loan would not be cleared, then the guarantors could be compelled to pay the outstanding amount.

Having analyzed the evidence adduced, let me embark on the determination of the issues. Starting with the 1st issue, that is, **whether the plaintiff is entitled to sue the 2nd defendant under the contract of guarantee dated 16/5/2012 independent of other guarantors**, the starting point here is to look into the guarantee agreement (Exhibit P2). Upon perusing Exhibit P2, I have noted that, in terms of clause 4.1 and 5(c) of the same, the plaintiff is entitled to sue the 2nd defendant under the guarantee agreement independent of other guarantors. For ease of understanding of the coming discussion let me reproduce clauses 4.1 and 5(c) of the guarantee agreement hereunder;

Clause 4.1

"this guarantee shall be in addition to and not in substitution for any other guarantee given by the guarantor to the Bank for the Guaranteed obligations and shall not be in any way prejudiced or be affected by any other guarantee or other collateral, or other security now or hereafter held by the bank for the guaranteed obligations whether from the guarantor or otherwise nor shall such guarantee, collateral or other security or any lien to which the bank may be otherwise entitled or the liability of the guarantor or any person/s

not parties hereto for all or any part of the guarantee obligations be in any way prejudiced or effected by this guarantee”.

Clause 5(c)

"The guarantor hereby agrees and acknowledges that the obligations and liabilities of the guarantor hereunder shall be absolute and unconditional and in addition to the other provisions hereof, shall not be abrogated, prejudiced, affected or discharged:-

(c) by the Bank failing or neglecting to or deciding not to recover the moneys hereby guaranteed or any part thereof by the realization of any collateral or other security or in any manner otherwise or in the event of the enforcement by the Bank of any collateral or other security or any remedy otherwise, by any act, omission, negligence or other conduct or failure on the part of the Bank or any other person in connection therewith”.

My understanding of the above quoted clauses of the guarantee agreement, is that the plaintiff is not barred from claiming from individual guarantors. After all each guarantor, signed a separate guarantee agreement. No guarantee agreement was signed jointly.

I am in agreement with the views held by Advocates for the plaintiff in their closing submissions that this issue has to be answered in the affirmative as there is no provisions/clause in Exhibit P2 which states that the obligation of a guarantor in respect of the guarantee agreement is dependent on guarantors.

In his closing submission, Mr. Garubindi, invited this court to exercise its powers under order XVI Rule 5 of the Civil Procedure Code Cap 33 R.E. 2019 ('CPC') and add new issues, to wit;

- i. *whether the 1st and 2nd defendants breached their agreement.*
- ii. *Whether the plaintiff can opt to go for personal guarantee instead of dealing with the mortgaged property offered as a security.*

With due respect to Mr. Garubindi, his views explained herein above are misconceived. As I have pointed out earlier in this judgment there is a default Judgment against the 1st defendant and Mr. Garubindi being an advocate who has been handling this case is aware of the same. Thus, in this case, currently, I cannot frame any issue in respect of the 1st defendant as his case has been decided already. The 2nd issue proposed by Mr. Garubindi is similar to the 2nd issue framed by the court. Therefore, I do not see any need to amend the issues already framed or add new issues as suggested by Mr Garubindi. I have noted that Mr. Garubindi's closing submission is confined to the issues he proposed with the exception of the last issue. Thus, great part of his final submission is misconceived. Form the foregoing it is the finding of this court that the 1st issue is answered in the affirmative, thus paving my way to the second issue that is, **whether the plaintiff is entitled to claim the outstanding amount from the 2nd defendant if any.** According to Exhibit P3, (the Bank statement) there is an outstanding loan amount to a tune of Tshs. 259,964,990.98. In the guarantee agreement (Exhibit P2 collectively) the 2nd defendant's guarantee to the loan facility is a total of Tshs.

300,000,000/= together with interests .For ease of understanding let me reproduce the relevant clause hereunder;

Provisor to Item No.1 to the guarantee agreement.

"Provided always that the total liability of the guarantor hereunder shall not exceed the principal sum of Tshs 300,000,000/= (Three hundred Million only) together with interest (including without limitation default interests at the applicable rates all discount and bankers charges costs and other expenses payable by the customer to the bank as"

In his testimony DW1 disputed the amount of interests claimed by the plaintiff on the ground that it caused by the plaintiff's negligence for failure to take appropriate recovery measures timely. However, in his testimony DW1 did not tendered any evidence to substantiate his contention that he is not liable to pay interest because the plaintiff delayed to initiate the recovery process or to institute the case in court against the defendants. After all, the 2nd defendant (DW1) was the director of the 1st defendant, therefore, under normal circumstances he was aware of how the 1st defendant was effecting the repayment of the loan amount as well as the default in repayment of the loan. DW1 claimed that he quitted from 1st defendant in 2013, but did not produce any documentary evidence to substantiate his aforesaid contention. Be as it may, the 2nd defendant's claim that he should not be liable to pay the accrued interests is unfounded as he guaranteed for the payment of the outstanding amount including interests. And there is no clause in guarantee agreement which exempts

the guarantor from payment of interests under any circumstances in case of default of payment of the loan by the principal debtor (the 1st defendant)

