

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
[COMMERCIAL DIVISION]**

AT DAR ES SALAAM

COMMERCIAL CASE NO. 55 OF 2019

**FIRST NATIONAL BANK TANZANIA LIMITED PLAINTIFF
*VERSUS***

**CHOTEC LIMITED 1ST DEFENDANT
CHOBBA JOHN MUMBA 2ND DEFENDANT
RESTITUTA SHIDUKI 3RD DEFENDANT**

JUDGMENT

29th September and 18th October, 2021

KISANYA, J.:

The plaintiff, First National Bank Tanzania Limited sued the above-named defendants jointly and severally, claiming for the following reliefs: -

- a) A declaration that the Defendants have breached the Business Loan Agreements and the two Facility Letters dated 31st March, 2016 and 22nd June 2016 respectively.*
- b) The Defendants be ordered to immediately pay the outstanding principal loan amount plus interest to the tune of **TZS 1,537,909,720.86.33** as at 9th May, 2019.*
- c) Interest on (b) above at the rate of 23% per annum from the date of filing the suit to the date of Judgment.*
- d) General damages to be assessed by the court.*
- e). Interest on the Decretal amount at the tune of 7% per annum from the date of Judgment till the date of full and final satisfaction of the Decree.*
- f) That the Defendants be ordered to pay costs of this suit.*

g) Any other relief(s) the court deems fit and just to grant.

The facts which prompted the plaintiff to institute this suit, are stemmed on four loan facilities advanced to Chotec Company Limited (the 1st defendant). According to the plaintiff, three facilities were issued on the 31st day of March, 2016. These were an overdraft facility of TZS 300,000,000/= lasting for one year and repayable on demand, business loan of TZS 400,000,000/= repayable with interest in sixty equal monthly instalments of TZS 11,044,815.75 and business loan of TZS 150,000,000/= repayable with interest in twenty-four months equal monthly instalment of TZS 7,779,786.80. The plaintiff averred further that the fourth facility, was an overdraft facility of TZS 50,000,000/= lasting for 60 days repayable on demand, granted to the 1st defendant on the 22nd day of June, 2016. It was also pleaded that, the said overdraft facilities and business loans were secured by legal mortgage over residential property on Plot No.143, Block 7 located at Mbweni Mpiji Area, Kinondoni, Dar es Salaam in the name(s) of Choba John Mumba (2nd defendant) and Restituta Shiduki (3rd defendant), and personal guarantee of the 2nd and 3rd defendants.

The plaintiff went on to allege that the defendants defaulted to repay the said amount on loans and overdraft facilities. It was pleaded that, as of the 9th day of May, 2019, sum of the outstanding principal and interest in respect of all facilities was to a tune of TZS 1,537,909,720.86.33. The plaintiff averred further that the defendants neglected and or refused to pay the outstanding principal loan amount plus interest, despite the demand note and the default

notice that were duly issued and served upon the defendants. In view thereof, she was inclined to institute the present suit for the above stated reliefs.

Contesting the plaintiff's claims, the 1st and 2nd defendants filed a joint written statement of defence, while the 3rd defendant lodged her own written statement of defence. All defendants disputed to have signed and received the business loans and overdraft facilities. The 2nd and 3rd defendants stated further that they neither executed any legal mortgage nor made personal guarantee of the same. The 3rd defendant went on to state that the alleged indebtedness subject to this suit was solely the liability of the 1st defendant, and not otherwise.

In view of the pleadings, by both parties, the following issues are subject to the determination of this court:-

- 1. Whether the parties lawfully executed a business loan facility agreement.*
- 2. If issue number 1 is decided in affirmative, whether the defendants defaulted to pay the loan.*
- 3. Whether the defendants lawfully created a mortgage over Plot No. 143, Block 7, Mbweni Mpiji, Kinondoni in favour of the plaintiff.*
- 4. Whether the 2nd and 3rd Defendants guaranteed business loan facility agreement by the plaintiff to the 1st defendant.*
- 5. Whether the defendants were lawfully issued with any demand and 60 days default notice.*
- 6. What reliefs parties are entitled to.*

During the hearing of this case, the plaintiff was represented by Mr. Joseph Kipeche, learned advocate. On the other side, the 1st and 2nd defendants enjoyed the legal services of Mr. Musa Kiobya, learned advocate, while Mr. Godwin Nyaisa and Mr. Stephen Axwesso, learned advocates appeared for the 3rd defendant.

