

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 51 OF 2019.

BANK OF INDIA (T) LIMITED.....PLAINTIFF

VERSUS

MAMUZUNGU INJECTION SERVICE

& USED SPARE CO LTD1ST DEFENDANT

AHMED KHALID SAID2ND DEFENDANT

MARIAM JUMA MAPUNDA.....3RD DEFENDANT

Date of Last order: 25/06/2021

Date of Judgement: 16/07/2021

JUDGEMENT

MAGOIGA, J.

The plaintiff, **BANK OF INDIA (T) LIMITED** by way of plaint preferred under summary procedure instituted the instant suit against the above-named defendants praying for judgement and decree in the following orders: -

- i. A declaration that the 2nd and 3rd defendants mortgaged to the plaintiff.
- ii. A declaration that the 2nd 3rd and 4th defendants are liable jointly and severally to pay the principle sum of TZS 992,817,593.69 (Tanzania shillings Nine Hundred Ninety-two Million Eight



Hundred Seventeen Thousand, Five Hundred Ninety-Three Sixty-Nine Cents)


- iii. An order of sale of mortgage property with CT No. 97191, LO No. 2391, Plot No 52 Block "A" Mbuti area Temeke Municipality, CT No. 144261, LO No. 628911, Plot No. 82 Block "G" Amani Gomvu area, Temeke Municipality, CT No 144259, LO No. 62889, Plot No. 75 Block "G" Amani Gomvu area, Temeke Municipality, CT No 144260, LO No. 628894, Plot No. 99 Block "G" Amani Gomvu area, Temeke Municipality, CT No 145290, LO No. 628901, Plot No 101 Block "G" Amani Gomvu area, Temeke Municipality, CT No 145260, LO No. 628903, Plot No. 74 Block "G" Amani Gomvu area, Temeke Municipality, CT No 144258, LO No. 628907, Plot No. 90 Block "G" Amani Gomvu area, Temeke Municipality, CT No 144296, LO No. 628904 ,Plot No. 83 Block "G" Amani Gomvu area, Temeke Municipality, CT No 144552, LO No. 628908 ,Plot No 81 Block "G" Amani Gomvu area, Temeke Municipality, CT No 97195, LO No. 486939, Plot No 2392 Block "A" Mbutu area, Temeke Municipality, CT No 85416, LO No. 284089, Plot No 47 Aman Gomvu area, Temeke Municipality, so as to recover the principle sum of TZS 992,817,593.69 (Tanzania Shillings Nine Hundred Ninty-Two Million, Eight Hundred Seventeen Thousand, Five Hundred Ninety-Three Sixty-Nine Cents) being repayment of a term loan and servicing the approved credit facility,
- iv. Interest over the decretal sum at the Bank rate of 20% from the date of default the date of judgement.



- v. Interest at the courts rate of 12% from the date of judgement till final payment.
- vi. The costs of the suit be provided jointly by the defendants
- vii. Any other orders or reliefs this honourable court may deem just, to issue.

Upon being served with the plaint, the defendants sought and were granted leave which enabled them to file joint written statement of defence disputing all plaintiff's claims on the ground that the 1st defendant have never approved and took the loan from plaintiff to the tune of TZS 992,817,593.69 and further denied to have been served with notice default to 2nd 3rd and 4th defendant. The defendants on serious note invited the plaintiff into strict proof of her claims thereof and eventually prayed that the suit be dismissed with costs.

Before embarking on the merits or demerits of this suit, I find it apposite to narrate the brief facts leading to this suit. According to pleadings, it is alleged that, on 29th July, 2015 plaintiff and 1st defendant executed a loan agreement whereby the 1st defendant was granted with a term loan to the tune of TZS.666,000,000/= (say Six Hundred Sixty-Six Million only) which was as follows: an overdraft loan to the tune of TZS 400,000,000.00 (say Four Hundred Million); Demand Term Loan of TZS.200,000,000.00 (say Two Hundred Million) and existing term loan of TZS.66,000,000.00 (say Sixty Six Millions). Facts go that, at the request of the 1st defendant to enhance the existing credit facilities, on 18th February, 2015, the 1st defendant received a top -up of TZS 100,000,000/= (One Hundred Million) as an overdraft and TZS 40,000,000/= as a term loan.



