

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**COMMERCIAL CASE NO. 114 OF 2021**

**BETWEEN**

**OM – AGRO (T) LIMITED ..... PLAINTIFF**

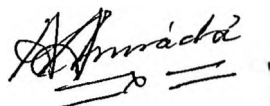
**VERSUS**

**BANK OF AFRICA TANZANIA LIMITED..... DEFENDANT**

**JUDGMENT**

**A.A. MBAGWA, J.**

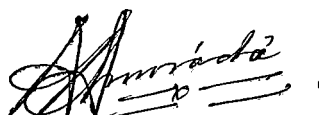
The central dispute in this suit arises from the alleged breach of banker - customer relationship between the parties. The plaintiff is a limited liability company with its physical offices in Mtwara and Dar es Salaam which deals with purchase and sales of cashew nuts. On the other hand, the defendant is a company incorporated under the laws of Tanzania with its head offices in Dar es Salaam and licensed to carry on banking business including lending. By way of plaint, the plaintiff herein instituted the instant suit against the defendant bank praying for judgment and decree in the following orders, namely;



- a) That this Honourable Court be pleased to declare that the defendant breached the contract of banker's customer relationship with the plaintiff.
- b) That this Honourable Court be pleased to order the defendant to refund the plaintiff the sum of Tanzania Shillings Five Billion Five Hundred Thirty-Six Million Five Hundred and Five Thousand Eight Hundred and Eight (Tshs. 5,536,505,808/=) withdrawn without plaintiff's authority from the plaintiff's Tanzania shillings account to wit, TZS A/C No. 05147980003.
- c) That this Honourable Court be pleased to order the defendant to refund the plaintiff the sum of United State Dollars Eleven Million Eighty-Five Thousand Ninety-One and Twenty-Two Cents (USD 11,085,091.22), withdrawn without plaintiff's authority from the plaintiff's United States Dollars Account to wit, USD A/C No. 05147980016.
- d) That this Honourable Court be pleased to order the defendant to refund the plaintiff the sum of Tanzania Shillings Four Hundred Thirty-Nine Million Three Hundred Twenty-Six Thousand Eight Hundred Fourteen and Seventy-One Cents (TShs. 439,326,814.71/=) charged from the plaintiff's account to wit, Tanzania Shillings account that is TZS A/C No. 05147980003 as bank

charges charged from unauthorized transactions in the plaintiff's account.

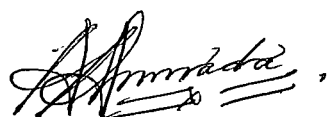
- e) That this Honourable Court be pleased to order the defendant to refund the plaintiff the sum of United State Dollars One Hundred Fifty-Five Thousand Eight Hundred Sixteen and Eighty-Seven Cents (USD 155,816.87) charged from the plaintiff's account to wit, United States Dollars Account that is USD A/C No. 05147980016 as bank charges charged from unauthorized transactions in the plaintiff's account.
- f) That the defendant be ordered to pay the plaintiff interest in (b,c,d, and e) above at the rate of 31% per annum from 08/09/2017 to the date of payment in full.
- g) That the Court be pleased to order the defendant to pay the plaintiff general damages not less than Tanzania Shillings Five Billion (TZS. 5,000,000,000/=) for inconveniences, loss of business and disturbances caused to the plaintiff.
- h) That the defendant be ordered to pay interest in (g) above at the rate of 12% per annum from the date of judgment to the date of payment in full.
- i) That the defendant be ordered to pay the plaintiff costs of, and incidental to the suit.



j) Any other relief as this Honorable Court may deem fit and just to grant.

Upon service, on 22<sup>nd</sup> November, 2021, the defendant filed a written statement of defence seriously disputing the plaintiff's claims on the ground that, all of the transactions in the plaintiff's accounts were authorized by its recognized signatories from the plaintiff's accounts to cashew unions while other transfers were between the plaintiff and its directors namely, Juma H. Kilimba and Emir Karamagi. The defendant further stated that other transactions were in respect of due taxes as agreed in the facility letter dated 9<sup>th</sup> October, 2017. In the end, the defendant urged this Court to dismiss the suit with costs.

