IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 56 OF 2022

STANDARD CHARTERED BANK (T) LTD ..... PLAINTIFF

VERSUS

HARUNA YUSUF MAVERE
T/A G.H HARDWARE ..... DEFENDANT

JUDGMENT

Date of Last Order: 15/06/2023
Date of Judgment: 30/08/2023

NANGELA, J.

The Plaintiff, a registered and licensed Bank operating under the Laws of the United Republic of Tanzania, is suing the Defendant for payment of **TZS 288,774,466.69**, being an outstanding credit facility plus interest, as of 9th March 2022.

For clarity, I will briefly summarize the facts of this case. It all started sometimes in April 2013 where the Defendant

applied for and was granted two credit facilities (i.e., an Overdraft facility and a "Term Loan).

The two facilities advanced to the Defendant were for the purpose of financing the Defendant's working capital requirement. The loans were secured by a Mortgage over a residential property located on Plot No. 2061, Block C, Ukonga Area, Ilala Municipality, Dar es salaam with CT No. 88089 and L.O No. 397936 in the name of the Defendant. The Plaintiff performed the terms and conditions of the Facility Letter by making available to the Defendant the overdraft facility and Term Loan.

However, the Plaintiff asserts that, the Defendant breached the terms and conditions of the said loan and failed to make good the Overdraft Facility and Terms Loan. Despite serving the Defendant with several demand letters and default notices, the Defendant failed and/or neglect to repay the outstanding amount or any part thereof as per their agreements. Seeing that the Plaintiff is robbed of an

opportunity to invest his monies in other business ventures, the Plaintiff has brought up this case.

In the Plaint filed in this court, the Plaintiff alleges that the Defendant is in breach of contract and, for that matter the Plaintiff seeks for judgment and decree against the Defendant as follows:

(a) Payment of the sum ofTZS 288,774,466.69, constituting of TZS 141,963,665.47 on account of Overdraft Facility and TZS 146,910,801.22 on account of Term Loan.

(b) Interest on the amount of TZS 288,774,466.69 at the contractual rate of 19% per annum from 9th March 2022 to the date of judgment.

(c) Interest on the amount of TZS 141,863,665.47 at the penal rate of 1% per month from 9th March 2022 to the date of judgment.

(d) Interest of the decretal amount of the Court's rate of 7% from the date of judgment until full and final payment.

(e) Costs of the suit, and

(f) Any other reliefs that this Honourable court may deem just to grant in favour of the Plaintiff.

On the 20th of September 2022, the Defendant filed his written statement of defense (WSD) and refuted the Plaintiff's claims on the ground that he had never defaulted nor breached the terms loan. He averred that, the Plaintiff is the one to blame since he could not continue paying the loan due to a pending case which took long time, since 2014 to 2019 and thereafter followed by a Notice of Appeal.

Upon completion of the filing of the pleadings and the carrying out of the preliminary processes related to pre- trial hearing, the matter went through a mediation process. Unfortunately, the mediation process failed as the matter could not be resolved amicably. Consequently, on the 16th of

August 2022, this court convened for a final pre-trial conference (FPTC). In agreement with both parties, the court drew up following three issues:

1. Whether the Defendant has defaulted in repaying the loan.
2. If the 1st issue in affirmative, whether the parties had agreed that a default interest will be charged in case of default.
3. To what reliefs are the parties entitled to.

During the FPTC, all parties were directed to file their respective witness statements as per the requirements of the Rule 49 (2) of the High Court (Commercial Division) Procedure Rules, GN. 250 of 2012 as (amended by GN. 107 of 2019). They all complied, and the case proceeded to its hearing session.

At the hearing, which commenced on the 29th day of May 2023, the Plaintiff was represented by Mr. Libert Lwazo, learned Advocate while the defendant enjoyed the legal

service of Mrs. Cyrine William, learned Advocate. Both parties called one witness each and their witnesses has duly filed their witness statements which were admitted as their testimonies in chief.

In support of the Plaintiff's case was Ms. Lolitha Eugene Mallya (who testified as Pw-1). I will briefly sum up her testimony, including the exhibits she tendered in court. In her testimony in chief, Pw-1 who is the Head of collections and Recoveries of Standard Chartered Bank Tanzania Limited told this court that her roles include providing support to the credit department on recovery of non-performing loan.

She testified that the Defendant did obtain an Overdraft Facility amounting to TZS 35,000,000 and an enhanced term Loan of TZS 171,187,563.64 in the year, April 2013. Pw-1 tendered a copy of Facility Letter in court which was admitted as **Exh.P-1**. Relying on **Exh.P1**, Pw-1 told this court that, the Facility Letter between the Plaintiff and Defendant, (**Exh.P1**) does show that the loans were secured by a Registered Mortgage for TZS 269,757,423 over residential property on

Plot No. 2061, Block C, Ukonga Area of Ilala Municipality, Dar es salaam with title certification No. 88089 and L.O No. 397936 in the name of Haruna Yusuf Mavere.

