

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

AT DAR ES SALAAM

COMMERCIAL CASE NO. 106 OF 2021

BANK OF BARODA (TANZANIA) LIMITED.....PLAINTIFF

VERSUS

KIZIMBANI GYPSUM AND MINING

PROSPECTOR LIMITED1ST DEFENDANT

MOHAMED SAID MOHAMED.....2ND DEFENDANT

ABDULAZIZ SAID MOHAMED.....3RD DEFENDANT

SABAN MOHAMED SAID.....4TH DEFENDANT

DELTA VILLO MAFIE.....5TH DEFENDANT

**SHARIFA ALLY YUSUPH (Administrator of the estate of the late
Ally Yusuph Suleiman)6TH DEFENDANT**

JUDGMENT

A. A. MBAGWA, J.

The plaintiff's claim in this suit arises from the alleged breach of loan agreements between the plaintiff and the 1st defendant. The Plaintiff, **BANK OF BARODA (TANZANIA) LIMITED** is a limited liability company incorporated under the laws of Tanzania and licensed to carry on banking business. On the other hand, the 1st defendant is the private limited liability company established under the laws of Tanzania whereas the 2nd to 5th defendants are natural persons who stood as mortgagors



and guarantors to 1st defendant's loan. The 6th defendant applied to be joined in order to claim interest in the landed property mortgaged by the 5th defendant Delta Vililo Mafie. By way of amended plaint, the plaintiff herein instituted the instant suit against the above-named defendants jointly and severally praying for judgment and decree in the following orders, namely;

- i) That Judgment be entered in favour of the plaintiff jointly and severally against the 1st, 2nd, 3rd, 4th, 5th and 6th defendants for TZS 918,445,307.58
- ii) Commercial interest at the rate of 19% per annum from 25th February 2021 until judgment date.
- iii) Interest at the court's rate from the date of judgment to the date of full payment.
- iv) That upon failure of the 1st, 2nd, 3rd, 4th and 5th defendants to satisfy the judgment and decree within 30 days from the date of judgment and decree, the plaintiff be allowed to exercise her right of sale of the property on Plot 1 Block 25 "A" Mwananyamala Area under L.O No. 117935 in Kinondoni Municipality, Dar es Salaam to satisfy the decree.



- v) The 1st, 2nd, 3rd and 4th defendants jointly and severally be ordered to pay the costs of this suit
- vi) Such further orders and reliefs this Honourable Court deems just, equitable and convenient to grant.

Upon being served with the plaint, the 1st, 2nd, 3rd and 4th defendant filed joint written statement of defence in which they denied to have obtained the alleged facilities from the plaintiff. On that note, the defendants put the plaintiff into strict proof of its claims thereof and eventually urged this Court to dismiss the suit with costs. On the other hand, the 6th defendant filed a separate written statement of defence disputing the plaintiff's claims on the reason that the mortgage transaction between the 5th defendant and plaintiff is null and void for want of spousal consent as such, she urged this Court to dismiss the suit with costs.

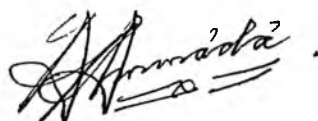
In brief, the facts leading to the institution of this suit may be narrated as follows; It is alleged that, on 14th March, 2016, at the request of the 1st defendant, the plaintiff extended to the defendant a term loan to the tune TZS 50,000,000/= and an overdraft of TZS 450,000,000/= for the purpose of boosting the working capital of the 1st defendant. In addition, on 29th December, 2017 and 29th March, 2019 plaintiff advanced funded interest term loan of TZS 77,000,000/= and TZS 76,000,000/= for the purpose of



funding interest on overdue interest in the overdraft. The facilities were secured by the 5th defendant's landed property located at Plot No. 1, Block 25 Mwananyamala Area in Dar es salaam registered under CT No. 36003, in the name of Delta Vililo Mafie, chattel mortgage on the motor vehicles, the first debenture charge created over all assets of the company and personal guarantee of the 2nd, 3rd and 4th defendants. It is contended that, upon disbursement of fund, 1st defendant defaulted repayment of the principal sum plus interest. The plaintiff issued notice of default to all the defendants but they failed, neglected and ignored to repay the said credit facilities which stood at TZS 918,445,307.58 as of 25th February, 2021. It is against this background, the plaintiff filed the present suit.

