IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM.

COMMERCIAL CASE NO. 150 OF 2021.

DR. MARY ANDREW MGONJA.....PLAINTIFF.

VERSUS

NCB BANK (TANZANIA) LTD..... DEFENDANT.

JUDGMENT.

Date of Last Order: 20/07/2022.

Date of Judgment : 5/9/2022.

MARUMA J.

This dispute arises from the breach of contracts entered into between the Plaintiff and the Defendant in respect of interest charged on Fixed Deposit Accounts 1 and 2, hereafter referred to as FDRI and FDR II. The Plaintiff is suing the Defendant on the following claims:

a) Payment of the remaining agreed interest of shillings 63,765,625/= for FDR 1

b) Payment of the remaining agreed interest of shillings 33,475.000/= for FDR II

c) An Order declaring that the change on repayment of the

personal credit from 36 to 60 months was unlawful.

d) Payment of interest on the decretal amount al court rale from the day of judgment to the day of payment.

e) Costs of this suit

f) Any other remedy the court may deem fit and just to grant.

The background of this dispute is to the effect that the Plaintiff on 5th December, 2016 opened a fixed account (FDR1) in the Defendant's bank with a deposit of TZS 463.750.000/= for a fixed period of 12 months with the interest at a rate of 15%. It was in agreement terms that on maturity, the principal amount would be rolled over and the interest be deposited in the Plaintiff's current account number 117179100033 maintained by the Defendant's Bank. However, no FDR certificate was issued by the Defendant. The Plaintiff opened a second fixed deposit account (FDR II) on February 24th, 2017 with a deposit of TZS 386,250.000/=. Also, no FDR certificate was issued by the Defendant. However, FDR II Customer's Instruction was provided to the Plaintiff stipulates that the agreed interest rate was 14% and the period covered was from February 24th , 2017 to February 23rd , 2018. It also stipulates that on maturity

the principal should be rolled over and credit interest on Plaintiffs current account number 1 17179100033 on monthly basis. On February 23, 2018, the Defendant provided a credit facility to the Plaintiff by which the latter obtained a personal loan of TZS 80,000,000/= for the period of thirty-six (36) months secured by the Plaintiff's FDR I with a fixed interest of 20%. The said interest was to be recovered by debiting the Plaintiff's current account with the Defendant under the instruction that 15% interest from FDR I plus 5%. That means there was a linkage between FDR 1 and the Loan Agreement. It is alleged that although the Defendant retained the discretion of altering the interest rate in accordance with the market trend under the Loan Agreement. The Bank was still obligated to inform the borrower (the Plaintiff) by notice in writing of the alteration and its effective date, fourteen days (14) prior to the commencement date of the amendments. The parties also agreed that any variation, renewal, extension, amendment, or replacement, a Letter of Offer, would be offered to and accepted by the Plaintiff (borrower). The Plaintiff alleged that on 12th , 2021 discovered that the maturity period and interest rate credited to her FDR accounts

were incorrect for being inconsistent as per the agreed percentages, and in all the cases, there was no prior notification of the amendments made by the Defendant as required under the contracts. She claimed to have discovered that the Defendant unilaterally decided to charge 20% interest on the personal loan for FDR I and reduced the FDR I interest rate to 10%, resulting in a 5% underpayment over 33 months from January 1, 2019 to September 20, 2021, for a total underpayment of TZS 63,765,625/=.In relation to FDR II, the interest rate was raised from 4% to 10% with effect from January 1, 2019 to February 1, 2021, resulting in a TZS 33,475.000/= deficit, hence this suit.

The hearing of this suit was at the service of Prof. Leonard P. Shahid, advocate assisted by Mr. Mlyambelele Levy Ngw'eli, advocate for the Plaintiff and Mr. Elisa Abel Msuya, Advocate assisted by Ndehorio Ndesamburo, Advocate for the Defendant.

To support the plaintiff's case, one witness, Mary Andrew Mgonja, the borrower (PWI), had testified in support of documentary evidence including the fixed deposit customer instruction dated 5th

December 2016 (exhibit P1 collectively), the NCBA credit facility loan exhibit P2, emails correspondences (exhibit P3). On the other hand, the Defendant contesting the Plaintiff's claim called one Seifdin Kabange, the Branch Manager (DW1) who produced one documentary evidence of indicatives rates from Bank (exhibit D1).