Pw-1 testified further that, according to the terms and conditions as explicitly detailed in **Exh.P-1**, it was agreed by the plaintiff and the defendant that the Overdraft Facility will be repaid within one day and the Term Loan Facility will be repaid within 36 months in equal monthly installment of TZS 6,275,054.76 and, that, it attracted 19% interest per annum, calculated on a daily overdrawn balances and payable monthly in arrears.

However, Pw-1 told this court that, the Defendant breached the terms of **Exh.P-1** as he failed to repay both the Overdraft Facility and Term Loan Facility.

She told the court that, due to the Defendant's default, as of the 9th of March 2022, the outstanding amount as evinced by the Defendant's Bank Statement stood at a tune of TZS 141,214,135.28 (in respect of the Overdraft Facility) and TZS 146,910,801.22 (in respect of the Term Loan). The Bank

Statement together with an affidavit of authenticity of its contents were collectively admitted as **Exh.P-2.**

Pw-1 told this Court further that, since the Defendant did not repay the loan amount, a demand notice was issued on 24th March 2022 demanding for repayment of the outstanding balances. The Demand Letter was admitted as **Exh.P-3.** Based of the failure to repay the loan, she urged that the Plaintiff's prayers be granted.

During cross-examination, Pw-1 told the Court that, the Insurance cover which was taken at the time of borrowing is only issued to cover an incident of death of a borrower. She also told this court that, as far as the other case (the Land case in the Land Court) what she could remembered was that the wife of the Defendant objecting to the use of the house as the collateral to cover the loan agreement. When further cross-examined by Ms. William, Pw-1 told this court that, as per the contract the defendant was supposed to repay the loan every month.

During re-examination, Pw-1 told this Court that, communication between the Plaintiff and the Defendant were to be done via phone calls or by post offices address.

Since the Plaintiff's case came to an end, the Defendants' case opened. The Defendants called 1 witness, Mr. Haruna Yusuf Mavere, the Defendant herein. He testified as Dw-1. In his written statement received as his testimony in chief, Dw-1 attached and so, tendered in court one Document only.

According to his testimony in chief, Dw-1 admitted that the Plaintiff advanced to him an Overdraft facility and Term Loan Facility. He, however,told this court that, since the 26th of January 2013, the Defendant started repaying the loan but in 2014, the Plaintiff instituted a Land Case No. 62 of 2014, and thereby his business become paralyzed, and he never continued paying the loan since the case took a long time.

According to Dw-1, after the judgment in Land Case No.62 of 2014, there was a Notice of Appeal which showed

that the Plaintiff wished to Appeal. He tendered in court the Notice of Appeal which was admitted as **Exh.D-1.**

During cross-examination, Dw-1 told this Court that, it was true that the Plaintiff advanced monies to him in the form of overdraft facility and term loan and that he used to repay the loan as might be shown in the bank statements. He also reiterated that he did stop repayment after the filing of the land case No. 62 of 2014 which was filed by his wife.

Dw-1 told this court that, there was no letter from the Plaintiff which required him to stop from servicing the loan. When shown **Exh.P-1**, he did admit having signed it. So far that was the case for the defendant.

At that juncture, the learned counsels for the parties prayed to be granted time to file closing submissions and this court granted their prayer. They did comply with the schedule of filing, and I will go through their submissions during my deliberation of the issues raised in this Case.

As I pointed out earlier here above, there are three issues which I am called upon to address. Before I embark on

that noble duty, let me state, as a matter of the cardinal principles of law that, he who alleges must prove. Section 110 and 111 of the Evidence Act, Cap.6 R.E 2019 and a host of cases, both reported and unreported, do affirm to that. See, for instance, the case of **Jasson Samson Rweikiza vs. NovatusRwechunguraNkwama**, Civil Appeal No.305 of 2020 (unreported).

With that in mind, let me proceed to address the issues. The first issue was:

> Whether the Defendant has defaulted in repaying the loan.

In his submission in respect of this case, Mr. Lwazo relied on the testimony of **Pw-1**, **Exh.P-1**, **Exh.P-2** and **Exh.P-3**. He told this court that, the Defendant has as well admitted to his default as per his own written statement of defence, at paragraph 8 and 9. But he has laid blames on the case filed by his wife, Land case No.62 of 2014 which this court took judicial notice of. He urged this court to respond to the first issue affirmatively.

In her submission, the learned counsel for the Defendant has not opposed the fact that the Defendant borrowed and was granted an overdraft facility from the Plaintiff and that **Exh.P.1** was executed. However, she submitted that, the Defendant started repaying only to be let down by the filing of the Land Case No.62 of 2014 which made his business to collapse.

Mrs William submitted and argued that, when the Land Case No.62 of 2014 was proceeding in court, the Plaintiff never sent a demand notice until the year 2022 when the Plaintiff's lawyer issued a demand notice while there is a pending matter before the Court of Appeal. She contended that, it could not be possible for the Defendant to continue repaying the loan while there is an appeal pending in the Court of Appeal instituted by the Plaintiff herself. She told the court that, even the interests charged were unfairly charged and the case created a confusion on the Defendant to the extent that he was unable to repay the loan.

