

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO.50 OF 2021.

EXIM BANK (TANZANIA) LIMITED PLAINTIFF

VERSUS

RIAZ G. GANGJI t/a ABBAS EMPORIUMDEFENDANT

Date of Last Order: 23/04/2022

Date of Judgement: 22/04/2022

JUDGEMENT

MAGOIGA.J

The plaintiff, EXIM BANK TANZANIA LIMITED by way of a plaint instituted the instant suit against the above-named defendant praying for judgement and decree in the following orders, namely: -

- (a) declaration that defendant has defaulted in to repay his loan;
- (b) An order that the defendant pays claimed amount of Tanzania Shillings Six Hundred and Eighty-Eight Million Four Hundred Seventy -Three Thousand One Hundred Fifty-Six and Eighty-Four Cents. (TZS. 688,473,156,.84);
- (c) An order for payment of interest on amount in prayer (b) above at commercial rate per of 28% per annum from the 26th February,2021 to the date of judgement;



- (d) An order for payment of interest on decretal sum at the court rate of 7% per annum from the date of judgement to the date of full satisfaction;
- (e) General damages;
- (f) Costs of and incidental to the suit;
- (g) Interest on the costs at the courts rate of 7%;
- (h) Any other relief that the honourable may deem fit, just and equitable to grant.

Upon being served with the plaint, defendant filed written statement of defence disputing plaintiff's claims and stated that the loan was not settled because plaintiff failed to open a loan account after the loan was transferred to it, and eventually, the defendant prayed that the instant suit be dismissed with costs.

The brief facts of this suit are imperative to be stated for better understanding the gist of this suit. According to the plaint, it is averred and not disputed by defendant that, 22nd May, 2019 UBL Bank Tanzania Limited (as a transferor) and Exim Bank Tanzania Limited (as transferee) entered into asset and liabilities agreement. Facts go that, among others, assets which were transferred to plaintiff is credit facility between UBL Bank Tanzania Limited (transferor) and the defendant.



Further facts were that, through the deed of novation, plaintiff was empowered by UBL Bank Tanzania Limited all rights and obligations under the facility agreement between transferor and the defendant. However, the defendant failed, ignored or refused to pay the loan as a such on 7th September, 2020 and 2nd March, 2021 the plaintiff issued demand notices claiming for an outstanding debt. The legal dispute ensued between parties each throwing blames against each other for breach of facility agreement. As a result on 31st March, 2021 plaintiff instituted this suit claiming for payment of TZS.688473.156/= being outstanding loan amount for credit facility as at 25th February, 2021 and other consequential reliefs as contained in the plaint.

The plaintiff at all material has been enjoying the legal services Ms. Maria Patrick, learned advocate. On the other adversary part, the defendant equally at all material time has been enjoying the legal service Ms. Wivina Kaloli, learned advocate.

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

- i. Whether the there was breach of the credit facility agreement?
- ii. Whether the defendant is liable to pay TZS 688473,156.00 being outstanding amount for credit facility as at 25th February

2021, at commercial interest rate 28% and 7% court rate per annum per to the plaintiff.

iii. What relief(s) parties are entitled to.

The plaintiff in proof of her case, called one witness, SIBOGA MASUNGA MADUHU (to be referred in these proceedings as "**PW1**"). PW1 under oath and through his witness statement adopted in these proceedings as his testimony in chief told the court that, he is a Retail Collection Assistant Manager of the plaintiff and his major role includes but not limited to monitoring impairment and collection of classified loan accounts such as suit and non-suit filed under retail and corporate segments of the loan book, hence, conversant with the fact of this case. PW1 went on telling the court that, on 2nd September, 2019 the plaintiff vide a deed of novation empowered by UBL Bank (Tanzania) Limited(the Transferor) all rights and obligations under the facility agreement between the transferor and the defendant.