In determining this suit, the Court framed four issues as follows:

1. Whether there is a breach of agreement in respect of interest rate in;
    A. Agreement FDR1
    B. Agreement FDR 2
2. Whether the defendant unilaterally change the loan repayment period from 36 months to 60 months.
3. Whether the plaintiff is entitled to a loss at a tune of TZS 63,765,625/= for FDR1 and TZS 33,475,000/= for FDR2
4. What relief are parties entitled?

Having the background of the dispute above, there are facts not in dispute which I would like to point out that, the Plaintiff did deposit some of her gratuity payments with NCBA Bank with effect from on

5th December, 2016 in fixed deposit account (FDRI) with TZS 463,750,000/= for the period of 12 months and agreed interest was 15%. Also, on 24th February, 2017, deposited second Fixed Deposit account (FDR II) with TZS 386,250,000/= for the period covered from 24th February, 2017 to 23rd February, 2018 with an agreed interest of 14%. All the FDRs were issued with a Fixed Deposit Customer's Instruction (Exhibit Pl) with no Fixed Deposit Certificate or any other certificate issued by the Bank. Also, it is not in dispute that on maturity period for both FDRs I & II, the principal amount agreed to be rolled over and the interest be deposited on a monthly basis in the Plaintiff's current account number 117179100033 maintained by the Defendant Bank. It is undisputed that on February 23, 2018, he obtained a personal loan of TZS 80,000,000/= from the Defendant secured by FDR 1 for a period of thirty-six (36) months.

Starting with the first issue on whether there is a breach of agreement in respect of interest rates in agreements FDR1 and FDR II. It is the evidence of PW1 that, the agreed interest rate for the FDRI was 15% and the interest rate for FDR II was 14%. It was also

mutually agreed that upon maturity of the FDRs, the Defendant should rollover only the principal amount and credit interest into the Plaintiff's account number 117179100033 on a monthly basis. These facts are also reflected in paragraphs 4 - 8 of the plaint.

PW1 also testified that the agreed-upon rolling over and interest terms were followed for two years in a row, from 5/12/2016 to 4/12/2017 and 5/12/2017 to 4/12/2018, as evidenced by emails correspondence and print outs attached thereto made on various dates (Exhibit P3). However, the Plaintiff came to discover that in respect of FDR I, the Defendant did not implement the agreed rates and unilaterally decided to charge a 20% interest on the personal loan and at the same time reduced the FDR rate to 10%, resulting in an underpayment of 5% on FDR I from 1st January, 2019 to September, 2021. During cross examination, PW1 admitted to being aware of the possibility of changes in the rates. Thus, why did she request the bank to clarify about her interest when the bank had to consult her in advance so she could reject or withdraw it but the Bank had not. PW1 went to testify that the Defendant unilaterally changed the loan repayment period from 36 months to 60

months. She testified that she tried to address the issue with the Defendant through several meetings and correspondence between March and June 2021, but the efforts proved futile though the Defendant in reply to the demand letter, acknowledged the existence of the shortfalls complained of and committed herself to resolving the said dispute. A commitment never fulfilled by the Defendant. PW1 also testified that it was agreed that in any circumstance, conditions or instructions to be revised or reviewed, or if new FDR Customers Instructions are issued, they should be acceptable and negotiated by both parties. The thing that was not done by the Defendant, who is duly bound to do so every year as indicated in the agreement for 12 months. She argued that since there was a failure of duty of care by the defendant, as held in the case of T**he National Bank of Commerce v. Saidi Ally Yakut** [1989] TLR 119, at page 121 it was held that a bank "owes a duty of care to its customers, such that it conducts its activities with care and circumspection". The defendant is in breach of the agreement and should be bound by the claims.

Responding to this issue, DW1 in his witness statement under paragraph 3 (iv) and (v) and paragraph 8 (iii) and (iv) which also showed indicative interest rates between 15% - 10% for FDR I and 14% to 12% for FDR II covering the period from 5th December, 2017 to 28th April, 2021 for any sums in excess of TZS 100 million deposited for a period of 12 months (exhibit DW1) This was also stated in the witness statement of defence that the FDR-1 was for a fixed term of 12 months, so the interest to be applicable in the FDR tends to fluctuate depending on the market and economic forces and guidance issued by the Bank of Tanzania. This is indicated in paragraph (iv) in the written statement of defence that the chargeable interest rate for each year was per inductive interest rate worked out and calculated by the Treasury Department of the Defendant based on the factors stated. DW1 testified that, considering that the Plaintiff a premier customer, the defendant managed to pay a higher and reasonable interest rate compared to the indicative rates as stated above. In paragraph v of the witness statement, it is also stated that the interest rates above were communicated to the Plaintiff and she accepted them. However, the