Further facts were that, on 20th March, 2013 the 1st defendant credit facilities were reviewed and the proposed limit was TZS. 270,000,000.00 to be repaid with accrued interest. Subsequently on 10th February, 2015 the 1st defendant requested for sanction of additional credit facility. With that request the 1st defendant was granted an overdraft of TZS. 200,000,000/=and TZS 70,000,000.00 as demand loan. Later on the overdraft and the demand loan was reviewed and the 1st defendant was availed with an overdraft of TZS 400,000,000.000 and demand term loan 200,000,000.00 which were to be paid with accrued interest.

Facts went on that, the overdraft loan, term loan and demand term loan were secured by personal guarantee of the 2nd 3rdand 4th defendants on landed properties described above in the names of Ahmed Khalid Said (2nd Defendant) Mariam Juma Mapunda (3rd Defendant) and Salum Khalid Said (4th defendant). All said properties are located at Mbutu and Aman Gomvu area Tememe Municipality. The debenture was issued by Mamuzungu Injection & Used Spares Company Limited in the favour of the plaintiff.

However, the 1st defendant did not repay the loan as agreed, the efforts by the plaintiff to make arrangement for 1st defendants to repay the loan proved futile. It is against this background, the plaintiff instituted this suit claiming reliefs as contained in the plaint, hence this judgement.

The plaintiff at all material has been enjoying the legal services of Mr. Shukurani Mzikila, learned Advocate, while the defendants were equally enjoying the legal service Mr.Alphonse Peter Kubaja learned Advocate


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



1. Whether the 1st defendant was approved and took loan from the plaintiff to the tune of TZS 992,817,593.69 (Tanzania shillings Nine Hundred Ninty-two Million Eight hundred Seventeen Thousand, Five Hundred Ninety-Three, Sixty-Nine Cent)
2. If the 1st issue is answered in affirmative whether the 1st defendant had discharged all loan taken from the plaintiff.
3. Whether the 2nd 3rd and 4th are liable for the default made by the first defendant
4. To what reliefs parties are entitled.

To prove this case, the plaintiff called one witness to testify, one, Ms. AISHA OTHMAN MOHAMED, hereinafter to be referred as '**PW1**'. Under oath and through his witness statement dully adopted as his testimony in chief, PW1 told the court that she is Credit Manager and custodian of the documents of the plaintiff and therefore conversant with the matter before this court.

PW1 went on to tell the court that, through facility letter dated 23rd October 2010, the 1st defendant was granted the term loan to the tune of 60,000,000/= and an overdraft to the tune of 40,000,000/= making the total of 100,000,000/=. PW1 testified further that, the 1st defendant requested for enhancement of the credit and on 6th March 2012 he was approved with term loan TZS 40,000,000/= and TZS 100,000,000/= as an overdraft later on by the virtual of credit facility letter dated 20th March, 2013 credit facility was reviewed with proposed limit of TZS 270,000,000/=.




Further testimony of PW1 was that, on 10th February, 2015, the 1st defendant requested for sanction of additional credit facilities and was approved TZS. 200,000,000/= as an overdraft and TZS 70,000,000.00/as demand loan.

PW1 told the court further that, the 1st defendant requested of demand term loan and an overdraft and on 29th July, 2015 plaintiff extended to 1st defendant TZS 400,000,000/= as an overdraft and TZS 200,000,000/= as demand term loan plus the existing Term loan of TZS 66,000,000 .According to PW1, the said loan was secured by different securities, which are several mortgages of right of occupancy, personal guarantees of the 2nd 3rd and 4th defendants together with the deed of debenture of the 1st defendant.