To prove her case, the plaintiff marshaled one witness namely, Antony Bwahama (PW1) who tendered in evidence, thirteen (13) exhibits. On the other hand, the 2nd defendant, Choba John Mumba (DW1) testified for the 1st and 2nd defendants. The 3rd defendant, Restituta Shiduki (DW2) gave evidence on her behalf. The evidence in chief of all witnesses was given in their respective witness statements filed under rule 49(1) of the High Court (Commercial Division) Procedure Rules, 2012 (as amended by GN. No. 107 of 2019). After the hearing, the counsel for the plaintiff and the 3rd defendant filed their respective final submissions.

Having dispassionately gone through the pleadings, evidence adduced by the witnesses for both sides and the counsel's contending submissions, I now proceed to determine the issues at hand.

The first issue, is, whether the parties lawfully executed the business loan agreements. In his evidence in chief, PW1 echoed the facts averred in the plaint as summarized above. He testified on oath that, on the 31st day of March, 2016, the plaintiff advanced three bank facilities to the 1st defendant, namely; an

overdraft facility of TZS 300,000,000/= lasting for one year repayable on demand with 22% interest, business loan of TZS 400,000,000/= repayable with 22% annual interest in sixty equal monthly instalments of 11,044,815.75, and business loan of TZS 150,000,000/= repayable with 22% interest in twenty four months equal monthly instalments of TZS 7,779,786.80. It was deposed further by PW1 that, the fourth facility was granted to the 1st defendant on the 22nd day of June, 2016 and that it involved an overdraft facility of TZS 50,000,000/= lasting for 60 days until 21st August, 2016 repayable on demand with 22% interest. To supplement his testimony, PW1 tendered in evidence a Bank Overdraft Facility Letter for Account No. 62598406984 (Exhibit P1), Business Loan Agreements (Exhibits P2 and P3) and Temporary Overdraft Facility Letter for Account No. 62598406984 (Exhibit P4). It is captured in evidence that, all agreements were executed by the plaintiff on one hand and the 1st defendant on the other hand. In support and for the part of the 1st defendant, all agreements were signed by the 2nd and 3rd defendants as her Directors. Further to that, the common seal of the 1st Defendant was affixed on all facility agreements (Exhibits P1, P2, P3, and P4).

I have also considered the evidence in chief adduced by Choba John Mumba (DW1) in his witness statement for the 1st and 2nd defendants. He admitted that the 1st defendant had a Client-Bank relationship with the plaintiff upon which the former, sought and obtained bank facilities with intention to boost her business undertakings. However, DW1 contended on any loan to have

not been disbursed. On her part, the 3rd defendant denied having executed any loan facility agreement with the plaintiff. She stated further that the loan facility agreements were executed at the time when she was neither a Shareholder nor Director of the 1st defendant.

In view of the above, Mr. Kipeche urged me to hold the first issue in affirmative; while Mr. Axwesso invited me to consider rival argument that the facility agreements were void, for it is not established by the plaintiff that the said agreements were signed by the 3rd defendant.