For purpose of understanding the nitty-gritty of the suit, the brief facts leading to the institution of the case as gleaned from the pleadings and evidence may be recounted as follows; It is on the record that on 9<sup>th</sup> August, 2017 the defendant advanced to the plaintiff, a term loan to the tune of USD 2,950,000.00 and an overdraft of USD 50,000.00, thereby making a total of USD 2,724,500.00. The said facility was to be repaid within one year. It was agreed, among others that, where the plaintiff emerged a successful bidder in the cashew nut auction, the plaintiff would notify the defendant. Then the cooperative union whose cashew nuts were purchased by the plaintiff on auction would issue an invoice to the

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defendant for payment. Thereafter the defendant would process payment for cashew nuts through the plaintiff's account to the respective cooperative unions. It is undisputed that the plaintiff had two accounts at the defendant bank namely, A/C No. 05147980003 for Tanzania shillings and A/C No. 05147980016 for United States Dollars.

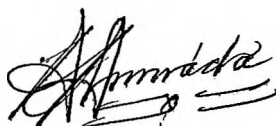
It was averred that, for purpose of smooth operation of the plaintiff's accounts, the plaintiff's board of directors on 2<sup>nd</sup> day of September, 2017, appointed four signatories of the plaintiff's account notably, Thankppan Pillai Pratheesh Kumar and Mashaka Hebert Msumai for category "A" while Emir Nazir Karamagi and Juma Hassan Killimbah were appointed signatories under category "B". Further, the board approved either of the two to authorize withdrawals in sense that at least one signatory from each category. Consequently, on 5<sup>th</sup> September, 2017 the defendant was informed of the appointment of the signatories. However, the plaintiff lamented that despite being aware of the appointed signatories and the attendant instructions, the defendant without proper authorization, effected withdrawals of TZS 5,536,505,808/= from the Tanzania shillings account No. 05147980003 and USD 11,085,091.22 from USD account No. 05147980016. It was further alleged that, apart from the above withdrawals, defendant debited the plaintiff's accounts the sum of TZS 439,326,814.71 and USD 155,816.87 as bank charges. Moreso, it was the

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plaintiff's evidence that, on 13<sup>th</sup> day of April, 2018 through its board resolution, the plaintiff removed signatories from category "A" and in lieu of appointed Emir Nazir Karamagi a sole signatory in category "A" and Juma Hassan Killimbah a sole signatory in category "B". The said changes were communicated to the defendant via a letter dated 25<sup>th</sup> April, 2018. The plaintiff contended that despite the changes of signatories, the defendant continued to allow unauthorized transactions in the plaintiff's accounts. It was the plaintiff's contention that the defendant's act of allowing unauthorized transfers and withdrawals amounted to breach of banker's customer relationship. Moreso, the plaintiff stated that the efforts to settle the matter out of the court proved futile. As such, the plaintiff resolved to institute the instant suit.

When the matter was called on for hearing, the plaintiff was in the legal services of Mr. Andrew Kasaizi, learned advocate whereas the defendant enjoyed the services of Mr. Godwin Nyaisa and Mr. Philip Irungu, learned advocates. Before hearing started, during final pre trial conference, the following issues were framed, recorded and agreed between the parties for the determination of this suit, namely:

1. Whether the defendant breached the contract of banker's customer relationship by allowing unauthorized transactions in the plaintiff's accounts.



2. If the answer in issue No. 1 is in affirmative, whether the defendant caused or occasioned loss of TZS 5,534,505,808/= and USD 11,085,091.22 in the plaintiff's accounts.

3. What reliefs are the parties entitled to?

In a bid to prove the claims, the plaintiff marshalled three witnesses namely, Emir Nazir Karamagi (PW1), Juma Hassan Kilimbah (PW2) and Nazir Mustapha Karamagi (PW3) whose statements were adopted and admitted to form part of their testimonies. In addition, the plaintiff through Emir Nazir Karamagi (PW1) tendered ten (10) documentary exhibits to wit, board resolution by the plaintiff company dated 2<sup>nd</sup> September, 2017 which appointed four account signatories (exhibit P1), a letter dated 2<sup>nd</sup> September, 2017 from the plaintiff company to the defendant bank informing the defendant on the changes of signatories (exhibit P2), a letter dated 24/01/2018 authored by Dr. Nazir Karamagi inquiring into the alleged inconsistencies in the plaintiff's accounts (exhibit P3), board resolution of the plaintiff company dated 13<sup>th</sup> April, 2018 removing two signatories (exhibit P4), minutes of extra-ordinary meeting by the plaintiff dated 10/08/2021 authorizing the company to request for bank statements for the period from 01/08/2017 to 31/07/2021 (exhibit P5), affidavit of authenticity and two account bank statements of the plaintiff (exhibit P6), a letter dated 20/08/2021 authored by Dr. Nazir