PW1 went on to testify that, things went well at the beginning, but in 2016 delay in payment started and at that time there was so many withdraws on deposited amount by 1st defendants on their own use. It was PW1 testimony that, on 30th June, 2017 the 1st defendant subsequently stopped making repayment of outstanding debt. Following that omission and refusal to honour the agreement, the plaintiff issued the default notices seeking full payment of (TZS 992,817,593.69) which is principal sum plus interest. The efforts by the plaintiff to have defendant paid back the money has been in vain, hence this suit claiming the relief(s) as contained in the plaint.

In proof of the case the plaintiff tendered in evidence the following exhibits, namely; -

1. Credit facility letters dated 23/10/2010, 6/3/2012, 20/3/2013, 10/2/2015, and 24/7/2015 admitted collectively in evidence as **exhibit P1 a-e**
2. Deed of variation of mortgage of right of occupancy dated 16/3/2012, Mortgage right of occupancy of CT 97195 dated 25/3/2013, Mortgage right of occupancy of CT 85416, dated 20/3/2013 Mortgage right of occupancy of CT 97195 dated 18/2/2015, Mortgage right of occupancy of CT 85416, dated 18/2/2015, Mortgage right of occupancy of CT 97191 dated 29/7/2015, Mortgage right of occupancy with CT 144258 dated 15/5/2017, Mortgage right of occupancy with CT 144258 dated 15/5/2017, Mortgage right of occupancy with CT 144259 dated 1/9/2017, Mortgage right of occupancy with CT 145260 dated 11/9/2017, Mortgage right of occupancy with CT 144296 dated 15/5/2017, Mortgage right of occupancy with CT 144261 dated 15/5/2017 and Mortgage right of occupancy with CT 145290 dated 11/9/2017 are collectively admitted in evidence as **exhibit P2a-m.**
3. Personal guarantee of Mariam Juma Mapunda and Salum Khalid Said Dated 18/2/2015 and 29/7/2015 are collectively admitted in evidence as **exhibit P3a-b.**
4. Debenture dated 4/11/2010, Deed of variation dated 16/3/2012, 2nd Deed of variation dated 20/3/2013, 3rd Deed of variation dated 18/2/2015 and 4th Deed of variation are collectively admitted in evidence as **exhibit P4a-d.**
5. Customer position account dated 22/2/2019 collectively admitted in evidence as **exhibit P5.** 

6. Notice of defaults are admitted and marked as **P6 a-b**.

7. Affidavit of authentication of bank statement of the 1st defendant for overdraft, demand loans are collectively admitted in evidence as exhibit **P7a-b**.

Under cross examination by Mr Kubaja, PW1 told the court that, the last time 1st defendant repaid the loan was 2017. PW1 admitted not knowing how much the 1st defendant has paid. PW1 further told the court that exhibit P6 was served to both defendants, however, she has no proof of service. PW1 when further cross examined admitted that there were three accounts which all transactions were taking place and that the 1st loan was in 2010 which was guaranteed by Mariam, Said and Ahmed.

Under re-examination by Mr. Mzikila, PW1 told the court that the said accounts are office account but those account were transferred into their account. On the issue of service of the notice PW1 replied that both guarantors were served with notices and those who refused to be served were served by way of post.

When asked questions by the court for clarification, PW1 told the court that the bank statement show that by the time plaintiff filed this case the amount due was TZS. 194,435,355.29 plus 25,982,165.77 plus overdraft 485,106,716.57 which is equal to 705,524,237.65 and it is interest which make the amount of 992,817,593.69/=

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


In defence, the defendant called three witnesses. The first witness was **MARIAM MAPUNDA** to be referred in these proceedings as 'DW1'. DW1 through his witness statement which was adopted as his testimony



in chief told the court that, she is the director of the 1st defendant, hence, aware of the credit facilities.