defendant admitted in paragraph of the same WSD that interest rates agreed on each specific contract ceased to apply upon maturity of the particular FDR and parties were required to agree on new interest rates; otherwise, the rolled over amounts were subject to interest rates applicable at the material dates as determined by the defendant. Moreover, in paragraph 8 (iii) the defendant admitted that the Bank complied with the terms of the FDR (I) and FDR (II) i.e. to roll over the principle sum only no interest rates were agreed between the Plaintiff and Defendant or at all. This was supported by the evidence of DW1 in his witness statement under paragraph that no special interest rates were contracted or at all but the Bank continued to award favorable interest rate to the Plaintiff as attested as FRD1 was awarded interest rate of 15% from 5th December, 2016 - 4th December, 2017 over and above the normal interest rate and another interest rate of 10% from 5th December, 2018 to 4th December, 2019, the increment is 1% for year from December, 2016 - December, 2017; 5.5% for the year form December, 2017 - December - 2018; 1.5% for the year from December, 2019 - December, 2020 and 3.5% for the year from December, 2020 -

December, 2021. Similarly, for FDR-II the increment made on was as follows: - from February, 2017 - February, 2018 - Zero (No special rate was awarded); from February, 2018 - February, 2019 increment was 7%; February, 2020 - February, 2021 is 3% and February, 2021 - Feb-2022 interest was 5.5% above normal.

DW1 went further to testify that the Plaintiff was required to submit FDR-I certificate as condition precedent - Clause 9 (iii) of Schedule. However, such a schedule was not tendered in Court. He also testified that Plaintiff and Defendant acknowledged that interest chargeable to FDRI was to be subject to change from time to time after maturity as under Clause 4 (a) of the agreement, but such an agreement was not tendered in Court to justify.

It was also the evidence of DW1 that the Plaintiffs accounts were credited monthly as agreed in all agreements and the Plaintiff accessed the money credited by the Defendant which in essence reflects the rate of interest chargeable on both FDR-I and FDR-II. Therefore, since the Plaintiff kept silent for all this period and she never terminated the arrangements (contracts) she acquiesced to

the arrangement and is now precluded from making any claims or at all.

Considering the arguments made by both parties, it is pointed out that the defendant did change the interest rate to be paid by the Plaintiff for both FDR1 and FDR II as evidenced by DW1 and in the WSD, where there was no agreement to the respective interest rates. Also, in his witness statement under paragraph 6 DW1 admitted that despite of the indicative interest rate, the defendant continued to offer the plaintiff favorable interest. In addition, during cross examination, he testified that the parties did not negotiate on interest but on the terms and conditions of the FDR at maturity, and that if no negotiation occurred, the interest should have prevailed.

Furthermore, it can be agreed that the bank has the exclusive right to determine the interest rate depending on the prevailing factors. However, despite giving the favourable rate to the Plaintiff, the pertinent question is why the defendant maintained the same rate for the period from December 2016 to December 2018 and what was the basis for making the difference to the coming years from

2019 onwards. Furthermore, despite the Plaintiff's numerous emails to the Defendant requesting clarification and negotiating changes, as evidenced by exhibit P3, The defendant seems to have made little effort to address the issue by making mere promises to tackle it. Moreover, in the written statement of defence, the defendant admitted that no interest was agreed between the parties. Even if one assumes that the interest rate was in favor of the Plaintiff and that the chargeable interest rate for each year was determined by market and guidance by the BOT. Then the question to be asked is why did the Defendant fail to issue a fixed deposit certificate or instruction, which should be issued every year as it has been done in the previous two years as evidenced in exhibit P1.

All these facts and observations raised a doubt on how the defendant handled the FDRI and FDRII which I am of the settled view that the defendant failed to exercise its duty with reasonable care in handling her customer affairs arising from the contractual relationship between them, which resulted in the breach of the terms in the FDR I and II as discussed above. This is contrary to the

Regulation 16 (l), (2) (d) of Bank of Tanzania (Financial Consumer Protection) Regulations, 2019 which prohibits unfair contract terms.

In my view, the fact that there are fixed deposit customer instructions for both FDRI and FDRII issued to the Plaintiff by the Bank for the first period of 12 months, means that after the completion of the respective year, the Bank had a duty to prepare for the new one for the respective year which need to be communicated and signed by the other party despite of the condition to roll over which has already agreed.