It is apposite to state, at this juncture, that as per the court orders dated 16th March, 2022 and 21st June, 2022, the hearing proceeded *ex parte* against the 1st to 5th defendants. The 1st to 4th defendants failed to file witness statements whereas the 5th defendant defaulted to file written statement of defence.

During hearing, the plaintiff was enjoying the legal services of Mr. Charles Mathias Kisoka and Luka Elinganya, learned advocates whereas the 6th defendant was represented by Mr. Michael Frank, learned advocate. The 1st, 2nd, 3rd and 4th defendants were in the legal service of Mr. Isack

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Mutashobya who however, withdrew his services prior to the commencement of hearing. Upon conclusion of the pleadings, the following issues were framed and agreed between parties for the determination of this suit, namely:

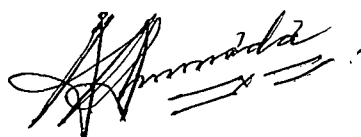
1. Whether the plaintiff extended bank facilities to the 1st defendant and on what terms and what amount?
2. Whether the said facilities were guaranteed by the 2nd, 3rd, 4th and 5th defendants.
3. Whether defendant has defaulted to pay loan under the said facilities.
4. To what reliefs parties are entitled to?

The plaintiff, in the efforts to prove her case, called one witness, **Fredy Fratern Kiwango (PW1)** and tendered several documentary exhibits which were admitted and marked from exhibits P1 to P10. PW1 under oath and through his witness statement which was admitted and adopted by Court to form his testimony in chief told the court that, he is a recovery manager of the plaintiff. He explained that by virtue of his position, his duty, among others, is to monitor and recover loans hence conversant with this suit. It was the testimony of PW1 that on 14th March, 2016, upon application by the 1st defendant, the plaintiff extended to the 1st defendant



a term loan to the tune TZS 50,000,000/= and an overdraft of TZS 450,000,000/= for the purpose of strengthening working capital of the 1st defendant. PW1 tendered in evidence a facility letter dated 14/3/2016 which was admitted and marked as **exhibit P1**. Besides, on 29th December, 2017 and 29th March, 2019 the plaintiff extended to the defendant the funded interest term loan of TZS 77,000,000/= and TZS 76,000,000/= for funding interest on overdue in the overdraft facility. In support of this fact, PW1 tendered in evidence the facility letters dated 29/12/2017 and 29/3/2016 which were admitted and marked as **exhibit P2 collectively**.

Testifying on securities, PW1 told the Court that, the following securities were used to secure the loan; first single debenture over assets of 1st defendant, a legal mortgage over 5th defendant's immovable properties on landed property located at Plot No. 1, Block 25 Mwananyamala Area in Dar es salaam registered under CT No. 36003, in the name of Delta Vililo Mafie, chattel mortgage on the motor vehicles and personal guarantee of the 2nd, 3rd, 4th and 5th defendants. PW1 tendered in evidence single debenture issued by the 1st defendant dated 14/3/2016, chattel document between Mohamed said Nakanga dated 14/3/2016, mortgage of right of occupancy between Delta Vililo Mafie and Bank of Baroda dated 14/3/2016, personal guarantee of 2nd, 3rd and 4th defendants and CT No. 36003, in the name of

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Delta Vililo Mafie which were admitted and marked as **Exhibit P3- P7 respectively**. It was further the testimony of the PW1 that, parties agreed, among others, that in case of default, the plaintiff would have the right to enforce the said deed. Further, the testimony of PW1 was that, the 1st defendant defaulted service of the loan and after notifying the other defendants nothing was done consequently, as of 25th February, 2021 the outstanding debt was TZS 918,445,307.58 which comprised overdraft of TZS 643,125,121.50, term loan TZS 61,893,269.58, funded interest term loan (1) of TZS 106,857,907.81 and funded interest term loan (2). PW1 tendered in evidence 1st defendant's Bank Statement which was admitted as **Exhibit P8**. PW1 testified that following the defendants' default, the plaintiff issued demand notices dated 5/3/2021 and 13/6/2019 which were admitted and marked as **Exhibit P9** and **P10**. According to PW1, despite the notices issued, the defendant failed and/or neglected to pay the outstanding amount. On the basis of the above testimony, PW1 beseeched the Court to enter judgement and decree against all the defendants as prayed in the plaint.