On my part, I am satisfied that the alleged agreements (Exhibit P1, P2, P3 and P4) were legally executed as between the plaintiff and the 1st defendant. As indicated herein, DW1 did not dispute to have executed the facility agreements, as he admitted it when cross-examined by the learned counsel for the plaintiff. Regarding the 3rd defendant's contention that she did not sign the same, the law is settled under section 110 of the Evidence Act (Cap 6, R.E 2019) that a person alleging existence of certain fact must prove the same and that the standard is one on balance of probabilities. The same is recapitulated in countless of judicial authorities. See for instance, the decision of the Court of Appeal of Tanzania in **Paulina Samson Ndawavya vs Theresia Thomas Madaha**, Civil Appeal No. 53 of 2017 (unreported) where it was held, and I quote in verbatim:

"It is trite law and indeed elementary that he who alleged has a burden of proof as per section 110 of the Evidence Act, Cap. 6

[R.E. 2002]. It is equally elementary that since the dispute was in civil case, the standard of proof was on a balance of probabilities which simply means that the Court will sustain such evidence which is more credible than the other."

In the case at hand, the plaintiff tendered in evidence the facility agreements which were duly signed by the 3rd defendant. The said agreements were appended to the plaint and duly served to the 3rd defendant. It is the 3rd defendant who alleged that the signature appearing on all facility agreements is not hers. She was therefore, in my view, charged with the duty to prove her allegation. It is apparent that she did not discharge her duty. She tendered no evidence to prove that the signature appearing on the facility agreements was not hers. Further to that, as rightly submitted by Mr. Kipeche, the 3rd defendant did not tender any evidence such as board resolution or search report from the Business Registration and Licensing Agency (BRELA) to prove her contention that the facility agreements were executed when she was neither a Shareholder nor a Director of Chotec Company Limited. In that regard, the third defendant has failed to prove that the facility agreements (Exhibits P1, P2, P3 and P4) are void. Basing on the decision in the case of **Merali Hirji and Sons vs General Tyre (E.A) Ltd** (1983) TLR 175 relied upon by her counsel, I am of the view that there were valid facility agreements between the plaintiff and the 1st defendant. Therefore, the first issue is answered in affirmative.

I now direct my mind to the second issue whether the defendants defaulted to repay the loan. I think this issue should not detain this Court for so long. PW1 testified in chief that the defendant defaulted to pay back the loan and overdraft facilities as per the terms and conditions stipulated in the loan agreements and facility letters. He testified further that, the outstanding debt inclusive of principal debt, interest and penalties was TZS 1,537,909,720.86 as of the 9th day of May, 2019. PW1 substantiated that the outstanding amount on two business loans was TZS 651,601,853.89 and TZS 221,036,258.03, while the outstanding amount on the two overdraft facilities was TZS 665,271,271,608.94. His evidence was supported by the Loan Statements (Exhibits P11 and P12) and the Bank Statement (Exhibit P13) which show the outstanding amount in respect of the facilities advanced to the 1st defendant. He also tendered in evidence the default notice served to the defendants requiring them to pay the outstanding amount.

Although, the 1st and 2nd defendants pleaded in their joint written statement of defense that the loan was not disbursed, DW1 admitted during cross examination that, the facilities subject to Exhibits P1, P2, P3 and P4 were advanced to the 1st defendant. On the other hand, the 3rd defendant testified in her witness statement that the outstanding loan subject to this case if amenable is the solely liability of the 1st defendant. All said, I am of the humble view that, the plaintiff has proved that the defendants defaulted to pay back the loan and facilities advanced to the 1st defendant.

Dealing with the third and fourth issues jointly, both issues are based on the securities documents [mortgage deed (Exhibit P7) and personal guarantees (Exhibit P5 and P6)] alleged to have been signed by the 2nd and 3rd defendants to enable the 1st defendant to secure loan from the plaintiff. This Court is called upon to determine whether the defendants lawfully created a mortgage over Plot No. 143, Block 7, Mbweni Mpiji, within Kinondoni Municipality in favour of the plaintiff, and whether the 2nd and 3rd Defendants guaranteed the business loan facility agreement of the 1st defendant to the Plaintiff.