DW1 admitted to have requested term loan, demand term loan and overdraft loan from the defendant for tune of TZS 666,000,000/=only. She emphatically stated the whole loan was repaid in full. DW1 went on to tell the court that, the payment of the loan was effected through different account. For example, Tshs 850,750,000.00 was deposited in Account No 0122008511, Tshs 33,071,550.00 was deposited in account No 360105UNDEP099 and Tshs.202,349,765.00 was deposited in Account No 360101220008511 and 36001602000020 as was directed by the plaintiff. According to DW1 the 1stdefendant does not owe anything to plaintiff instead the plaintiff is the one to repay back the extra money paid as payments exceeds the borrowed money.

DW1 admitted that the said loans were secured by personal guarantee, and personal properties belongs to second defendant and 3rd defendant which are located at Mbutu Area, Temeke municipality identified as CT No 97191, LO No. 2391, Plot No 52 Block "A", CT No. 144261, LO No. 628911, Plot No 82 Block "G" , CT No. 144259, LO No. 628896, Plot No 75 Block "G", CT No. 144260, LO No. 628894, Plot No 99 Block "G" , CT No 145290, LO No. 628901, Plot No. 101 Block "G", CT No. 145290, LO No. 628903, Plot No. 74 Block "G" , CT No. 144258, LO No. 628907 ,Plot No 90 Block "G", CT No. 144296, LO No. 628904 ,Plot No 83 Block "G", CT No. 144552, LO No. 628908 ,Plot No 81 Block "G", CT No. 144552 97195, LO No. 628908 , Plot No. 81 Block "G", CT No. 97195 , LO No. 486939, Plot No. 2392 Block "G" and CT No. 85416, LO No. 284089, Plot No 47Block "G".



It was further testimony of DW1 that, the 1st defendant has repaid all loans from 2010 up 2017 in full and therefore the 2nd, 3rd and 4th defendants are not liable for payment.

In proof of what has been testified above, DW1 tendered in evidence the following exhibits, namely

1. Cash deposit slips for account No 0122008511-233 cash deposit slips, Account No 36010GGENS05099-1 cash deposit slip, Account No 36010SUNDEP05099-3 cash deposit slips and Account No 36010122008511 with 1 cash deposit slip are collectively admitted in evidence as exhibit D1-1 -238

Under cross examination by Mr.Mzikila learned advocate for plaintiff, DW1 told the court that, she know the Bank of India and admitted to have granted an overdraft loan. DW1 when pressed with questions he replied that she knew how overdraft operate and that she does not have bank statement she has only receipts which she has tendered here. DW1 further told the court that, the 1st defendant took only 600million which they have paid with interest as when reconciled their calculation they realised that plaintiff has no claim against them. DW1 still told the court that it is true they mortgaged their landed properties and debentures.

The next witness for the defendant was Mr. KHALID SAID SALUM to be referred in these proceedings as 'DW2'. Through his witness statement adopted in these proceedings as his testimony in chief, DW2 told the court that he is the guarantor of the disputed loan. DW1 went on to tell the court that in various time the plaintiff extended loans with total



amount of TZS. 666,000,000/= to the 1st defendant the said loan was a term loan, overdraft loan and demand loan.


The rest of testimony of DW2 was more of that of DW1 on the properties used to secure the loan.

Under cross examination by Mr. Mzikila, learned advocate for the plaintiff, DW1 admitted to have guaranteed the loan to the 1st defendant.

The last witness of the defendant was Mr. AHMED KHALID SAID to be referred in these proceedings as 'DW3'. Through his witness statement adopted in these proceedings as his testimony in chief, DW3 told the court that, in various time the plaintiff extended loans to the 1st defendant with to the tune of TZS.6,666,000,000/=the said loan was a term loan, overdraft loan and demand loan.


DW3 told the court that, his personal guarantee was in respect of term loan only and not in overdraft loan or demand loan extended to the 1st defendant. DW3 went on to tell the court that the 1st defendant has repaid the entire above said loan through Account No 0122008511, Account No. 36010GGENS05099 Account No. 36010SUNDEP05099and Account No. 36010122008511.

The rest of testimony of DW3 was more of that of DW1 on the properties used to secure the loan.

Under cross examination by Mr. Mzikila, DW3 admitted to have guaranteed the loan in dispute, but told the court that, the loan has been paid fully though with no document to prove that the loan has been paid fully. 

