

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DARE ES SALAAM**

**COMMERCIAL CASE NO. 118 OF 2022**

**BETWEEN**

**EQUITY BANK (TANZANIA) LTD.....PLAINTIFF**

**VERSUS**

**REGIONAL LOGISTIS LIMITED .....1<sup>ST</sup> DEFENDANT**

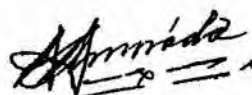
**CATHERINE KETTIE MHANGO.....2<sup>ND</sup> DEFENDANT**

**PETRO ODONGO KITIWA.....3<sup>RD</sup> DEFENDANT**

**DEFAULT JUDGMENT.**

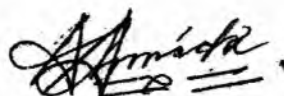
**A.A. MBAGWA J.**

This default judgment results from the defendants' failure to file defence and enter appearance despite being duly served through publication. The plaintiff's claim is for payment of the outstanding loan amount following the defendants' breach of loan agreement and deeds of guarantee. The Plaintiff is a registered company under the Companies Act No. 12 of 2002 and licensed to carry on banking business in Tanzania. On the other hand, the 1<sup>st</sup> defendant is a corporate entity established under the laws of Tanzania whereas the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are natural persons and



guarantors to the loan advanced to the 1<sup>st</sup> defendant. By way of plaint, the plaintiff, **EQUITY BANK (TANZANIA) LTD**, instituted this suit against the above-named defendants jointly and severally praying for judgment and decree in following reliefs, namely:

- i. Declaration that the 1<sup>st</sup> defendant is in breach and default of the facility letters
- ii. Declaration that the 1<sup>st</sup> and 2<sup>nd</sup> defendants are in breach of the deeds of guarantee
- iii. An order for payments jointly and severally of USD 370,410.36 (United States of America Dollars Three Hundred Seventy Thousand Four Hundred Ten and Thirty -Six Cents) and Tanzania shillings Fifty -Nine Million Three Hundred Seventy -Six Thousand Four Hundred and Two Shillings and Eighty -Two cents (TZS. 59,376,402.82)
- iv. Interest on the outstanding sum at the contractual rate of 10% and default interest of 6% per annum respectively as per the contract from the date of default to the date of judgment
- v. Interest on the decretal amount at the court's rate of 2% per annum from the date of judgment to the date of full and final settlement
- vi. An order against all the defendants jointly and severally to surrender to the plaintiff (14) motor vehicles which were put as security



including brand news VW pick ups with registration No T293 DHC,a trailer (2008) with registration No. T.732DDF, a trailer (2003) with registration No. T255DGO, a trailer (2004) with registration No. T255DCC, a trailer (1998) with registration No T546BTU, a trailer (1996) with registration No. T332BTU, a trailer (2001) with registration No. T266AVQ, DAF tractor (2005) with registration No. T417DGR, DAF tractor (2006) with registration No. T563DEW,Man Tractor (2005) with registration No T730CSN, DAF tractor (2005) with registration No. T393CKD, DAF tractor (2005) with registration No. T341DBE and Man Track(2008) with registration No. T192AED.

- vii. An order for sale of the surrendered motor vehicles in clause (vi) above to recover the loan
- viii. The defendant jointly and severally be ordered to pay the costs of this suit
- ix. General damages for breach of contract to be assessed by this Honourable Court
- x. Any other relief as the Court may find just, convenient and equitable to grant

In brief, the material facts of the case may be narrated as follows;  
According to the plaint, on 23<sup>rd</sup> February, 2017 the 1<sup>st</sup> defendant applied

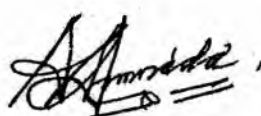


for asset facility and the plaintiff advanced TZS 84,000,000 in favour of 1<sup>st</sup> defendant for the purpose of facilitating purchase of brand-new Rangers and TZS 50,000,000.00 for purpose of purchasing truck DAF with registration No. T17 DGR from Ikupa Francis Mwakapala. The two facilities were payable with thirty-six (36) months at monthly instalment of TZS 3,243,334.00 and twenty-four (24) months at monthly instalments of TZS 2, 618,666.00 respectively. In addition to above loans, on 4<sup>th</sup> January, 2018, the plaintiff advanced a business overdraft up to USD 100,000.00 as working capital to facilitate the company operations and the same was payable within six months.

The said credit facilities were secured by various legal securities including: specific debenture of fifteen (15) motor vehicles, personal guarantees and indemnity of the directors executed by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants dated 15<sup>th</sup> January, 2018 and general debenture over all assets of the 1<sup>st</sup> defendant current and future. Despite the plaintiff's performance of the terms and conditions of the credit facility by disbursing the fund, the 1<sup>st</sup> defendant defaulted in repayment of the loan amount. The efforts by plaintiff through its lawyers to have the money repaid amicably were in vain. As such, the plaintiff instituted this suit praying for reliefs as indicated in the plaint.



Upon filing the plaint, the plaintiff was ordered to serve the plaint to defendants. However, the efforts by plaintiff to serve the defendants by normal means proved futile. There is an affidavit of the court process server to that effect. Based on the affidavit of court process server filed in this Court on 18<sup>th</sup> January, 2023, this Court ordered substituted service on front page of the local newspapers widely circulated in the country. The plaintiff therefore served the defendants on 17<sup>th</sup> April, 2023 through Nipashe newspaper. When the suit was called on for orders on 30<sup>th</sup> May, 2023, the defendants had not filed their written statement of defence nor was there any application for extension of time made to file one. In the circumstances, Mr Philip Irungu, the learned advocate for plaintiff prayed the Court to proceed with the case under the provisions of Rule 22(1) of the High Court (Commercial Division) Procedure Rules, 2012 as amended by G.N.107 of 2019. Consequently, the Court granted the plaintiff's prayer and ordered her to file Form No. 1 with its requisite annexures as required under Rule 22(1). The plaintiff complied with the court order as she filed the same on 13<sup>th</sup> June, 2023. In addition, the plaintiff filed an affidavit sworn by Mr. Juma Jabir, the recovery officer of the plaintiff along with annexures in support of the case.