Karamagi from OM-AGRO (T) LTD informing the bank about the alleged irregular transactions (exhibit P7), a letter dated 21/09/2021 from the plaintiff to police asking the status of investigation (exhibit P8), a letter dated 24/09/2021 from police to the plaintiff informing her that the investigation was still going on (exhibit P9) and a board resolution dated 01/09/2021 authorizing the plaintiff to institute the case against the defendant (exhibit P10).

In essence, the plaintiff's evidence was substantially to the effect that the defendant bank breached contractual obligation (banker-customer relationship) by effecting unauthorized transactions in the plaintiff's Tanzania shillings and US dollars accounts held and maintained at the defendant's bank. The plaintiff's witnesses stated that on 2<sup>nd</sup> September, 2017, the plaintiff company passed a resolution nominating four persons to be signatories. According to the evidence, the four signatories were in two categories as follows. Category "A" was made up of Thnkappan Pillai Pratheesh Kumar and Mashaka Hebert Msumai whereas category "B" comprised of Emir Nazir Karamagi and Juma Hassan Killimbah. As per the board resolution, any transaction in the plaintiff's accounts was to be approved by at least one signatory from each group. The said company resolution was tendered in evidence and admitted as exhibit P1. Further, the said board resolution was subsequently communicated to the

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defendant bank via a letter dated 5<sup>th</sup> September, 2017 (exhibit P2). However, the plaintiff noted some irregular transactions which were not duly authorized by the appointed signatories and therefore decided to register the complaints to the defendant via a letter dated 24<sup>th</sup> January, 2018 (exhibit P3) which, according to the plaintiff, was not replied to. As such, on 13<sup>th</sup> April, 2018 the plaintiff passed another resolution to change the account signatories. According to exhibit P4, the plaintiff appointed Emir Nazir Karamagi as a sole signatory in category A and Juma Hassan Killimbah as a sole signatory in category B. It was the plaintiff's evidence that despite change of signatories, the defendant continued to allow bank transactions in the plaintiff's accounts without proper authorization from the appointed signatories. Further, the plaintiff's witnesses testified that on 10<sup>th</sup> August, 2021, the plaintiff requested for bank statements for the period from 01/08/2017 to 31/07/2021 and upon scrutiny, they observed eighty-nine (89) unauthorized transactions in TZS account No. 05147980003 and eighty-three (83) unauthorized transactions in USD account No. 05147980016. Consequently, the plaintiff requested for details of the alleged transactions along with the supporting documents but the defendant did not heed to the plaintiff's demand. The plaintiff tendered exhibit P7 to support its assertion. In the result, the plaintiff resolved to report the matter to police as a criminal case but until at the

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time of filing this case, the investigation was underway. The plaintiff tendered two letters to wit, exhibits P8 and 9 to prove the communication between her and the police in respect of the alleged criminal investigation.

It was further the plaintiff's evidence that after the defendant's failure to account for the transactions in dispute, the plaintiff, through a board resolution dated 1<sup>st</sup> September, 2021 (exhibit P10) resolved to institute the present case against the defendant with the view to recover funds illegally withdrawn from its accounts.

On the adversary, the defendant paraded one witness namely, Litty Nyamkungu Kisuda (DW1) who produced six (6) documentary exhibits. The tendered exhibits are loan application letter dated 9<sup>th</sup> August, 2017 from the plaintiff to the defendant bank (exhibit D1), facility letter dated 9<sup>th</sup> October, 2017 (exhibit D2), minutes of the plaintiff's extra-ordinary meeting dated 7<sup>th</sup> August, 2017 authorising the plaintiff to borrow from the defendant (exhibit D3), credit letters and certificate of authenticity (exhibit D4), decree between Fatuma Said Ally vs Bank of Africa (TZ) LTD and Another in Land Case No. 15 of 2019 (exhibit D5) and tariff guide 2018 (exhibit D6). In her witness statement which was duly adopted and admitted to form part of her testimony in chief, DW1 stated that the plaintiff and defendant entered into loan agreement (exhibit D2) in which the defendant extended loan to the plaintiff in the form of letters of credit



to the tune of USD 2, 950,000.00 and overdraft to the tune of USD 50,000.00. DW1 went on telling the court that, it was common understanding between the parties that, the plaintiff's loan was in USD currency but the payments to the Cashew Unions were to be made in Tanzania shillings currency as such, the defendant had to disburse the loan money to the plaintiff's USD account and subsequently transfer the same to the plaintiff's TZS account and thereafter effect payments to the cashew unions directly from the plaintiff's TZS account.

