

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 129 OF 2021

BETWEEN

HABIBU AFRICAN BANK LIMITED..... PLAINTIFF

VERSUS

KASSIM ALLY SULEIMAN

T/A CHIMWAGA HARDWARE..... DEFENDANT

JUDGMENT

A. A. MBAGWA, J.

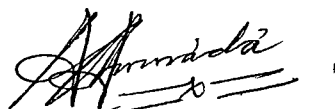
The Plaintiff is a corporate body duly established under the laws of Tanzania and licensed to carry out banking business. On the other side, the defendant is a natural person operating his business in Dar es Salaam through a trade name of **CHIMWAGA HARDWARE**. The plaintiff's claim is for payment of TZS. 1,156,423,519.39 being outstanding loan amount.

Briefly, the plaintiff's case is that from the year 2007 the plaintiff had a banker customer relationship with the defendant. In the course of their business relationship, the plaintiff, on different occasions, advanced a series of loan facilities. It is discerned from the evidence that, through the



letter dated 27th August, 2016, the defendant made an application for merging the outstanding overdraft of TZS 511,370,000/= and term loan of TZS 132,980,000/= into consolidated term loan. The plaintiff approved the request and on 17th September, 2016 the two facilities were merged and consolidated into a term loan of TZS 644,350,000/=. It was agreed, among other things, that the defendant would pay the said outstanding amount on monthly instalments. However, the defendant defaulted repayment, an act which constituted a breach of contract. The efforts by the plaintiff to have the money repaid amicably proved futile. As such, the outstanding loan stood at TZS 1,156,423, 519.39 as of 3rd August, 2019. It is against this background the plaintiff, Habibu African Bank, instituted the instant suit against the above-named defendant praying for judgement and decree in the following orders, namely;

- a. Declaration that the defendant is in breach of the credit agreement as constituted under a consolidated term loan facility and thus, the plaintiff is entitled to realize the securities pleaded in paragraph 12,13 and 14 for full repayment of the outstanding credit facility.
- b. Payment of commercial interest at the rate of 23% per annum of the amount due, from the date it was due to the date of judgment.
- c. Payment of interest on the decretal sum at the court's rate from the date of judgment until payment in full.



d. Costs of this suit

e. Any other order(s) and relief(s) may this Honourable Court deem fit and just to grant.

Upon service, the defendant, on 22nd December, 2021, filed a written statement of defence disputing all the claims by the plaintiff on the ground that the plaintiff has never extended or enhanced a loan in form of overdraft or term loan to defendant. Further, the defendant averred that, there was procedural illegality on the creation of the mortgage and eventually, prayed that the instant suit be dismissed with costs.

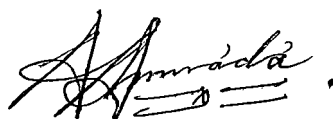
When the matter was called on for hearing, the plaintiff was in the legal services of Ms. Ritha Chihoma, learned advocate whilst the defendant was represented by Mr. Zakaria Daudi, learned advocate. Before hearing started, during final pre-trial conference, the following issues were framed, recorded and agreed between the parties for the determination of this suit, namely:

1. Whether the plaintiff advanced bank facility to the defendant?
2. If issue number one is answered in affirmative, whether the securities were legally created
3. Whether the plaintiff is entitled to the relief of TZS 1,156,423,519.39
4. What reliefs parties are entitled to?



In a bid to prove its case, the plaintiff called one witness, **Syed Sibtain Muhktar (PW1)**. PW1 under oath and through his witness statement which was received by this Court and adopted as his testimony in chief told the Court that, he is General Manager of the plaintiff, hence conversant with the facts of this suit. It was the testimony of PW1 that since 2007, the plaintiff had a banker's customer relationship with the defendant whereby upon application by the defendant, the plaintiff, on divers times, advanced a series of loan facilities. It was further the testimony of PW1 that through the letter dated 1st August, 2010, the defendant applied for a term loan to the tune of TZS 50,000,000/= and overdraft of up to TZS. 150,000,000/= from the plaintiff's bank and on 10th August, 2010, the plaintiff approved the requested facilities. PW1 tendered in evidence a request for overdraft and sanctioning letter with reference No HABL-KB-180/2010 dated 10th August, 2020 and the same were admitted as **exhibit P1 and 22** respectively.

