

**IN THE HIGH COURT OF UNITED REPUBLIC OF
TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM**

COMMERCIAL CASE NO. 37 OF 2023

AZANIA BANK LIMITED.....PLAINTIFF

VERSUS

SAUMU HERI SAKALA.....DEFENDANT

Date of Last Order: 4/7/2023

Date of Judgment: 4/8/2023

DEFAULT JUDGMENT

NANGELA, J.:

This is a default judgment. According to the rules governing the procedure of this court, where a Plaintiff files a suit against the Defendant and a Defendant fails to file his defense against such a claim, the Plaintiff is entitled to a default judgment.

The Plaintiff, AZANIA BANK LIMITED by way of a plaint instituted in this court against the Defendant, SAUMU HERI SAKALA, praying for judgment and decree in the following orders, namely: -

1. For Payment of a total sum of TZS 140,029,428.16 being the amount outstanding and remaining unpaid in respect of the consumer loan granted by the plaintiff to the Defendant as per the terms of the consumer loan Agreement as of 09th March 2023, and
2. For Payments of interest computed at an agreed rate of 14% per annum on outstanding amount referred in (a) above, computed from date of filing this suit to the date of judgment; and
3. For payment of interest on the decretal sum at Court's rate from the date of judgment till full satisfaction of the entire decretal sum; and
4. For payment of general damages suffered by the plaintiff for loss of business and other resultant losses and damages suffered by the plaintiff as a result of the Defendant's failure

to heed to the terms and conditions
of the loan agreement.

5. For Cost for this suit; and
6. For any other relief(s) the Court may
deem fit to grant.

In terms of representation, the Plaintiff enjoyed the services of Mr. Mbagati Nyarigo, learned Advocate. Since the Defendant and never filed any defense, she was therefore unrepresented. Before I proceed further, I should, perhaps set out, in brief, the facts constituting this suit.

As gathered from the Plaint, in May 2017 the Defendant, being the member of the parliament of the United Republic of Tanzania, applied for and was granted by the Plaintiff a "Consumer Loan" amounting to TZS 104,000,000/=. The Facility was advanced to her subject to the terms and conditions contained in a "*Term Sheet for Consumer Facilities for Members of Parliament.*"

Later, it turned out, however, that, the Defendant defaulted repayment. Despite several reminders were made requiring the Defendant to repay the loan, the Defendant

refused, failed, and or rejected honour the Plaintiff's repayment demands and, consequently, the total loan plus interest, which had accrued to a sum of TZS 140,029,428.16, remained unpaid as of 09th of March 2023, hence, this suit.

As per the records of this suit, having filed the Plaint, the Plaintiff's several efforts made to serve the Defendant by normal means proved to be futile. At last, the Plaintiff resorted into use of substituted service mode by praying for an order allowing her to serve the defendant by way of publication.

On 16th of May 2023 this court granted such orders directing that the summons asking the Defendant to appear and file her defense be published in two widely circulating newspapers in the country. On 26th day of May 2023 the Plaintiff served the Defendant by way of publication of the summons on *The Citizen* and *Mwananchi* newspapers.

By the time when this suit was called on for orders on 15th of June 2023, no defense had been filed in court and, at the same time the defendant never appeared in court. At that juncture, the learned advocate for the Plaintiff prayed for orders to proceed under the provisions of Rule 22 (1) of the

High Court (Commercial Division) Rules of Procedure, GN. No. 250 of 2012 (as amended by GN. No.107 of 2019). Under that provision, the Plaintiff may apply for a default judgement by filing in this court Form No.1. In the circumstances, his prayer was granted.

The Plaintiff's prayer to prove his case by filing Form Number 1 accompanied with affidavit in proof of the claim as provided for under Rule 22 (1) as amended by G.N. 107 of 2019, thereof, paved way for this default judgment. In proving the claim, the Plaintiff did, on 30th of June 2023, file in this court, Form 1 accompanied by an affidavit sworn by one Charles Mugila, a Principal Officer of the Plaintiff.

Having carefully gone through the affidavit and the exhibits annexed in proof of the claim, I am satisfied that this suit revolves around breach of contract on the part of the Defendant who unjustifiably failed to repay the Plaintiff's consumer loan earlier advanced to her.

