

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 129 OF 2020

FIRST NATIONAL BANK TANZANIA LIMITED.....PLAINTIFF

VERSUS

PETROLUX SERVICE STATIONS LIMITED.....1ST DEFENDANT

SYLVANUS CHACHA.....2ND DEFENDANT

CHACHA SYLVANUS MAGORI.....3RD DEFENDANT

MARWA SYLVANUS CHACHA.....4TH DEFENDANT

JUDGMENT

Date of Last Order: 23/3/2023

Date of Judgment: 21/4/2023

AGATHO, J.:

The Plaintiff is a registered company under the Companies Act No. 12 of 2002 R.E 2002 and licensed under the Banking and financial institution Act 2006 to carry out banking business in Tanzania. The 2nd, 3rd and 4th defendants are natural person who have been sued by virtue of being guarantors of the loan advanced to 1st defendant. The latter is a company registered under the Companies Act, Act No. 12 of 2002 doing her business in Dar es salaam.

Briefly the Plaintiff case is that, sometimes in 2015 and 2016 by agreement the Plaintiff availed the 1st defendant a credit facility for vehicle financing agreement and business loan agreement in 2015 to the tune of (TZS 1,036,500,000/=) for the purposes of financing acquisition of three Scania R 460 LA 6 X 42013 Model from Truck store centurion and to repay the term loan from NBC. For the purposes of securing such facilities the 1st defendant issued specific debenture in favours of plaintiff over the 1st defendants fixed and floating assets, joint and limited personal guarantees of the 2nd, 3rd and 4th defendants. According to the plaint it was averred that, it was a common understanding among others, that the said facilities were to be paid within a period of thirty-six (36) months and interest was to be charged on daily basis. It was alleged that, at beginning things went well until 2018 when the 1st defendant started to default in repayment of installments. Parties' effort to settle the debt culminated into consolidation and restructuring of all unpaid dues into single business loan. In the said agreement, among others, it was agreed that the debt should be repaid within twelve (12) Months with interest of 16% per annum to be calculated on daily basis. Notwithstanding the said agreement the defendant failed, neglected and ignored to repay the said outstanding balance which as per

5th November, 2018 stood at TZS 178,927,206.50. This state of affair made the plaintiff to request for court intervention on the following orders: -

- a. Declaration that, the 1st defendant has breached the fundamental terms and conditions of the business loan agreement signed and accepted by the 1st defendant on the 6th September, 2018
- b. A declaration that the 1st defendant has breached the terms and conditions of the specific debenture as varied he have entered into and signed in favour of the plaintiff and cause to be registered by the Registrar of companies
- c. A declaration that the 2nd, 3rd and 4th defendants have breached the terms and conditions of the unlimited personal guarantee they each signed and entered in favour of the plaintiff.
- d. An order directing the defendants jointly and severally liable to pay to the plaintiff the sum of Tanzanian Shillings One Hundred Seventy-Eight Million Nine Hundred Twenty-Seven Thousand and Six and Fifty Cents (TZS. 178,927,206.50/=) being the outstanding principal sum plus interests as of the 5th day of November 2020 arising from the default on credit facilities

extended to the 1st defendant by the plaintiff under loan agreement mentioned herein.

- e. An order directing the defendants to pay to the plaintiff interests of 16% of the amount stated in item (d) herein above per annum and to be calculated on daily outstanding balance and capitalized monthly in arrears from the 5th day of November 2020 to the date of payment in full
- f. An order directing the defendants to pay to plaintiff interests of 7% of the decretal sum calculated on daily outstanding balance and capitalized monthly in arrears from the date of judgment to the date of payment in full
- g. The defendant be ordered to pay general damages to the plaintiff the same to be assessed by his honorable Court for the loss of income to invest in banking business, hardship and disturbance which was caused by the defendants act to refuse and or neglect to pay the outstanding balance or debt on time
- h. The defendants to be ordered to pay costs of this matter
- i. An order granting the plaintiff permission to sell the motor vehicle make Ford, Model ranger with registration number T 900 DJQ and

use the proceeds thereof to discharge part of the defendant's liability against it as shall be collectively awarded by this honorable court

- j. And any other relief as this court will deem fit and just to be granted

Upon being served with plaint, the 2nd 3rd and 4th defendants filed a joint written statement of defence disputing the plaintiff claims on the ride that the loan has been repaid in full. Whist the 1st defendant failed to file its written statement of defence and the in circumstance on 13th day of May, 2022 default judgement was entered against the 1st defendant.

The plaintiff at all material has been enjoying the legal services of Mr. Augustino E. Ndomba, learned advocate. On the other adversary part, the 2nd, 3rd and 4th defendants at all material time have been in the legal service Mr. Dedan Kapigo.

When this suit called on for its final pre-trial conference During the following issues were framed, recorded and agreed between the parties for determination of this suit namely:

1. Whether the 2nd, 3rd and 4th defendants guaranteed for the payment of the loan issued and or disbursed to the 1st defendant by the plaintiff
2. To what reliefs are the parties entitled to.