PW1 continued that on 5th September, 2011 the defendant made an application to the plaintiff requesting for increment of the existing facilities. Following that request, the existing term loan was increased to TZS 76,000,000/= while the overdraft was enhanced up to TZS 100,000,000/=. PW1 tendered in evidence enhancement letter dated 15th September, 2011 and sanctioning letter dated 1st October, 2011 which



were admitted as exhibit **P3 and exhibit P4** respectively. PW1 further testified that, on 21st May, 2012 the plaintiff made another request for increase of the existing term loan. The request was approved and the term loan was increased to TZS 150,000,000/= while the overdraft was increased up to TZS. 150,000,000/=. PW1 tendered in evidence enhancement letter dated 21st May, 2012 and sanctioning letter with reference No HABL-KB-287/2013 dated 12th October, 2013 which were admitted **as exhibit P5 and exhibit P6**. PW1 continued that, through the letter dated 1st June, 2014, the defendant requested for enhancement of the existing overdraft and a fresh term loan. As such, the plaintiff vide sanction letter dated 20th June, 2014 enhanced the overdraft to TZS 300,000,000/= and fresh term loan to the tune of TZS 400,000,000/=. PW1 tendered in evidence sanction letter dated 20th June, 2014 which was admitted **as exhibit P7**. The plaintiff's witness further testified that, through the letter dated 17th September, 2016, the defendant made an application for merging the outstanding overdraft of TZS 511,370,000/= and term loan of TZS 132,980,000/= into consolidated term loan. The plaintiff approved and on 27th August, 2016 the outstanding overdraft and term loan were merged and consolidated into single term loan of TZS 644,350,000/=. PW1 tendered in evidence the sanction letter dated 17th September, 2016 which was admitted **as exhibit P8**.



Testifying on the securities, PW1 told the Court that, the said credit facilities were approved subject to security arrangement which were registered in 2010 and the same were being varied according to the review of the credit facilities. PW1 stated that the defendant deposited the following securities in favour of the plaintiff to wit; personal guarantees, letter of hypothecation of goods and or over stocks, dated 19th August ,2010 which was varied through the deed of variation dated 22.10.2013, 25.06.2014 and 17.9.2016. The said deeds of variation were tendered in evidence as **exhibit P9 and exhibit P10 respectively**. PW1 continued that the defendant also secured the loan by his landed property in Plot No. 308, located at Ex Day Estate, Ilala Municipal, registered under CT No. 186205, in the name of Kassim Ally Suleiman, landed property located at Plot No. 2010, Block D at Karakata Area Ilala Municipal, registered under CT No. 85567, in the name of Kassim Ally Suleiman, Plot No. 2010, Block D at Karakata Area Ilala Municipal, registered under CT No. 85845, in the name of Kassim Ally Suleiman and Plot No. 87 Block M at Temeke Area, registered under CT No. 100109, in the name of Kassim Ally Suleiman. PW1 tendered in evidence the mortgage deeds in respect of the above landed properties together with their deeds of variation which were admitted as **exhibit 10 collectively**,



exhibit P11 collectively, **exhibit P12** collectively, **exhibit 13** collectively and **exhibit P14**.

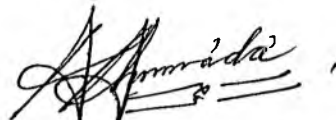
Further, the testimony of PW1 was that, since 2019 the defendant defaulted repayment of monthly instalments contrary to the agreed terms and conditions in the credit facility agreement. As such, as of 3rd August 2021 the outstanding amount stood at TZS 1,156,423,519.39. PW1 tendered in evidence overdraft statement with account No. 12300-0001, loan account No. 12300-1142 and loan account No. 123-1143 which were admitted as **exhibit P15** collectively. PW1 testified that following the defendant's default, the plaintiff issued notice of default against Plot No. 308 dated 5th August, 2021, notice of default against Plot No. 2010 dated 5th August, 2021, notice of default against Plot No. 2009 Block D Karakata area, dated 5th August, 2021, notice of default against plot No. 87 dated 5th August, 2021 and demand notice dated 5.3.2021 which were admitted as **exhibit P16** collectively. PW1 told the Court that the defendants on divers dates promised to repay the loan but in vain. Mr. Muhktar tendered in evidence commitment letter dated 29th September, 2016, letter dated 30th June, 2016, letter dated 27th February, 2017, letter dated 31st March 2017, letter dated 8th September, 2017 letter dated 7th January, 2018, letter dated 2nd July, 2018, letter dated 24th July, 2018, letter dated 29th September, 2018, letter dated 17th



November, 2018, letter dated 30 November, 2018 letter dated 24th December, 2018, letter dated 31st December, 2018, letter dated 1st January, 2019, letter dated 16th January, 2019, letter dated, 30th March, 2019, letter dated 31st March, 2019, letter dated 13th April, 2019, letter dated 28th May, 2019, letter dated 28th June, 2019, letter dated 24th July, 2019, letter dated 19th August, 2019, letter dated 15th February, 2021, mortgage deed for Plot No. 87 dated 25th June, 2014, letter of guarantee for TZS 200,000,000/= dated 23rd November, 2010, letter of guarantee for TZS 300,000,000/= dated 24th May, 2012 and the affidavit of Sibitain Mukhtar authenticating the bank statement dated 2nd September, 2022 which were admitted as **exhibit P17 to exhibit P43** respectively.