PW1 went on to testify that on 13th August, 2015 the transferor and the defendant entered into agreement for a short term and an overdraft of Tanzania Shillings Five Hundred Million (TZS.500,000,000.00). Under the arrangement, the defendant agreed to pay by signing the promissory note of Tanzania Shillings Five Hundred Fifty Million



(TZS.550,000,000/=). PW1 pointed out that, among others, it was agreed that:-

- a. The defendant shall pay interest to the transferor on the outstanding facility amount from the date of draw down until payment in full;
- b. The interest period shall commence on the disbursement of the advance be duration of one (1) month;
- c. The interest on short term loan will be due and payable on the last business day of interest period at 4% over three months T-Bills floor and interest on the overdraft shall be 18% per annum.

Testifying further PW1 told the court that, defendant made an application for renewal of the existing credit facility, in which on 26th July, 2016 the amount of Tanzania Shillings Five Hundred Million (TZS 500,000,000.00) was approved with similar terms in existing facility. Further testimony of the PW1 was that, in addition the defendant on 19th February, 2018 made an application for renewal and conversion of existing facilities to an overdraft facility of TZS.625,000,000/= which was guaranteed by Riaz G. Ganji.

PW1 went on with his testimony by telling the court that, the said facility was secured by a promissory note, personal guarantee and the facility



agreements both securities were signed by Riaz G. Gangji. It was PW1 testimony further that, the claim of TZS 688,473,156.00 is the result of deed of Novation dated 22nd May, 2019 between plaintiff and UBL Bank Tanzania Limited in which plaintiff was empowered all rights and obligations under the above credit facility between UBL Bank and defendant. PW1 went on telling the court that, defendant failed to meet its obligations under the facility as agreed and the plaintiff had no option rather than issuing demand letters dated 7th September,2020 and 2nd March,2021 informing of default and sought of payment of the outstanding loans.

PW1 told the court that despite the said notices issued the defendant failed and /or neglected to pay the outstanding amount due which as of 25th February,2021 stood at TZS. 688,473,156.84. On the basis of the above testimony PW1 prayed that this court be pleased to enter judgement and decree against defendant as prayed in the plaint.

In proof of the above facts, PW1 tendered in evidence the following exhibits, namely:-

1. Deed of novation dated 13th August, 2015 and Deed of variation dated 2nd September,2019 as **exhibit P1a-b.**



2. Credit facility letter dated 13th August,2015 and promissory note dated 13th August 2015 as **exhibit P2a-b.**
3. Bank statement dated 19th February,2019 and an affidavit of authentication of the bank statement **as exhibit P3a-b.**
4. Credit facility letter dated 26/7/2016 **as exhibit P4.**
5. Credit facility letter dated 19/2/ 2018, promissory note dated 19/2/2018 and irrevocable guarantee dated 19/2/2018 **as exhibit P5 a-c.**
6. Demand notices dated 7/9/2020 and 2/3/2021 **as exhibit P6a-b.**

Under cross examination by Ms. Kaloli, PW1 told the court that, the defendant in this suit is Riaz G. Gangji, he is client from UBL Bank whom he owes the plaintiff TZS. 688,000,000/= as per the bank statement. PW1 shown exhibit P3 identified it and told the court that it is a statement but it does not reflect the claimed money because interest suspended. However, the name of the bank statement is Abbas Emporium.PW1 when asked to read paragraph 4 of his witness statement read it and insisted that the name is Riaz Abbas Emporium. PW1 went on to read paragraph 7 and told the court that it was from plaintiff.



PW1 further shown exhibit P5 read and told the court that, it was from defendant. PW1 when pressed with questions told the court that, plaintiff claims is on credit facility of 2018 in which its tenure was for 12 months and there was no agreement to renew after the expire of the tenure. PW1 when shown exhibit P6 a-b recognized it and told the court that they are demand notices issued on 7/9/2020 and 2/3/2021 after the expire of one year in which client is required to pay even without the notice.