The answer to these two issues is found in the evidence on record. PW1 adduced in his evidence in chief that the defendants signed the acceptance part of the business loan agreements and overdraft facility letters which required the facilities to be secured by legal mortgage over the landed property belonging to the 2nd and 3rd defendants. He testified further that, in compliance with the terms of the bank facility letters, the 2nd and 3rd defendants mortgaged their landed property located on Plot No. 143, Block "7" Mbweni Mpiji within Kinondoni Municipality. PW1 further testified that the 2nd and 3rd defendant signed personal guarantee letters dated the 3rd day of April, 2016. In support of his evidence, PW1 tendered the mortgage of a right of occupancy (Exhibit P7), Consent to create mortgage of a right of occupancy (Exhibit P8), Guarantee signed by Choba John Mumba (Exhibit P5) and Guarantee by Restituta Aloyce Shiduki (Exhibit P6).

On the other hand, DW1 who testified for the 1st and the 2nd defendants testified that there was no credit value secured with the personal guarantee. Regarding the third defendant (DW2), she stated on oath that she never signed any security document to guarantee the loan. She also disputed to have appeared before the Commissioner for Oaths who witnessed her signing the alleged documents. On cross-examination, DW1 and DW2 adduced that the loan was processed when the 3rd defendant was in Sengerema for maternity leave and that the signature appearing thereon was not hers.

Having weighed the evidence adduced by both sides, it is common parlance that Plot No. 143, Block 7, Mbweni Mpiji, Kinondoni was mortgaged to secure the facilities granted by the plaintiff to the 1st defendant. This is pursuant to PW1's evidence which is supported by the mortgage of a right of occupancy (Exhibit P7) and the consent to create mortgage of a right of occupancy (Exhibit P8) which is alleged to have been signed by the 3rd defendant. It is also common ground that the 2nd and 3rd defendants are said to have signed the guarantee (Exhibit P5 and P6) as guarantors of the facilities granted to the 1st defendant by the plaintiff.

Upon being cross-examined, DW1 admitted to have signed the security documents. However, it is DW1 and DW2's contention and Mr. Axwesso's submission that the security documents were not signed by the 3rd defendant. In other words, it is the defendants who allege that the security documents

were all forged. Therefore, referring to section 13 of the Law of Contract Act [Cap. 345, R.E. 2019], Mr. Axwesso argued that there was no valid contract. He submitted further that the mortgage was not lawful for want of spousal consent, as it was held in the case of **National Bank of Commerce vs Abdallah Mulla**, Civil Appeal No. 283 of 2017 (unreported). Mr. Axwesso submitted further that the 3rd defendant did not guarantee the 1st defendant by mortgaging of the suit property to secure the loan facilities. Citing the case of **Hemed Said vs Mohamed Mbilu** (1984) TLR 113, the learned counsel urged me to draw an adverse inference against the plaintiff for failure to call the commissioner for oaths alleged to have witnessed the 3rd defendant signing the personal guarantee.

As indicated earlier, it is the defendants who allege that the security documents were not signed by the 3rd defendant and therefore, forged. Guided by the law, the burden to prove that the 3rd defendant's signature appearing on the mortgage of a right of occupancy (Exhibit P7), guarantee by the 3rd defendant (Exhibit P5) and the consent to create mortgage of a right of occupancy (Exhibit P8) was forged lies on the defendants. As it was in respect of the first issue, neither DW1 nor DW2 produced evidence to prove that Exhibits P5, P6, P7 and P8 were forged. It was DW1's evidence during cross-examination that, the third defendant was aware that the land in question had been mortgaged. Indeed, she also become aware of that fact when served with the plaint and subsequent pleadings. However, she admitted that she did not

report the issue of forgery of the security documents to the police. Therefore, there is neither investigation nor evidence given to confirm the contention that the signature appearing on the above-named documents was not signed by the 3rd defendant.