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

The learned advocates for 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 refer to their points raised and argued.

Having gone through pleadings, testimonies of the witnesses and final closing submission of the parties, I noted some facts not in dispute and wish to point them out and narrow down non contentious issues. **One**, it is not disputed by the parties herein, on 23rd October ,2010 parties entered into loan facilities which was categorized as term loans of Tshs 600,000,000/= and Tshs 400,000,000/=as an overdraft in terms and conditions as evidenced by exhibit P1a. **Two** it is not disputed that on 6th February, 2012 the loan was enhanced to the tune of 100,000,000/=as overdraft and 40,000,000/= **Three** it is not disputed that on 20th March, 2013 the credit facility was reviewed to the tune of TZS 270,000,000/= and on 10th February, 2015 the sanction additional credit facilities was approved to the limit of TZS 200,000,000/=as overdraft and TZS 70,000,000/=as demand loan. **Four** it is not disputed that on 24th July, 2015 the 1st defendant reviewed overdraft to the tune of 400,000,000.00 and demand term loan 200,000,000.00 plus the existing term loan of TZS 66,000,000/= **Five** it is not disputed that the said loan was guaranteed by 2nd, 3rd, and 4th defendant's properties' as listed in the plaint. 

However, the notable duty of this court now is to determine the merits and demerits of this suit by determining each issue as agreed and recorded. It should be noted that in this suit plaintiff is claiming for payment of outstanding loan balance to the tune of TZS 922,817,593.69. On the other hand defendant are disputing the existence of the debt and that no notice of default has been served to 2nd, 3rd, and 4th defendants.

With the above contention, therefore it is imperative to determine issues against the evidence on record. The first issue was thus couched *whether the 1st defendant was approved and took loan from the plaintiff to the tune of TZS 922,817,593.69*. The plaintiff has alleged that on diversity dates the plaintiff approved and granted the 1st defendant which comprised of principal and interest at TZS. 922,817,593.69. In rebuttal the defendants has argued that he only took TZS 666,000,000/.

I have carefully revisited and considered the pleadings, the testimonies PW1, DW1 and final closing submission of the parties together with exhibit P1a, P1b, P1c, P1d and P1e the amount taken by the defendant is TZS 600,000,000/= as being a principle sum without bank interest. I am saying so because the last reviewed loan was an overdraft of TZS 400,000,000/= and Term loan 200,000,000/= so I am certain that the amount which defendant was approved and took the loan was TZS 600,000,000/.

That said and done, the first issue must be and is hereby answered that the plaintiff advanced TZS.666,000,000.00 and not TZS 922,817,593.69.

This takes this court to issue number two which was couched that **if the 1st issue is answered in affirmative whether the 1st defendant**



had discharged all loan taken from the plaintiff. Following the finding in issue number one that the plaintiff took TZS 600,000,000/= as principal sum the issue is whether the 1st defendant has discharged all loan taken from the plaintiff. Plaintiff has alleged that defendant have not paid the outstanding balance. In rebuttal the defendants has argued that he only took TZS 666,000,000/= which has already paid in full.

According to evidence tendered and exhibits, there is no dispute that the amount loaned to defendants has not been paid in full. This is clearly exhibited by exhibit P7d which is clear and loud that the outstanding balance TZS 98,255,893.85 and not TZS 922,817,593.69 as claimed by the plaintiff. I am saying so because exhibit P7 b and exhibit P7c show 00 zero balance meaning that all term loan taken by the first defendant has been paid in full but Exhibit P7d with the loan amount of TZS 400,000,000.00 the outstanding balance is TZS 98,255,893.85 means that the outstanding balance is on the loan categorized as an overdraft. Since this amount remained unpaid this is breach of the terms and conditions of the facility letters dully signed between the parties.