According to DW1, the defendant discharged her contractual obligation according to the terms and conditions agreed between the plaintiff and defendant as per (exhibit D2). DW1 tendered in evidence the credit letters which were issued by the plaintiff for payments and the same were admitted and marked exhibit D4. The defendant's witness clarified that all the transactions in dispute were direct payments to Cashewnuts Cooperative Unions as agreed in the facility letter (exhibit D2). Expounding on the terms of the loan agreement, DW1 elaborated that according to the facility letter (exhibit D2), the defendant was entitled to make direct payments to the Cashew Unions after the plaintiff had submitted the letters of credit. DW1 added that apart from direct payments to Cashewnuts Unions, other transactions which appear in the plaintiff's accounts are taxes remitted to Tanzania Revenue Authority,

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bank charges and costs for filing Commercial Case No. 139 of 2019. According to DW1, the disputed transactions did not require the approval of the signatories because the terms of the facility letter (exhibit D2) were quite clear that the defendant would directly pay the Cashew Unions upon receipt of invoices. Moreso, DW1 added that, the present case is an afterthought following the institution of Commercial Case No. 139 of 2019 in which the defendant successfully sued the plaintiff for breach of a facility letter (exhibit D2). In fine, the defendant's witness prayed the Court to dismiss the suit with costs.

Upon conclusion of hearing, learned counsel prayed for and were allowed to file final written submissions pursuant to rule 66(1) of this Court Rules. I feel compelled to express my sincere gratitude to both counsel for their industrious input on the matter. Although I would not be able to reproduce the submissions verbatim, suffice it to say that, the same have been considered in determining this suit.

To start with the 1<sup>st</sup> issue namely, whether the defendant breached the contract of banker's customer relationship by allowing unauthorized transactions in the plaintiff's accounts. The plaintiff's account was that, the defendant is in breach of banker's customer relationship for effecting payments amounting to TZS 5,536,505,808/= in the plaintiff's TZS account No. 05147980003 and USD 11,085,091.22 in the plaintiff's USD

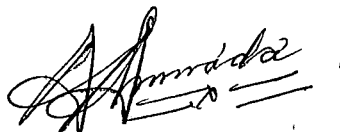
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account No. 05147980016 without proper authorization. In contrast, the defendant vehemently contested the plaintiff's claims on the ground that all the transactions were done in consonance with the terms of the facility letter (exhibit D2) which authorized the defendant to make direct payments to the Cashew Unions.

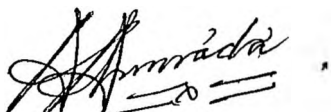
I have carefully navigated through the pleadings and the evidence particularly exhibit P6, exhibit D4 and exhibit D2 especially at page 2 under the Sub-Title titled '**Other Conditions and Warranties**'. For easy reference, I reproduce the contents of exhibit D2 hereunder which provides that; -

- i) All legal charges related to this transaction shall be borne by you through a debit to the current account with us.*
- ii) All fees in relation to the pass guarantee shall be borne by you*
- iii) You shall be required to execute authority to collect funds (ATC) issued by the bank whereby the collection period is seven (7) days.*
- iv) The payments shall be made directly to the Beneficiaries e.g., Cashew Unions etc.*

The plaintiff did not dispute this contract (exhibit D2) throughout the evidence save in final submissions. Thus, considering the above clauses of contract in particular clause (iv), it is common cause that the defendant was entitled to effect payments directly to the cashew union without a