PW1 further told the Court that despite all the notices, the defendant failed and/or neglected to pay the outstanding amount. On the basis of the above testimony, PW1 beseeched this Court to enter judgment and decree against defendant as prayed in the plaint.

Under cross examination by Mr. Zakaria Daudi, learned counsel for the defendant, PW1 told the Court that exhibit P2-P8 defined borrower as Chimwaga Hardware and according to exhibit P.15, the holder of the account is Chimwaga. PW1 when pressed with questions, told the Court that in exhibit P9, P10, P11, P12, P13, P40, P41 and P42, the attesting



officer is Thomas Brash. Upon further question PW1 admitted that it is true that all the securities were attested by Thomas Brush however, he was quick to point that he did not call Brush because he was not aware if Brush would be needed. PW1 went on telling the Court that he was not present when Kassimu Ally Suleiman was signing exhibit P17 to 39.

During re - examination by Ms. Ritha Chihoma, learned advocate for the plaintiff, PW1 told the Court that, the borrower is Chimwaga Hardware but Kasim Ally Suleiman is the one who approached the plaintiff bank because he is the proprietor of Chimwaga Hardware. On further question, PW1 told the Court that Mr. Brush was introduced to him by Kassim Ally and all documents were signed before their submission to bank. This marked the end of hearing of plaintiff case and the same was marked closed.

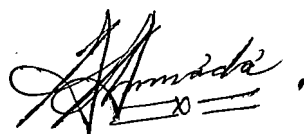
In defence, the defendant was defended by one **Kassimu Ally Suleiman (DW1)**. DW1 told the Court that, on 6th December, 2021 he was served with copies of plaint and court summons to file written statement of defence within twenty-one days. It was the testimony of DW1 that upon perusal of the copy of the plaint, he discovered that the plaintiff on divers dates granted loan to Chimwaga Hardware and the said loan has been partly paid and partly defaulted. DW1 went on telling the Court that his



lawyer assisted him to prepare the written statement of defence together with the notice of preliminary objection. According to DW1, the plaintiff's case is unfounded because he has never executed any loan with the plaintiff. On that note, he urged this Court to dismiss the suit with costs.

While under cross examination by Ms. Ritha Chihoma, DW1 told the Court that he knew Chimwaga but he denied to have transacted in relation to Chimwaga. DW1 when shown extract from BRELA, he identified it and told the Court that, the indicated business name is Chimwaga and Kassimu Ally is a sole proprietor of Chimwaga who is allowed to operate the account. DW1, when shown exhibit P1, denied its knowledge and the signature appearing thereon. DW1, when shown exhibits P9, P41, P42 identified them and told the Court that they are letters of guarantee which were issued and signed by Kassimu Ally Suleiman but he remarked that he is not aware how they reached the bank.

At the close of hearing, counsel were granted leave to file final written submissions in term of rule 66 (1) of the Court Rules. I appreciate for their insightful submissions. Suffice it to say that I have considered them in my decision but for the obvious reasons I could not reproduce them verbatim.



The 1st issue is whether the plaintiff advanced bank facility to defendant. The plaintiff's evidence is that the bank advanced to the defendant bank facilities as depicted in exhibits P1 to exhibit P8. In rebuttal, the defendant had it that the loan transaction was between Chimwaga Hardware and the plaintiff as per exhibit P2, P4, P5, P7 and P8 hence the defendant is not bound by the terms thereof. He placed his reliance on the case of **Austack Alphonse Mushi and Bank of Africa Tanzania Limited & Another, Civil Appeal No. 373 of 2020**. Having considered this issue and upon appraisal of the pleadings and the evidence particularly in **exhibit P1 to exhibit P8**, I am inclined to answer this issue in affirmative that the plaintiff advanced bank facility in dispute to defendant. My position is fortified by the fact the defendant does not dispute that plaintiff extended the loan to Chimwaga Hardware. Instead, he is alleging that the plaintiff wrongly sued the defendant. According to Mr. Zakaria Daudi, learned counsel for the defendant, the plaintiff ought to sue Chimwaga Hardware and not Kassimu Ally Suleiman because Kassimu is not privy to the loan agreement.