Whether the 2nd 3rd and 4th are liable for the default made by the first defendant, plaintiff has alleged that the 2nd 3rd and 4th defendant are liable for payment of unpaid balance since the 1st defendant has failed to heed the agreement and that the notice of default was send to them but they refused to take it. In rebuttal the defendants pointed out that they have paid in full and therefore not liable. Having considered the rival arguments by both trained legal minds of the parties and having equally revisited the pleadings and testimonies I am of the considered view that plaintiff has proved his case on balance of probabilities that 1st defendant has not paid the loan in full. However there is yet another



important point to observe here in relation to the service of notice default.


The defendants have denied to have been served with default notice and plaintiff has admitted that he served them but they refused and following that refusal he served them with postal office unfortunately he did not tender any evidence to that effect. Going through the testimony of both parties it's my considered opinion that, the Plaintiff has failed to prove if notices were statutorily served to guarantors. I am saying so on the following reasons: **One**, during cross examination PW1 said they did not serve the defendant because they refused to accept the service and he decided serve them through postal office. This argument was not substantiated because no proof that the defendants were served. It is worth noting that the onus of proof lies to the party who alleges. I found this issue wanting in evidence on the part of plaintiff in the circumstance of this suit .Guided by the provision of Section 110 of Tanzania Evidence Act, [Cap 6 R; E 2019] which provides that:-

Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of a facts which he asserts must prove that those facts exists. The same legal position was stated by the Court of Appeal of Tanzania in the case of **Antony M. Masang V (1) Penina (mama Mgesi) (2) Civil Appeal No 118 of 2014 CAT (Unreported)** that, the burden of proof lays on the party who alleges anything to be decided in his favour. It is common knowledge that in civil proceedings the party with burden also bears the evidential burden and the standard in each case is on balance of probabilities.



Guided, by the above cited legal principles, the court find that a burden of proof of the service of default notice lies on the plaintiff to prove that indeed the defendants were served.

It should be noted that the guarantors under discussion guaranteed the 1st defendant term loan and of an overdraft .As a matter of a law the liability of guarantors co-exist with that of the borrower as per section 8 of the Law of Contract. Though the notice requirement under section 127 of Land Act may not be relevant to the borrower where guarantee is in the form of a third party mortgage like this one at hand, it is common banking practice that, in an overdraft, a demand note is a minimum requirement to establish default. The rationale behind is to give opportunity to the mortgagor to settle the claimed amount so when the case is brought before the court of law it means mortgagor denied his opportunity to fulfil his obligation. In the case of **Joachimson Vs Swiss Bank Corporation (1992) All ER 92**, in which it was held that, an advance made on overdraft does not become due until the banker has actually demanded payments.

Guided by the above, therefore, going by exhibits P6a-b it cannot be said that the 2nd 3rd and 4th defendants were not served with the notice of default. Therefore, from foregoing discussion in the presence of exhibit P6a-b addressed to the known address of the guarantors suffice to be proof of service of default notices to defendants in terms of overdraft. It cannot be said the 2nd, 3rd and 4th defendants as guarantors are held liable in the event of default in terms of the third party mortgage is proved as in this case. 

In the fine, I find the third issue is answered in affirmative that the notices given and served by post are enough to held the guarantors liable.

This trickles down to the last issue that what relief's parties are entitled. The learned advocate for the defendants prayed that this suit be dismissed with costs. Based on my findings above, this suit is not to be dismissed.

The plaintiff on the other hand prayed for judgement and decree in the following payment of *TZS 922,817,593.69* which I am certain that plaintiff managed to prove only TZS 98,255,893.85 and not *TZS 922,817,593.69* claimed. The plaintiff, therefore, is entitled to TZS.98,255,893.85 being principal claim. The above amount shall attract interest as claimed in items (d) and (e) to be paid within three months from the date of this judgement. In case of failure by the defendants to pay the money in dispute within the period given, the plaintiff shall exercise her rights under item prayed under item (c) of the plaint.

In the final analysis, the plaintiff suit is allowed to the extent explained above with costs.

It is so ordered

Dated at Dar es Salaam this 16th day of July, 2021.




M. MAGOIGA

JUDGE

16/07/2021.