Having carefully gone through the affidavit in proof of the claim and exhibits 1-5 in this suit, I find no doubt that the Plaintiff has complied with the requirements stipulated under

Rule 22 (1) of the High Court (Commercial Division) Procedural Rules, G.N. 250 as amended by G.N. 107 of 2019. The said Rule provides as follows: -

“Rule 22 (1) ‘Where a party required to file written statement of defence fails to do so within the specified period or where such a period has been extended in accordance with sub-rule 2 of Rule 20 within the period of such extension, the court may, upon proof of the service and on application by the plaintiff in Form No. 1 set out in the Schedule to these Rules accompanied by an affidavit in proof of the claim, enter judgment in favour of the plaintiff.”

This court interpreting the above Rule in the case of **A-one Products and Bottlers Limited vs. Techlong Packaging Machinery Limited and Another**, Commercial Case NO.105 OF 2017 to the effect that, following the amendment of Rule 22 by G.N.107 of 2019 a party who wishes

or desire to be granted default judgment must prove the following three co-existing ingredients, namely: -

1. That, there has been proof of service to the Defendant but who has failed to file written statement of defence.
2. That, the plaintiff has made an application in the prescribed Form No.1 to the First Schedule to the Rules.
3. That, the said application in Form No.1 is accompanied by an affidavit in proof of the claim.

In the above cited case, the court went on to insist that:

'affidavit in proof of the claim must be self-explanatory proving all claims in the plaint in the same way a contested suit was/is to be proved and all documentary evidence must be authenticated in accordance with the law.'

Guided by the above position, and after going through the Plaint, there is no dispute that the Defendant was served in

accordance with the law. However, no written statement of defense was filed by the Defendant and neither did she file an application for extension in this court. Equally it is not in dispute that the Plaintiff has made an application in prescribed Form No.1 and same was accompanied with the affidavit in proof of the claim.

Having carefully gone through the affidavit and exhibit 1-5 attached thereto, I am satisfied that the Plaintiff has been able to prove his claim as required by law. There is no doubt that Defendant in breach of consumer loan facility agreement which was duly entered herself and the Plaintiff by failing to perform her obligation as agreed.

According to section 37(1) of the *Law of Contract Act*, Cap.345 R.E 2019, the law is clear, as a matter of principle, that:

“the parties to a contract must perform their respective promises, unless such performance is dispensed with or excused under the provision of this Act or of any other laws.”

The above stated principle was aptly stated albeit differently, by the Court of Appeal of Tanzania in the cases of **Simon Kichele Chacha vs. Aveline M. Kilawe**, Civil Appeal No.160 of 2018 (unreported) and **Abualy Alibhai Azizi v Bhatia Brothers** [2000] T.L.R. 288. In those cited cases, the Court was of the view that:

"the principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no fraud (actual or constructive) or misrepresentation and no principle of public policy prohibiting enforcement."

From the evidence availed to this court by the Plaintiff, this court hereby declares that the Defendant has, indeed, breached the facility agreement and should be liable for that. Consequently, therefore, in terms of Rule 22(1) of the Rules as amended by G.N. No.107 of 2019, this court hereby enters Default Judgment and Decree in favour of the Plaintiff and states as follows: -

1. That the defendant is hereby ordered to pay to the plaintiff a sum TZS 140,029,428.16 being the amount outstanding and remaining unpaid.
2. That the defendant is hereby ordered to pay interest on the above sum at the Commercial rate of 14% from the date of filing this suit to the date of judgment.
3. That the Defendant is hereby ordered to pay interest on the decretal amount at the court rate of 7% from the date of judgment till the date of full satisfaction.
4. That the Defendant is condemned to pay costs of this suit.

FURTHER ORDER:

5. That, in terms of Rule 22(2) (a) and (b) of the rules, I further order that the decree in this suit shall not be executed unless the decree holder

has, within a period of ten (10) days from the date of the default judgment, publish a copy of the decree in at least two newspapers of wide circulation in the country and after the period of twenty one (21) from the date of expiry of the said ten (10) days has elapsed.

Order accordingly.

**DATED AT DAR-ES-SALAAM ON THIS 04TH DAY OF
AUGUST 2023**



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**DEO JOHN NANGELA
JUDGE**

Date: 04/08/2023 Coram: Hon. Nangela, J.

For the Applicant: Mr. Mbagati Nyarigo, Advocate

For the Respondent: Absent

C/Clerk: Fortunata

Court: Ruling delivered today, this 04th of August 2023 in the absence of the defendant.



John Nangela

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**DEO JOHN NANGELA
JUDGE.**

ORIGINAL