Under re-examination by Ms. Patrick, PW1 when shown exhibit P1 identified it and told the court that, these are deed of novation and variation. PW1 when asked on the relation between plaintiff and defendant, PW1 told the court that, Abbas was UBL bank client in which Exim bank was empowered all right and obligation under the credit facility. PW1 when asked the character of Abbas he was quick to point out that, Abbas was not good in payments of the loan and when shown exhibit P4 and asked whose name is? PW1 was quick to point out that the name of defendant is Riaz Abbas Emporium which is the same name in witness statement and bank statement, the other name is Abbas Gangji t/a Abbas Emporium. PW1 when pressed with questions told the court that, they visited defendant and had meeting with him. PW1 shown exhibit P6 identified it and told the court that those are efforts to



get defendant pay the loan. PW1 when pressed with more questions told the court that, the tenure of the loan expired while at UBL and they were in process of recovering in September 2019 and therefore plaintiff did not contribute to his failure to repay the loan.

PW1 when shown exhibit P3 identified it and told the court that, the amount due is TZS 688,244,829.83, because interests were suspended and taken to suspension account.

This marked the end of hearing of plaintiff case and same was marked closed.

In defence, defendant was defended by one, Mr. RIAZ G. GANGJI t/a ABBAS EMPORIUM (to be referred in these proceedings as '**DW1**'). DW1 under affirmation and through his witness statement adopted in these proceedings as his testimony in chief told the court that, he is the Managing Director of the defendant, hence, aware of plaintiff claims in the suit. DW1 went on to tell the court that, it is true on 13th August 2015 the defendant entered into credit facility with UBL Bank Tanzania Limited to the tune of TZS.500,000,000 for period of 12 months and the loan was secured by the following securities personal guarantee of Mr. Riaz G Gangji, Promissory note dully signed by Riaz G Gangji, agreement



of term loan facility signed by Riaz G Gangji and agreement of overdraft signed by Riaz G Gangji.

It was the testimony of PW1 that, UBL Bank being satisfied with defendant trends on 26th July,2018 renewed plaintiff existing facility in addition to above renewal on 19th February 2018 UBL Bank advised defendant on renewal and conversation of existing credit facilities from TZS 500,000,000 to proposed overdraft TZS. 500,000,000 with the existing held securities.DW1 went on telling the court that, defendant observed all terms of the credit facility despite of business hardship and difficult circumstances that existed in that particular time.

It was a further testimony of DW1 that on 22nd May,2019 plaintiff and UBL Bank Tanzania Limited entered into asset and liability agreement that all rights and obligations under facility letter dated 13th August,2015, 26th July,2016 and 19th February,2019 on favour of the UBL Bank be transferred to plaintiff. However, DW1 told the court that, plaintiff has never afforded the defendant the opportunity to discuss the deed of novation and the outstanding liability and stated that non-payment was attributed by plaintiff who frustrated the performance of contract for failure to allow restructuring of the loan and failure to create loan account with which defendant could make payments. DW1 went on

telling the court that if the bank account for debt was made the debt would have been liquidated but defendant did not make payments because payments could not be made into air. According to DW1 the claim by plaintiff is misplaced because plaintiff conduct constitutes act of repudiation of the contract which has greatly frustrated the compliance with the deed of novation.

On the foregoing, DW1 urged this court to find that, plaintiff claim have no merits and is not entitled to any prayers sought and eventually urged this court to dismiss the instate suit.

In disproof of the Plaintiff claims DW1 prayed, which prayer was not objected that **exhibits P1a-b, exhibit P2a-b, exhibit P4 and exhibit P5** a-c form part of the defence case.

Under cross examination by Ms. Patrick, DW1 told the court that, he is a business man of various items and his with her sister. DW1 told the court that he is before this court because of the instant case whereby Exim Bank claims money from him. DW3 went on to telling the court that, he took the loan from UBL which has been taken by Exim Bank Limited. DW1 when shown exhibit P1a-b identified it and admitted to sign it and that time he owned car known as Prado. DW1 was shown exhibits P4 and told the court that, the amount involved is TZS.

500,000,000 which was an overdraft and he signed it before UBL Bank but he has yet paid the loan and admitted to have signed all documents admitted in evidence.