I have looked at the evidence available before me and the parties' closing submissions. There is no doubt that the Defendant borrowed from the Plaintiff and has not fully repaid the loans taken. Dw-1 did admit that he signed **Exh.P-1** and that he stopped servicing the loan due to pendency of the Land case No.62 of 2014.

In his defence, however, the Defendant seems to be leaning on the Land Case No.62 of 2014 and the pending appeal in the Court of Appeal which arose from the said case. Although that seems to be the case, the Plaintiff's learned counsel has not said to what extent the Land Case No.62 of 2014 and the intended appeal may have effect on this case or the loan facility which the Defendant executed with the Plaintiff.

In the Land Case No.62 of 2014, the Plaintiff therein is shown to be a wife of the Defendant herein and had sued both the Defendant herein and the Plaintiff Bank seeking to void the mortgaging of the property used to secure the loan Facilities which are the subject of this suit. In that suit the

court held that the mortgage was created in breach of section 114 of the Land Act, Cap.113 R.E 2019, and, thus, was *void ab initio*.

I do understand that the judgement of the court in that Land Case No.62 of 2014 is still a subject of an appeal as contended by the Defendant. But since no decision has been obtained on appeal, it means that the Judgement of this court in Land Case No.62 of 2014 still prevails. What is its implication?

Although the parties did not submit on that point, it is clear that, the voiding of the mortgage transaction made the loan facilities to be unsecured loans. This does not mean that the Plaintiff in this case cannot claim for repayment of the loan. Had it been that what was found to be void is the loan facility agreement itself, that would have been a different thing.

In the South African case of **Panamo Properties vs. Land and Agricultural Development Bank** [2015] ZASCA

70, the South African Court of Appeal (SCA) held, and I do agree to that holding, that:

> "A mortgage bond is of course always accessory to an obligation, no matter its origin. If the obligation is unenforceable the security in respect of it is unenforceable too."

As I stated herein, the situation in our case at hand is a bit different since it is the mortgage which was declared by the court in the Land Case No.62 of 2014 to be void ab initio meaning that the loans advanced to the Defendant became unsecured loans. Their being unsecured does not mean that they should not be repaid. The problem to them is that the risk becomes bigger than the lender could have anticipated. Even so, once proved the unsecured loan should be repaid.

In this suit at hand, the Plaintiff has established that, the Defendant breached the loan facility agreement (Exh.P.1) and Dw-1 did admit that he stopped repaying or servicing the facilities contrary to what was agreed. In the circumstance,

the first issue is responded to in the affirmative and I see no reasons as to why the pendency of the Land Case No.62 of 2014 or for that matter the pending appeal at the Court of Appeal should have made the Defendant to stop repaying the loans.

Having found that the first issue is responded to in the affirmative, the second issue is:

> If the 1st issue in affirmative, whether the parties had agreed that a default interest will be charged in case of default.

Having ruled that the 1st issue should be held in the affirmative, a response to the 2nd issue is a matter which requires examination of the terms of the facility agreement itself since, as a matter of principle, the document must speak for itself. See for that matter, section 100(1) of the Evidence Act, Cap.6 R.E 2022 and the case of **Tanzania Fish Processors Ltd vs. Christopher Luhanyula,** Civil Appeal No.21 of 2012 (CAT) (Mwanza) (unreported).

According to **Exh.P-1**, it is clear, in its page 1, that the parties agreed Interest and Interest on "Default Interest", and this was to be charged at 1% per month. The interest levied on the overall amount advanced was 19%. The penalty interest is said to be "in addition to the interest charge as mentioned…which will be levied on the entire outstanding amount." It follows, therefore, that, the second issue is responded to in the affirmative.

The final issue is *to what reliefs are the parties entitled*. In my view, the Plaintiff has discharged her burden of proof to the requisite standards and is entitled to reliefs. It follows, therefore, that, since the Plaintiff has proved her case to the required standards, this court gives Judgement and Decree in favour of the Plaintiff and orders as follows:

1. That, the Defendant is hereby ordered to pay the Plaintiff the sum of TZS 288,774,466.69, constituting of TZS 141,963,665.47 on account of Overdraft Facility and TZS

146,910,801.22 on account of Term Loan.

2. That, the Defendant is to pay interest on the amount of TZS 288,774,466.69 at the contractual rate of 19% per annum from 9th March 2022 to the date of this judgment.
3. That, the Defendant is to pay interest on the amount of TZS 141,863,665.47 at the penal rate of 1% per month from 9th March 2022 to the date of this judgment.
4. That, the Defendant is to pay interest of the decretal amount of the Court's rate of 7% from the date of judgment until full and final payment.
5. That, the Defendant is to pay Costs of the suit.

It is so ordered.

DATED AT DAR-ES-SALAAM ON THIS 30TH DAY OF AUGUST 2023

HON. DEO JOHN NANGELA
JUDGE

Right of Appeal Explained