I have also considered Mr. Axwesso's argument that the Court should draw an inference against the plaintiff for failure to call the commissioner for oaths who witnessed the 3rd defendant signing the security documents. It is true that the 3rd defendant is said to have signed all security documents, before the commissioner for oaths. However, nothing suggests that the said commissioner for oaths works for the plaintiff. PW1 stated on oath that it is the client who had the obligation to procure the commissioner for oaths to attest the documents. In the circumstances, the Court cannot draw adverse inference against the plaintiff for not calling the said commissioner for oaths. All in all, it was the defendants' duty to prove that the 3rd defendant did not sign the security documents. Since that duty was not discharged, I am inclined to decide the third and second issues in affirmative.

The next issue for consideration is whether the defendants were issued with any demand note and 60 days Default Notice. This issue is based on the provision of section 127 of the Land Act [Cap. 114, R.E. 2019] which requires issuance of default notice where there is a default in respect of payment secured by mortgage. The provisions read as follows: -

"127(1) Where there is a default in the payment of any interest or any other payment or any part thereof or in the fulfillment of any condition secured by any mortgage or in the performance or observation of any covenant, express the mortgagor a notice in writing of such default.

(2) The notice required by subsection (1) shall adequately inform the recipient of the following matters:

(a) the nature and extent of the default;

(b) that the mortgagee may proceed to exercise his remedies against the mortgaged land; and

(c) actions that must be taken by the debtor to cure the default; and

(d) that, after the expiry of sixty days following receipt of the notice by the mortgagor, the entire amount of the claim will become due and payable and the mortgagee may exercise the right to sell the mortgaged land.

In the instant case, PW1 tendered in evidence the default notice (Exhibit P9) dated the 1st day of December, 2016. The notice was addressed to the 1st defendant and on the same date was served upon the 2nd and 3rd defendants as mortgagors. The default notice informed the 1st defendant that she had defaulted to pay the principal amount plus interest totaling TZS 903,951,925.81 as of the 1st day of December, 2016. The default notice notified the defendants that the plaintiff was going to exercise her right to sell the mortgaged property or appoint a receiver or lease of the property or enter possession in the event the default is not rectified by the 1st defendant within sixty days from the date thereof.

When cross-examined, DW 1, who testified for the 1st and 2nd defendants, admitted to have signed the default notice. As to the 3rd defendant, she denied to have signed the same. However, PW1 testified that he is the one who served her. As it was in the case of other documents, the third defendant did not prove that the signature appearing on the default notice was not hers. From the foregoing, I am satisfied that the defendants were lawfully issued with the demand note and/or default notice. Mr. Axwesso's argument that the default notice was not served to the 3rd defendant is not supported by evidence.

This now takes me to the last issue on the reliefs which the parties are entitled to. I will address this issue by considering the reliefs sought by the plaintiff. The first relief is a declaration that the defendant to has breached the two loan agreements and two overdraft facility letters. In view of the Court's findings on the second issue, I find it to have been sufficiently covered.

Another relief sought by the plaintiff is payment of TZS 1,537,909,720.86.33 being an outstanding principal loan as of 9th day of May, 2019. It follows that this relief is in form of specific damages. The law is settled that, unlike general damages, special damage must be strictly proved. (See **M/S Universal Electronics and Hadward (T) Ltd vs Strabag International GMBH (Tanzania Branch)**, Civil Appeal No. 122 of 2017, CAT at Dar es Salaam, (unreported)). Having analyzed the evidence on record, I am convinced that the plaintiff has proved that two overdraft facilities involving TZS

300,000,000/= and TZS 50,000,000/= respectively, were advanced to the plaintiff. It is also in evidence that two business loans to the tune of TZS 400,000,000/= and TZS 150,000,000/= respectively, were advanced to the 1st defendant. Thus, the plaintiff has proved that the principal sum advanced to the 1st defendant is TZS 900,000,000/= and that the 1st defendant defaulted to pay back the loan.