Under re-examination by Ms. Kaloli, DW1 told the court that, his loan was an overdraft facility operated at the rate of 500,000,000/= and the amount was for receiving and paying the loan through any account deposit .DW1 went on telling the court that, the loan was for one year starting 2016. However, DW1 admitted that he has not paid the balance because on 2019 the loan was transferred from UBL to Exim bank, in which Exim Bank Limited have not opened the account for defendant to date. DW1 admitted the amount owes plaintiff is 540 Million and not 680 Million as claimed by plaintiff.

This marked the end of hearing of the defence case and same marked closed. The learned advocates for parties prayed for leave to file final closing submissions under Rule 66(1) of the court's Rules. I granted the prayer. I have had time to go through the rivalling submissions, and I truly commend them for their immense research and contribution which has enlightens this court much on this kind of dispute in issue. However, to avoid this already long judgement, I will not repeat each and every thing argued but here and there will refer to them. And where I will not,



it suffices to say all have been taken and considered in determination of this suit.

However, having gone through exhibits tendered, rival submissions for and against this suit, I wish to narrow down non-contentious issues.

One, it is not disputed by the parties that defendant and UBL Bank Limited on 13th August, 2015 entered into credit facility agreement which same was renewed on 26th July, 2016 and on 19th February, 2018. **Two**, it is not disputed by the parties that, through the deed of novation dated 2nd September, 2019 plaintiff was empowered with all rights and obligations in the credit facility between defendant and UBL Bank Limited. **Three**, it is not disputed that the said credit facilities dated 13th August, 2015, 26th July, 2016 and 19th February, 2019 were secured by personal guarantee of Mr. Riaz G Gangji, Promissory note duly signed by Riaz G Gangji, agreement of term loan facility signed by Riaz G Gangji and agreement of overdraft signed by Riaz G Gangji. **Four** it is not disputed by the parties as well that defendant has not paid the said amount to date.

However, in the circumstance, what is in serious dispute between parties is what caused defendant to fail to meet her obligations under the



facilities and to what tune because DW1 admitted only the amount of TZS.540,000,000 Million.

On that note, the noble duty of this court now is to determine the merits or demerits of this suit by answering each issue as agreed and recorded in the light of evidence on record.

The first issue was thus coached that **whether there was breach of the credit facility”?** While the defendant counsel is of strong submissions that, the plaintiff caused and frustrated the defendant effort to pay debt on three folds, **one**, non-creation of debt account after the credit facility transferred to it. **Two**, refusal to restructure the loan facilities, and **three**, PW1 was not available to discuss the deed of novation. In the totality of the above reasons, Ms. Kaloli urged this court to find and hold that the plaintiff frustrated the efforts of defendant to repay the debt, then, the instant suit is amenable to be dismissed with costs.

On the part of the plaintiff, Ms. Patrick laboured at length to differ with the defence counsel and pointed out that exhibits P2, 3, 4 respectively shows that the outstanding loan amount has not been repaid within stipulated time frame. According to Ms. Patrick, that amounts to breach of contract. The obligation to honour what was agreed by the parties to



a contract is fundamental. To bolt up his arguments cited the case of SIMON KICHELE CHACHA Vs. AVELINE M. KILAWA, CIVIL APPEAL NO. 160 of 2018 (CAT) Mwanza (unreported) in which it was held that: -

"parties are bound by the agreement they have freely entered into, and this is a cardinal principle of the law of contract that there should be a sanctity of the contract.

In addition to that learned counsel submitted that, defendant has failed to produce any evidence regarding payment or attempt to repay the loan also cited the case of MONTIX KNIGHT WEAR LIMITED vs. GOPPITEX, CIVIL CASE NO 834 /2004 [2009] ECLR.CRDB in which the court pronounced as follows: " the defendant in this case opted not to call any evidence therefore makes the evidence tendered by Mr. Kanal Joshi for the plaintiff unchallenged and the court has no alternative but to rely on it fully."