This court during final pre-trial conference, among others ordered and directed parties learned advocates to file their respective witness statement on or before 28th February, 2023. within prescribed time of 14 days of that order both Parties complied with the order of filing witness statement in the circumstance this suit was set for hearing on 22/3/2023 however the sole witness for 2nd, 3rd and 4th defendant did not show up for cross examination.

In proof of the suit, the plaintiff paraded one witness JACOB SAMWEL SANGA (to be referred herein in these proceedings as '**PW1**'). PW1 under oath and through his witness statement adopted in these proceedings as his testimony in chief testified that, he is Senior Manager(special asset Management) at Exim Bank Tanzania Limited. PW1 testified further that, FNB ceased to do banking business and in the circumstance Exim Bank Tanzania Limited was given a power of attorney for the purpose of doing all recovery work and making follow-ups of the loan repayments to the

customers. PW1 tendered in evidence the general power of attorney in respect of written off accounts dated 8th day of July, 2022 which was admitted as **exhibit P1**. It was the testimony of PW1 that, he was assigned by Exim Bank Tanzania Limited to make a follow up of the above cited case and to testify on behalf of the FNB. Testifying on the 1st defendant loan PW1 told the court that, sometimes in 2015 the 1st defendant applied three different vehicle financing loan agreement and a business loan agreement whereby the plaintiff accepted and granted the 1st defendant the sum of Tanzanian Shillings One Billion Thirty Six Million and Five Hundred Thousand Only (TZS.1, 036,500,000/=). PW1 tendered in evidence Vehicle financing loan agreement and Business loan agreement which was admitted in evidence as **exhibit p2 and p3**. PW1 went on telling the court that, each of the 2nd, 3rd and 4th defendants signed and issued personal guarantees in the favour of the plaintiff. Testifying further PW1 told the court that, it was a common understanding between the parties that the 2nd 3rd and 4th defendant will be jointly and severally liable for repayment all dues from whatever source and whatsoever arising whether as principal debtor or guarantor. PW1 tendered in evidence Guarantee of Chacha Sylvanus Magori dated 21st September, 2015, Marwa Syvanus Chacha dated

21st September, 2015 and Sylvanus Chacha dated 21st September, 2015 which were admitted in evidence as **exhibit P4** collectively also PW1 tendered in evidence guarantee of credit facilities in favour of the Petrolux service station limited which was admitted in evidence as **exhibit P5**. PW1 went on further telling the court that, the 1st defendant serviced the facilities until came 2018 when the 1st defendant started to default. PW1 told the court that on 3rd day of September 2018 as an effort to settle the debt the plaintiff and 1st defendant agreed to consolidate and restructure of all unpaid dues into single business loan. It was testimony PW1 that after the consolidation and restructuring the unpaid balance stood at TZS213, 000,000/= which was to be repaid within 12 months with the interest rate of 16% per annum from the date of restructure. PW1 went on telling the court that, the 1st defendant failed to repay the loan as agreed as such the unpaid balance as per 20th November, 2020 stood at the TZS 178,927,206.50 being the principal sum plus interests.

PW1 told the court that, despite several demands and follow-ups by the plaintiff the 2nd, 3rd and 4th defendants refused to repay the loan as agreed the act which pushed the plaintiff to institute the above-named suit against them for redress. On the basis of the above testimony, PW1 prayed

that, this court to take judicial notice on the default judgement against 1st defendant and be pleased to enter judgment and decree against the 2nd, 3rd and 4th defendants as prayed in the plaint. This marked the end of hearing of the plaintiff case and same was marked closed.

In defence, the defendants were defended by Mr. MARWA SYLVANUS CHACHA (to be referred in these proceedings as '**DW1**'). DWI did not appear for cross examination at the trial, as such this court under Rule 56(2) of the HCCD Procedure Rules of 2012 as amended in 2019 his witness statement is liable to be struck out for lack of reason for non-appearance of the said witness. I thus strike out the DW1's witness statement. Since the DW1 witness statement has been struck out the said statement cannot be used in favour of or against the defendants. This marked the end of hearing of the defendant case.

Now the duty of this court is to determine the merits and demerits of this suit. However, I have noted some facts are not in dispute, **One**, it is not disputed by the parties herein sometimes in 2015 the 1st defendant made an application to FNB for a loan facility whereas they entered into a different three vehicle financing loan agreement and a business loan agreement where FNB agreed to advance to the 1st defendant the sum of

Tanzanian Shillings One Billion Thirty-Six Million and Five Hundred Thousand Only (TZS. 1, 036,500,000/=). **Two**, it is not disputed that the loan was to be repaid within 36 months by installments. **Three**, it is not disputed that the 2nd, 3rd and 4th defendants each signed and issued personal unlimited guarantees. **Four**, it is not disputed that 1st defendant defaulted in repayment of the loan and he has not paid the said amount to date.