In the circumstances, the issue which I am enjoined to determine in this case is whether the plaintiff is entitled to the prayers and reliefs sought in Form No. 1. It is worth noting that, proof of a case by filing Form No. 1 and affidavit in terms of rule 22 comes to play where the defendant has declined to defend his case. In this case there is no dispute that the defendants duly were served in accordance with the law but no written statement of defence was so far filed nor was there any application for extension of time to file written statement of defence (WSD) as provided under rule 22(1) of the High Court (Commercial Division) Procedure Rules, 2012 (as amended, 2019). For easy reference, the said rule 22(1) provides as follows;

*" Where any party required to file written statement of defence fails to do so within the specified period or where such 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 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."*

As it has been established herein above, the plaintiff filed Form No. 1 accompanied with the affidavit in proof of the claim. Having carefully gone



through the affidavit and annexures attached to the affidavit, it is my considered findings that, that the plaintiff advanced three different credit facilities to the 1<sup>st</sup> defendant but the latter failed to repay as per the agreements. The contents of annexures to the affidavit in particular facility letters dated 23<sup>rd</sup> February, 2017 and 4<sup>th</sup> January, 2018, directors guarantee dated 15<sup>th</sup> January, 2018, first deed of variation of specific debenture dated 15<sup>th</sup> January, 2018 and four account bank statements namely, USD account No. 3006511525007, TZS Account No. 3006511393530, TZS account No. 3000111229486 and USD No. 3001211229488 are very clear that 1<sup>st</sup> defendant was granted credit facilities. It is further established that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants as directors of the 1<sup>st</sup> defendant guaranteed the said facilities. Nonetheless, the 1<sup>st</sup> defendant failed to service the loans. According to the demand notice dated 20<sup>th</sup> December, 2021 and call for guarantee dated 19<sup>th</sup> January, 2022, the plaintiff notified the defendants of the default but nobody made good of it. According to the bank statements attached to the affidavit, the outstanding amount in respect of USD account No. 3006511525007 was USD 268,000.00 and TZS Accounts No. 3006511393530 was TZS 34,883,880.60 as of 4<sup>th</sup> June, 2021. Unfortunately, all the bank statements attached to the affidavit do not cover the period of up to 2022 despite the fact that the plaintiff claims for



outstanding amount due as of 19<sup>th</sup> January, 2022. It is important to remark that the bank statements attached to the affidavit for TZS account No. 3000111229486 and USD No. 3001211229488 contain transactions for the period up to 13<sup>th</sup> July, 2017 and 5<sup>th</sup> October, 2016 respectively. As such, they do not augment the plaintiff's case. Since the proof of the case is by affidavit, I considered the bank statements attached to the affidavit and not the ones attached to the plaint. In that regard, the outstanding loan amount which the plaintiff has managed to establish is USD 268,000.00 for USD account No. 3006511525007 and TZS 34,883,880.60 for TZS Account No. 3006511393530 as of 4<sup>th</sup> June, 2021. At this juncture, I would like to restate that, in *ex parte* proof like the case at hand, the plaintiff has still a burden to prove its case on balance of probabilities. As such, sufficient evidence must be adduced for the Court to make findings. Parties should not take for granted that in *ex parte* proof, the Court will automatically grant the reliefs sought.

All the above considered, I am satisfied that the plaintiff has proved its case and established the outstanding loan amount to the tune of USD 268,000.00 and TZS 34,883,880.60. Thus, in terms of rule 22(1) of the High Court (Commercial Division) Procedure Rules, 2012 (as amended,



2019), I hereby enter judgement in default in favour of the plaintiff and order as follows.

- i. It is hereby declared that the 1<sup>st</sup> defendant is in breach and default of the facility letters.
- ii. It is hereby declared that the 1<sup>st</sup> and 2<sup>nd</sup> defendants are in breach of the deeds of guarantee.
- iii. The defendants are jointly and severally ordered to pay the plaintiff USD 268,000.00 and TZS 34,883,880.60 being the principal amount and accrued as of 4<sup>th</sup> June, 2021.
- iv. The defendants are jointly and severally ordered to pay the plaintiff interest of 10% on the decretal amount under (i) from the time of filing this case to the date of judgment.
- v. The defendants are jointly and severally ordered to pay the plaintiff interest at the court's rate of 7% on the decretal from the date of judgment to the date of full satisfaction
- vi. The defendants are jointly and severally ordered to pay costs of the suit.

In terms of Rule 22 (2) (a) and (b) High Court (Commercial Division) Procedure Rules, 2012 (as amended, 2019), the plaintiff is ordered to ensure that, the decree emanating from this suit is not executed unless



the decree holder has, within a period of ten (10) days from the date of this default judgment, published a copy of it (the decree) in at least two (2) widely circulated newspapers in the country and after a period of twenty one days (21), from the date of expiry of the said ten (10) days, has elapsed.

It is so ordered.

The right to appeal is explained.



  
**A.A. Mbagwa**

**JUDGE**

**01/09/2023**