More so, Ms. Patrick submitted that clause 2 of the deed of novation provides for consent of all parties to the novation as described in clause 3 of the deed novation, therefore, according to Ms. Patrick, by virtual of deed of novation and variation of new contract between the plaintiff and the defendant a new contract was created and the terms



of the loan were never varied. To buttress his point cited the case of M/S MUSILAGA ENGINEERING vs.P.F NYAKUTONYA NYAMGESERA AND ANOTHER [1986] TLR NO. 115 in which it was held that: -

"By virtual of a letter there was created a new contract between the plaintiff and Musoma Foodstuffs Trading Co. The doctrine of novation recognizes that one party to contract can release the other and substitute a third person who then undertakes to perform the released person obligation."

On the account of the above reasons, Ms. Patrick equally urged this court to find and hold the first issue in the affirmative that plaintiff breached the facility agreement as was required to perform its obligation as agreed in the agreement between UBL Bank and defendant.

Having carefully considered both the pleadings, the testimonies of the respective parties' witnesses and documentary evidence tendered in their totality, I am inclined to answer this issue in the affirmative. My reasons are not far-fetched. **One**, the doctrine of novation is not novel in our law it is recognised under Section 62 of the Law Contract Act, Cap 345 [R; E 2019]. The Section provides as follows;



“If parties to contract agree to substitute a new contract for it or to rescind or alter it, the original contract need not be performed”

The same legal position was stated by the Court of Appeal of Tanzania in the case of M/S MUSILAGA ENGINEERING (supra) that, the doctrine of novation involves the substitution of a new contract with the effect of extinguishing the rights and obligation under the old contract depending on the agreement of the parties in the new contract.

Then if that is the position, terms of the new contract have to be ascertained from the wording of the new contract. In this case, deed of novation (**exhibit P1a**) after careful perusal, in particular, clause 3.2 as rightly submitted by the learned counsel for plaintiff the wording of the said clause is loud and clear that, the parties had agreed that, the borrower on and from the date of novation shall repay the debt in due dates in accordance with the terms of the facility agreement.

From the above clause, clearly shows and as rightly stated by the learned counsel for plaintiff that, there is nothing in the deed of novation that shows it having the effect varying previously term in the



credit facility between UBL Bank Tanzania Limited and defendant. Therefore, it is my humble conclusion that, the defendant is bound by the terms and condition of deed of novation and as a such the payments of the debt were to be made according to agreed terms in the facility letter.

With that in mind and back to this suit, and having gone through and considered both sides' pleadings, testimony of the PW1 and exhibits tendered, I am in considered view that, the allegation that plaintiff frustrated the arrangement of defendant effort to repay the outstanding is devoid of any merits because plaintiff was to make payments according to mode agreed in the facility letter between her and the UBL Bank Limited Tanzania.

Two the allegation on refusal to restructure the loan and denial of the deed of variation is mere statement without any iota of justification because apart from throwing blame to plaintiff nothing was tendered to substantiate that defendant tried and requested for re-structuring and the plaintiff refused to except request. In absence of such evidence, there is no way it can be conclusively held that, the plaintiff refused to restructure the loan as a such frustrated defendant effort. More so, the contents of exhibit P1a, particularly, clause 3.2 are loud and clear that



parties by consent entered into deed of novation in which defendant agreed to it. Now, defendant denial of availability to participate in discussion of the deed of novation is an afterthought.


Three, the content of **exhibit P5** are loud and clear that the parties had agreed that the life span of the facility would be 12 months starting from 19th February,2018 to 19th February, 2019.That means, the defendant debt was to be settled on or before 19th February,2019. Therefore, since the amount remains unpaid to date, this is other than breach of the term and conditions of the facility letters dully signed between the parties. Therefore, the allegation that it was plaintiff who frustrated the effort to settle the debt is an afterthought because even before the facility was transferred to plaintiff, the defendant was already in breach of the credit and even the case cited by the defendant clearly support the plaintiff case that parties are bound their agreement and defendant ought to perform the contract according to the terms and condition of the facility letter failure of which amounts to breach of contract.

On the above reasons, the arguments by Ms. Kaloli are far from convincing this court otherwise. That said and done, I associate myself



to the conclusion by Ms. Patrick that the first issue is to be answered in the affirmative that plaintiff breach facility letter.