As regards the next issue, that is **whether the 2nd defendant was issued with a demand notice**, the answer to this issue is straight forward in the affirmative as Exhibit P5 collectively show that on 7th February 2019, a demand letter for payment of Tshs 259,964,990.98/= was sent to the 2nd defendant via registered mail through the 2nd defendant's address that is indicated in the guarantee agreement, that is, P.o. Box 5337, Dar es Salaam. During cross examination, while responding to questions posed unto him, the 2nd defendant (DW1) told this court that he did not notify the plaintiff of any change of address for the purposes of communications with the plaintiff in respect of the guarantee agreement he signed with the plaintiff (the Bank).

For avoidance of doubts let me state here that it is not in dispute that the 2nd defendant was a member of parliament, so he also used the address he had as member of parliament as he told this court during cross examination, but that does not mean that he abandoned or stopped using the address he indicated in the guarantee agreement ,bearing in mind, that he did not notify the plaintiff to that effect. Clause 17 of Exhibit P2 provides as follows;

"A demand, notice, certificate or other communication may be given by any office or advocate of the bank and shall without prejudice to

another effective mode of making the same be deemed to have been sufficiently served on the guarantor or his personal representative(S) under this guarantee if sent to the address of the guarantor last known to the Bank (or such other address as shall have been specified for the purpose in writing by the guarantor to the bank) and shall be deemed to have been received by the guarantor if sent by post to an address within Tanzania, forty eight hours after posting, if sent by post to an address outside Tanzania, seven days after posting, if sent by hand, immediately upon delivery by messenger or upon personal collection by the guarantor, if sent by telegram, forty eight hours after sending and if sent by telex or, telefax, forthwith after transmission. In proving service it shall be sufficient to prove that the notice or demand was properly addressed and posted or delivered or transmitted”

As I have explained herein above, the last address given to the plaintiff by the 2nd defendant is P.o. Box 5337, Dar es Salaam. Exhibit P5 proves service of demand letter to the 2nd defendant. In the upshot, I am in agreement with the advocate for the plaintiff that this issue has to be answered in the affirmative.

Before moving to the last issue on the reliefs parties are entitled to, I wish to point out that according to the credit facility letters (Exhibit P1 collectively), the securities offered for the loan granted to the 1st defendant were not prioritized in such a way that in case of default in repayment of the loan, the plaintiff was not bound to start the recovery process with the

mortgaged properties first, before putting the guarantors into task. Mr. Garubindi failed to bring forward before this court any clause from either the credit facility letter (Exhibit P1) or the guarantee agreements or case law to support his stance that the plaintiff was bound to start its recovery process by dealing with the mortgaged properties first. Also, it is not mandatory under the law for the plaintiff to take legal action against all guarantors. The guarantee agreement does not contain any clause to the effect.

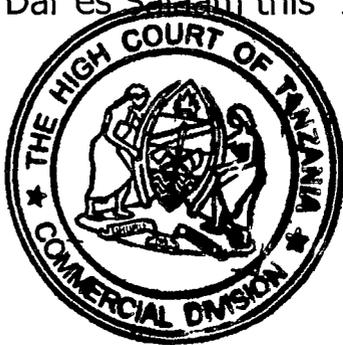
From the foregoing, I find myself unable to fault the plaintiff for not joining other guarantors in this case.

As regards the reliefs the parties are entitled to, it is the finding of this court that the plaintiff has proved his claims for the outstanding amount to the standard required by the law. Therefore I hereby enter judgment and decree against the 2nd defendant as follows;

- i. The 2nd defendant shall pay the plaintiff a sum of Tanzanian Shillings Two Hundred Fifty Nine Million Nine Hundred Sixty Four Thousand Nine Hundred Ninety Cents Ninety Eight (TZS 259,964,990.98/=) being the outstanding amount on account of the Credit facility as of 22nd January 2019.
- ii. The 2nd defendant shall pay the plaintiff interest on the decretal sum in item (i) herein above at the rate of twenty three percent (23%) from 22nd January 2019 to the date of judgment.

- iii. The 2nd defendant shall pay the plaintiff interest on the decretal sum in item (i) herein above at a court rate of 7% from the date of judgment to the date of full payment.
- iv. Costs of the suit shall be borne by the 2nd defendant.

Dated at Dar es Salaam this 12th day of July, 2021.



B.K.PHILLIP

JUDGE