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requirement for signatories' approval. In addition, the contents of exhibit P6 collectively are conspicuous that on 30/11/2017 USD 1,100,000 was debited and disbursed for payment of cashewnuts to Runali Cooperative Union. Furthermore, on 17/01/2018 and 14/02/2018, the bank statement indicates that the defendant disbursed loan amount to the tune of USD 1,000,000 and 1, 114, 299.10 respectively. On the other hand, TZS account No. 05147980003 (part of exhibit P6) shows that on 07/12/2017 received a sum of TZS 1, 574,017.00 from the USD account and on the same day a sum of TZS 1,504, 837,950 was transferred to Chama Kikuu cha Ushirika Runali. This transaction tallies with a transfer of USD 703,000 from USD account dated 7/12/2017 to TZS account. Moreso, TZS account bank statement shows that on 05/01/2018 received from USD account a sum of TZS 447,600,000 and on the same day a sum of TZS 231,006,930.00 was transferred to Commissioner for Customs and Excise, Tanzania Revenue Authority. Similarly, on 23/01/2018 and 29/01/2018, the TZS account received from USD account a sum of TZS 448,600.000 and 280,125,000 respectively and on the same date a sum of TZS 189,720,200 and 178,346,200 was transferred to Mwambao Cooperative Union. Unfortunately, the plaintiff's evidence is silent on the loan disbursement into her USD account and subsequent transfers to TZS account. In absence of evidence to controvert the defendant's version,



there is no way it can be conclusively held that, the defendant effected payments without proper authorization from the plaintiff. One would expect the plaintiff to bring forth the evidence showing authorized transactions and unauthorized transactions of purchases or cashew nuts or to tell the Court the different procedures used in performing the contract (exhibit D2) but nothing was done to challenge the defendant's evidence. It is common knowledge that, once a fact is alleged and testified on, then, the part has the duty to disprove it and since the plaintiff in this case opted not to call any witness or to tender the document that would contradict exhibit P6 and D2, it goes without saying that the defendant's evidence remained uncontroverted.

In addition, since the two accounts are operated by cheque, the plaintiff was expected to produce cheque books at least to satisfy the Court that the cheque books have not been used to authorize withdrawals or transfer which appear to have been effected and paid to the plaintiff's directors. Nonetheless, the plaintiff did not do that apart from mere verbals. It is trite law that, the court cannot make a finding basing on the document which was neither tendered nor admitted before it as exhibit. See the case of **Shemsa and Two Others Vs Seleman Hamed Abdallah**, Civil Appeal No. 82 Of 2012. Further, the case of **Ecobank Tanzania Limited vs Future Trading Company Limited**, Civil Appeal No. 80 of 2019, CAT

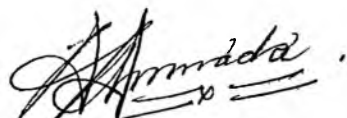
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at Dar es Salaam which was cited by the learned counsel for plaintiff is distinguishable because in the instant case the defendant has clearly stated the destination and purposes of the transactions in dispute as shown in the facility letter which authorized her to effect payments to the cashewnuts unions. Also, the bank statements exhibit P6 collectively are quite elaborate that the money was being transferred to the cashew unions as pointed out above.

That said and done, I am inclined to hold that the defendant did not breach contract of banker's customer relationship. What the defendant did was in consonance with the terms and conditions of the facility letter (exhibit D2). In other words, the defendant was authorized by the plaintiff to carry out the transactions in dispute. As such, the first issue is answered in the negative.

The 2<sup>nd</sup> issue is if the answer in issue No. 1 is answered in affirmative, whether the defendant caused or occasioned loss of TZS 5,534,505,808/= and USD 11,085,091.22 in the plaintiff's accounts. Following the deliberations in respect of the 1<sup>st</sup> issue, it follows that the 2<sup>nd</sup> issue naturally crumples.

All the above considered, it is my findings that the plaintiff has failed to prove its case. This is because the defendant's account weighs heavier

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than the plaintiff's evidence. It is a principle of law that in civil cases where the standard of proof is on balance of probabilities, the court is enjoined decide in favour of a party whose evidence weighs heavier than of the other. See **M & Food Processor Company Limited vs CRDB Bank Limited and 2 Others**, Civil Appeal No. 273 of 2020, CAT at Dar es Salaam and **Paulina Samson Ndawanya Vs. Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017, CAT at Mwanza.

In the upshot, I hold that the plaintiff's claims are without substance and therefore, unsubstantiated. Consequently, I dismiss the suit with costs.

It is so ordered

The right to appeal is explained.



  
**A.A. Mbagwa**

**JUDGE**

**17/08/2023**