This takes me to second issue which was couched that "**whether the defendant is liable to pay TZS.688,473,156.00 being an outstanding amount for credit facility as at 25th February,2019 a commercial interest rate of 28% and 7% per annum per to the plaintiff.**" The defendant has strongly disputed the payment of the TZS. 688,473,156.00 in number of ways namely; one, that **exhibit P3 and Exhibit P 5 a-c** does not state the name of defendant and was not addressed to the defendant; **two**, exhibit P3 stipulates the statement account from 19th January 2016 to 19th February2021 while the credit facility was entered on 19th February,2018 which show that the interest kept accruing even before the contract was concluded; and **three**, that the content of exhibit P3 is different to what was pleaded by the plaintiff. On the other hand, the learned counsel for plaintiff strongly submitted that, defendant through his evidence, pleading and during cross examination acknowledged to have received the loan and has failed to repay the loan and that following that breach interest kept accruing and therefore defendant is liable for payments of TZS 688,473,156/=.



Having gone through and considered both sides' pleadings, testimony of the witnesses respectively and careful perusal of the said **exhibits P3 and Exhibit P5 a- c**, I have noted that the name Abbas Emporium appearing on the said exhibits and that appearing on the plaint in the name Riaz G. Gangji t/a Abbas emporium are names of the same person. The only different is that the former is a registered business name of the defendant therefore, Abbas emporium and Riaz G. Gangji t/a Abbas emporium are names of same and one person and does not refer two different person as counsel for defendant wanted this court to believe. On that note, this argument is rejected.

The allegation that the amount stipulated in exhibit P3b and what was pleaded are different is not difficult to discern. Having considered the contents of exhibits P3b and after perusal of the plaint I have noted why there is discrepancies on the amount claimed by the plaintiff. The amount claimed in the plaint on 31st January, 2021 was TZS.688,473,156/= while the closing balance on Exhibit P3b on 29 December 2020 was TZS. 417,014,677.36. Now at this juncture the issue for determination is whether defendant is liable for repayment of TZS. TZS.688,473,156/= or not. It is not disputed by the defendant that they took loan and they have not repaid the whole amount. However, after carefully scrutiny of **exhibit P3b** the amount remained unpaid as

reflected in that exhibit is TZS.417,014,677.36. That said and done, the first issue must be and is hereby answered that the unpaid amount is TZS.TZS.417,014,677.36 and not TZS.688,473,156.00. as claimed by plaintiff.

This trickles down to the last issue that "what relief's parties are entitled". The learned advocate for the defendant prayed that this suit be dismissed with costs. Based on my findings above, this suit is merited. The plaintiff on the other hand prayed for judgement and decree against the defendant for payment of TZS.688,473,156.00 in which I am certain that plaintiff managed to prove only TZS. 417,014,677.00 and not TZS.688,473,156. claimed. The plaintiff, therefore, is entitled to TZS. 417,014,677/= being principal amount, accrued interest and bank charges as per paragraphs 3 and 9 of the plaint and consequential orders.

I have no flicker of doubt that, in this suit plaintiff has discharged the burden of prove on this suit to the standard required under the civil cases. That said and done, I enter judgement and decree against defendant on the following orders, namely:

- (a) I declare that the defendant is in breach of the terms of the contract between the plaintiff for failure to repay the loan;



- (b) The defendant is ordered to pay of the sum (TZS. 417,014,677.00) Tanzania Shillings Four Hundred seventeen Million and Fourteen Thousand Sixty Hundred and Seventy –Seven only as of 29th December, 2020 being an outstanding amount for credit facility;
- (c) I order the defendant to pay interest on the outstanding amount in Item (b) at the rate of 18% per annum from 26th February, 2021 and not 28% claimed;
- (d) The court further grant interest on the decretal amount at the rate of 7% from the date of the judgement until full and final payment;
- (e) The defendant is ordered to pay general damage to the tune of TZS. 2,000,000/=;
- (f) Costs of the suit be borne by the defendant.

It is so ordered.

Dated at Dar es salaam this 22nd day of April, 2022.



A handwritten signature in blue ink, appearing to read "S. M. Magoiga".

S. M. MAGOIGA

JUDGE

22/04/2022