The plaintiff has proved further that the facilities advanced to the 1st defendant were subject to interest agreed in Exhibit P1, P2, P3 and P4. In his evidence, PW1 tendered two loan statements (Exhibit P11 and P12) and bank statement (Exhibit P13) to prove the plaintiff's claim that the outstanding amount (principal sum and interest) which the 1st defendant owed the bank as of the 9th day of May, 2019 was TZS 1,537,909,720.86.33. Reading from Exhibits P11, P12 and P13, I have noted the following:

- (a) The bank statement of Chotec Company Limited (Exhibit P13) suggests that the outstanding amount on both overdraft facilities (Exhibit P1 and P4) was TZS 665,271,608.94.
- (b) The loan statement (Exhibit P11) shows that the outstanding amount on the business loan of TZS 400,000,000/= was TZS 651,601,853.89.
- (c) The loan statement (Exhibit P12) shows that the outstanding amount on the business loan of TZS 150,000,000/= was TZS 219,931,058.03.

In view thereof, the plaintiff has not proved that the outstanding amount on the business loan of TZS 150,000,000/= was TZS 221,036,258. The evidence

tendered by the plaintiff shows TZS 219,931,058.03. In sum, basing on Exhibits P11, P12 and P13, the outstanding amount (principal loan and interest) duly proved by the plaintiff is TZS 1,536,804,520.86

Another relief claimed by the plaintiff is general damages. The law is settled general damages is granted at the discretion of the court in a case where the injuries suffered cannot be assessed in a monetary term. In the present case, the default to pay the outstanding loan is subject to interest and claimed in the special damage. Further to that, PW1 did not depose on injuries suffered by the plaintiff due to the defendant's failure to pay the loan. It is also my considered view that, the injuries, if any, would be covered in the interests prayed in the case at hand.

The other relief sought is interest on the decretal sum at the rate of 23% per annum from the date of filing the suit to the date of judgment and 7% per annum from the date of judgment to the date of full and final satisfaction of the decree. In terms of Order XX, Rule 21(1) of the Civil Procedure Code (CPC) (Cap 33, R.E 2019), this Court is empowered to award interest at the rate of 7% per annum from the date of judgment until satisfaction of the decree or such other rate not exceeding 12% agreed upon by the parties before or after the delivery of judgment. The plaintiff tendered in evidence the facility agreements in which the interest rate agreed was 22% and 25% on the business loan agreements and overdraft facilities respectively. Since the

decretal sum combines the outstanding amount on the business loan agreement and overdraft facilities, I award interest on the decretal sum, at the rate of 22% per annum from the date of filing the suit to the date of judgment and 7% per annum from the date of judgment until satisfaction of the decree.

Lastly, the law is settled, that costs follow the event. In the premises and basing on the provisions of section 30 of the CPC, the relief for costs is granted in favour of the plaintiff.

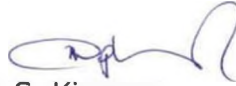
For the reasons demonstrated afore, the judgment is hereby entered for the plaintiff, as against the defendants in the following terms:

1. The defendants are in breach of the Business Loan Agreements and the two Facility Letters dated the 31st day of March, 2016 and the 22nd day of June, 2016 respectively.
2. The defendants, jointly and severally, are ordered pay the plaintiff TZS 1,536,804,520.86, being an outstanding principal loan amount and interest.
3. The defendants shall pay the plaintiff interest on the decretal sum at the rate of 22% per annum from the date of filing the suit to the date of judgment.
4. The defendants shall pay the plaintiff interest on the decretal amount at the rate of 7% per annum from the date of judgment till the date of full and final satisfaction of the decree.

5. The Defendants are to pay costs of the suit.

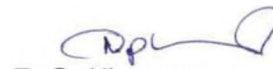
It is so ordered.

DATED at DAR ES SALAAM this 18th day of October, 2021.



E. S. Kisanya
JUDGE

COURT: Judgment delivered this 18th day of October, 2021 in the presence of Mr. Joseph Kipeche, learned advocate for the plaintiff and Mr. Robert Mossi, learned advocate for the 3rd defendant and holding brief for Mr. Musa Ryoba for the 1st and 2nd defendants. B/C Ms. Sania present.



E. S. Kisanya
JUDGE
18/10/2021