It should be noted that in this suit, the plaintiff is claiming payment of the outstanding loan balance of TZS. 178,927,206.50. On the other hand, the 2nd, 3rd and 4th defendants are in dispute that they are no longer guarantors because the loan they guaranteed has been fully discharged by the 1st defendant.

With the above contention, therefore, it is imperative to determine each issue against the evidence on record. The first was thus coached **'Whether the 2nd, 3rd and 4th defendants guaranteed for the payment of the loan issued and or disbursed to the 1st defendant by the plaintiff.** The plaintiff alleged that, the 2nd, 3rd and 4th defendants each signed and issued personal unlimited guarantees in favor of the plaintiff. In rebuttal the defendants have admitted that they did

guarantee the said loan, but the hardship of their business is an obstacle to repay the said loan. I have carefully revisited and considered the pleadings, the testimony of PW1 together with **exhibits P4 and P5**, there is no doubt that the 2nd, 3rd and 4th defendants guaranteed the said loan. I am holding so because the testimony of PW1 is loud that the 2nd, 3rd and 4th defendants guaranteed for the payment of the loan disbursed to the 1st defendant.

That said and done, I associate myself to the submission by the learned counsel for plaintiff that the first issue is to be answered in the affirmative that the 2nd, 3rd and 4th defendants guaranteed for the payment of the loan issued and or disbursed to the 1st defendant by the plaintiff as per exhibit p4 and p5.

This takes me to the second issue which was couched thus '**To what reliefs are the parties entitles to**'. The defendants prayed that this suit be dismissed with costs and give them an extension of time for six months to repay the loan due. Based on the findings above this suit is meritorious. The plaintiff on the other hand prayed judgment against the defendants for payment of Tanzanian Shillings One Hundred Seventy-Eight Million Nine Hundred Twenty-Seven Thousand, two hundred and Six and Fifty Cents

(TZS. 178,927,206.50/=) being the outstanding principal sum plus interests which also continued to attract interest at a rate of 16% per annum.

The law is clear under Section 37 of the Law of Contract Act, [Cap 345 R.E. 2019] that:

"The parties to the contract must perform their respective promises, unless such performance is dispensed with or excused under the provision of this act or by any other law."

There were not any excuses for the defendants' non-performance of their promises. Moreover, in **Simon Kichele Chacha v Aveline M. Kilawe, Civil Appeal No. 160 of 2018 CAT** when dealing with the sanctity of contract, the Court 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."

I have no flicker of doubt, in this suit that the plaintiff has discharged the legal burden to the standard required in civil cases. But before concluding I should remark on a prayer for an order granting the plaintiff permission to sell the motor vehicle make Ford, Model ranger with

registration number T 900 DJQ and use the proceeds thereof to discharge part of the defendant's liability against it as shall be collectively awarded by this honorable court. This issue of the motor vehicle has already been decided upon in the default judgment. Therefore, this court cannot deal with the prayer relating to that motor vehicle. That said and done, I enter judgment and decree in his favour of the plaintiff as follows:

- a. I declare that, the 1st defendant has breached the fundamental terms and conditions of the business loan agreement signed and accepted on the 6th September, 2018.
- b. I declare that the 1st defendant has breached the terms and conditions of the specific debenture as varied he have entered into and signed in favour of the plaintiff and cause to be registered by the Registrar of companies.
- c. I declare that the 2nd, 3rd and 4th defendants have breached the terms and conditions of the unlimited personal guarantee they each signed and entered in favour of the plaintiff.
- d. The defendants jointly and severally are ordered to pay to the plaintiff the sum of Tanzanian Shillings One Hundred Seventy-Eight Million Nine Hundred Twenty-Seven Thousand, two hundred

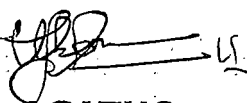
and Six and Fifty Cents (TZS. 178,927,206.50/=) within three months.

- e. The defendants are ordered to pay to the plaintiff interests of 16% of the amount stated in item (d) herein above per annum and to be calculated on daily outstanding balance and capitalized monthly in arrears from the 5th day of November 2020 to the date of payment in full.
- f. The court further grant interests on the decretal amount at the rate of 7% calculated on daily outstanding balance and from the date of judgment to the date of full and final payment.
- g. The defendants are ordered to pay general damages to the plaintiff to the tune of TZS 5,000,000.
- h. Costs of this suit shall be borne by the defendants.

It is so ordered.

DATED at DAR ES SALAAM this 21st Day of April, 2023.




U. J. AGATHO
JUDGE
21/04/2023

Date: 21/04/2023

Coram: Hon. U. J. Agatho, J.

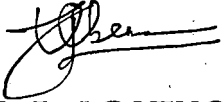
For Plaintiff: Augustino Ndomba, Advocate

For Defendants: Absent.

C/Clerk: Beatrice

Court: Judgment delivered today this 21st April 2024 in the presence of Augustino Ndomba for the Plaintiff, but in the absence of the Defendants.




U. J. AGATHO
JUDGE
21/04/2023