With due respect to Mr. Zakaria Daudi, his argument is misconceived. It is worth noting that a business name is not a separate legal entity from the proprietor as such, the proprietor is individually liable for the acts of the firm. See the case of the **State Trading Corporation vs. Eastern**



Province Transport Co. (1972) H.C.D. 74. Having strenuously considered the evidence, it is my considered findings that the defendant's argument is unfounded and he is trying to avoid liabilities by applying legal technicalities. The case of **Austack Alphonse(supra)** cited by the learned counsel for defendant is distinguishable from our instant case because in the case the Court was dealing with the issue of proper party to sue on legal entity as such, since Alphonse was a director and shareholder, he was not supposed to be sued in his name rather the plaintiff ought to sue Masaleni Linner Company. However, in the case at hand, we are dealing with a trade name which is not a legal entity. That said and done, the first issue is hereby answered in affirmative that defendant extended loan to plaintiff.

The next issue is if issue number one is answered in affirmative, whether the securities were legally created. The plaintiff's assertion is that all the securities used to secure the bank facilities were legally created and duly registered in law as established through the exhibits tendered in Court. On the other hand, the defendant contended that the attesting officer of all the securities i.e., exhibits P9, P10, P11 and P12 was not called to testify before the Court. To support his version, he cited the case of **Asia Rashid Mohamed vs Mgen Seif**, Civil Appeal No. 128 of 2011. Having carefully analysed the evidence, I am opined to answer this issue in



affirmative on the following reasons, One, the defendant does not dispute that there was registration nor does he claim that the securities were obtained by coercion, misrepresentation or any other reason that can vitiate their creation and perfection. As such, failure to call Mr. Brush as a witness cannot be taken as a fatal anomaly. Further, the case of **Asia Rashid Mohamed** (supra) is distinguishable from our instant case because the Court in that case was dealing with the transfer of ownership. Two, it is worth noting that the onus of proof lies to the party who alleges. I found the defendant's evidence too weak to outweigh the plaintiff's evidence. This is also supported by the fact that the defendant does not dispute that the plaintiff bank advanced loans to Chimwaga. This tells it all that if there was loan agreement, it naturally follows that there were securities. Three, failure to call attesting officer is not fatal because it was the plaintiff's evidence that Mr. Brush who attested the mortgage deeds was introduced to the plaintiff by the defendant and this fact was not refuted by the defendant. On the above reasons, I am inclined to answer the issue in affirmative that all the securities were legally created.

The next issue is whether the plaintiff is entitled to the relief of TZS 1,156,423,519.39. The plaintiff claimed that she is entitled to payment of TZS 1,156,423,519.39. In contrast, the defendant denied the claims. I have carefully analysed and considered the pleadings and evidence in



particular exhibit P1 to P8, exhibit P15 and the final closing submission filed by the parties. It is my findings that the plaintiff has established TZS 1, 154, 423,519.39 only being principal amount and interest. This is specifically established through **exhibit P15** particularly on loan statement from 7/10/2016 to 18/10/2021 which indicates that the outstanding balance was TZS 1, 154, 423,519.39 as of 5th October, 2021 and not TZS. 1,156,423,519.39. In view thereof, I hold that the plaintiff managed to prove the amount of TZS 1, 154, 423,519.39 as such, she is entitled to such amount.

The last issue is "what reliefs parties are entitled to?" The learned advocate for the defendant prayed for dismissal of the suit with costs. On the other side, the plaintiff strongly urged this Court to grant the reliefs sought in the plaint. Based on the evidence presented as analysed hereinabove, I am satisfied that plaintiff has proved its case to the standard required in civil cases. The plaintiff prayed for payment of TZS 1,156,423,519.39 but through the evidence she was able to prove only TZS 1, 154, 423,519.39 and not TZS. 1,156,423,519.39 as claimed. That said and done, I enter judgment and decree against the defendant with the following orders, namely:



1. It is hereby declared that the defendant breached credit agreement and thus the plaintiff is entitled to realize the securities pleaded in paragraph 12,13 and 14, if the defendant does not pay the decretal amount i.e., TZS 1, 154, 423,519.39 within three months from the date of judgment.
2. Payment of commercial interest at the rate 15% per annum on the decretal sum from the date of filing this case to the date of judgment.
3. Payments of interest on decretal sum at the Court's rate of 7% from the date of judgment till payment in full;
4. Costs of the suit be borne by the defendant.

It is so ordered.

The right of appeal is explained.




A.A. Mbagwa

JUDGE

28/08/2023