Furthermore, for the sake of fairness, banks have the independent right to change interest rates based on market trends. As we are all aware of the Tanzanian culture and levels of understanding of the bank's customers, it is very dangerous for the banks to assume that everyone knows where to find this information as alleged to be available at the bank's notice boards. It is a recommendation to the banks to ensure the information such as that of changing interest rates, which touches the rights of the bank's customers, is also reflected in the agreement to avoid unnecessary claims and also for the customer to be aware from the beginning of

what will take place in the transactions and what their rights and obligations are, even if one party has exclusive right to a certain obligation. I do not think that it was proper for the Bank to take up on its own the option to change the rate of interest, even if it had the exclusive right to do so without informing the Plaintiff or issuing a certificate of the new FDR.

In the premises, I find issue no 1 is answered positively that there is a breach of agreement in FDRI and FDRII. The defence given by the defendant that the Plaintiff was silent for all this period and she never terminated the arrangements (contracts) she acquiesced to the arrangement and is barred from raising a complaint is of no merit and is disregarded accordingly based on the settled principle of law of evidence that,

On the issue of the change of loan facility term from 36 months to 60 months by the defendant. PW1 testified that the Defendant, further, unilaterally changed the loan repayment period from 36 months to 60 months. PW1 testified to addressing the issue with several meetings and correspondence between March and June 2021 with the Defendant, but the efforts proved futile, though the

Defendant in reply to the demand letter, acknowledged the existence of the shortfalls complained of. She testified that this issue was never disputed by the defendant. While DW1 being cross examined, he declined to reply, saying that the question ought to be answered by someone from the loans section of the Bank. However, no witness came to explain this clear aspect of the breach of the loan agreement. According to DW1, the Plaintiff agreed with the Defendant that the principal sum of FDR-I would secure an advanced facility of TZS 80,000,000.00 repayable in 36 months, and the repayment period of the loan facility was never changed, as stated in paragraph 13 of his witness statement.The point was supported by the case of **Paulina Samson Ndawavya vs Theresia Thomas Madeha**, Civil Appeal No.45 of 2017. The defendant argued that since the documentary stipulated 36 days, no oral evidence would prove otherwise.

I had an opportunity to go through the credit facility whereby clause 3 (a) (exhibit P2) provides that the facility period is 36 months. That means the loan ought to have been fully discharged by February 2021. However, I failed to see how the term was

extended to 60 months. It is a trite law that the one who assets must prove as provided under section 110 of the Evidence Act, Cap 6 R.E 2019 that:-

"…110 (1) whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person…"

Also, the position set in the case of **MS. Msolopa Versus Paul Warema & Others** (Land Case No.23 of 2017 [2020] TZHC 2078 (26th February 2020) it was discussed that,

"…Where there is documentary evidence it is valid and that oral evidence cannot superseded….".

Therefore, in the present case PW1 did not adduce sufficient evidence to demonstrate how the defendant was still making repayments or deductions in her account. In the absence of such evidence, I find this issue to be answered in the negative, so it fails.

This takes me to the determination of the 3rd issue, whether the plaintiff is entitled to the loss at a tune of TZS 63,765,625/= for

FDR1 and TZS 33,475,000/= for FDRII. With the finding on the first issue that the defendant breached the agreement, it goes without saying that the Plaintiff is entitled to the specified losses under both FDR I and FDR II because the parties to an agreement are bound by their terms as it was held in the case of **Edwin Simon Mamuya vs Adam Jona Mbala** [1983] T.LR 410 at 414 whereas the Lord Lugakingira held that,

"….Once the parties bind themselves in contract for a lawful consideration they are obliged to perform their respective promise…"

On the last issue as to what relief the parties are entitled to. As it was confirmed in respect of issue no. 1 there was a breach of contract and the consequence for the breach of contract is provided under Part VII of the **Law of Contract Act, Cap. 345 of the Revised Edition**, 2019. Section 73 (1) thereof provides that,

"… When a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss or damage caused to him by the other party…"

The Plaintiff is therefore entitled to the relief sought in respect of issue no.1 as discussed in issue no. 3. Since issue no. 2 is answered in the negative, no relief is entitled to the Plaintiff.

As for the aforesaid findings on the breach of the agreements, I

proceed to enter judgment against the Defendant as follows:

a) The defendant to pay the remaining agreed interest of shillings 63,765.625/= for FDR 1

b) The defendant shall pay the Plaintiff the remaining agreed interest of shillings 33,475.000/= for FDR II

c) Payment of interest on the decretal amount at court rate of 7% from the day of judgment to the day of payment.

d) Costs of this suit.

It so ordered.

Dated **at Dar Es Salaam** on this 5th day of **September, 2022**

Z.A.Maruma.

JUDGE