During cross examination, PW1 told the Court that the procedure for creation of mortgage is that, the property in question should be registered in the name of Bank and before granting loan there must be spouse

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consent. PW1 pointed that exhibit P5 is genuine because the bank did due diligence to know if Delta was married. PW1 admitted that exhibit P9 was served to Kizimbani Gypsum.

Under re - examination by Mr. Luca Elinganya, learned advocate, PW1 told the Court that, since 2011 the title deed was in the name of Delta Vililo Mafie (5th defendant). PW1 stated that there was spouse consent which was brought by Delta.

This marked the end of hearing of the plaintiff's case and the same was marked closed.

In defence, only the 6th defendant appeared to defend her case. Sharifa Ally Yusuph (DW1) stood a sole defence witness and tendered four documentary exhibits which were marked exhibit D1 to D4. DW1, through her witness statement and during cross examination, told the court that, she is an administrator of the estates of the late Yusuph Ally who was married (husband) to the 5th defendant Delta Vililo Mafie. DW1 tendered in evidence marriage certificate of Ally Yusuph Suleiman and Delta Vililo Mafie dated 24.4.2002 which was admitted **as exhibit D1**. It was the testimony of DW1 that after being appointed as administrator of the estate of the late Ally Yusuph, it came to her knowledge that one of the properties acquired jointly between deceased and the 5th defendant was mortgaged to plaintiff.

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DW1 tendered in evidence a letter of administration of the estates and CT No. 36003 which were admitted as **exhibit D2 and D3** respectively. It was further the testimony of DW1 that, the said house was a matrimonial home which was mortgaged by the 5th defendant without the consent of the deceased. Further, DW1 testified that the spouse consent was obtained from one Khalfan Yusuph who was not a lawful spouse of the 5th defendant. On that note, she urged this Court to declare the purported mortgage as illegal and consequently dismiss the suit with costs.

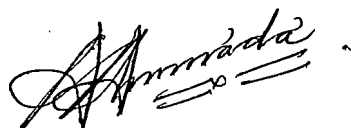
Under cross examination by Mr. Kisoka, learned advocate, DW1 admitted that, CT No. 36003 in respect of Plot No. 1 Block 25 was used to secure the 1st defendant loan. She further told the Court that, Delta Vililo owned the said property since 2011 before the death of his spouse. DW1 continued that the late Yusuph Ally did not challenge the mortgage because he was not aware of its existence. According to DW1, once a property is acquired during the subsistence of the marriage, it is a matrimonial asset. DW1 when pressed into further question told the Court that the transfer of the Certificate of Title was made on 21/11/2011 in the name of Delta Vililo as such, the property was never owned by Ally Yusuph. DW1 said that she was appointed an administratrix on 5/5/2022 that is three (3) years later after the death of her father and requested for letter of administration after

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realising that the surviving spouse would get married. Upon further cross examination, the defendant's witness acknowledged that she is aware of the spouse consent dated 14/3/2016 however, she was quick to point out that the said spouse consent is not genuine.

In re-examination by Mr. Michael Frank, learned advocate, DW1 told the court that, until the demise of Ally Yusuph, the 5th defendant and Ally Yusuph were still married. This marked the end of the 5th defendant's defence as such, it was marked closed.

Having summarized the evidence adduced by both parties and upon appraising the pleadings of the respective parties, the noble task of this Court now is to determine the merits or otherwise of the suit. The first issue was couched that, whether the 1st defendant has extended bank facilities to the 1st defendant and on what terms and amount? This issue has three parts, I will start to address the first part of the issue that is *whether the plaintiff extended bank facilities to 1st defendant?* the plaintiff's evidence was to the effect that, at the request of the 1st defendant, the plaintiff granted the 1st defendant loan. In rebuttal, the 1st to 4th defendants in their written statement of defence contended that the plaintiff never extended loan to defendants. Having considered this issue right from the pleadings, testimonies of the PW1, exhibits tendered, I am inclined to answer this



issue in affirmative on the following reasons, **One**, the contents of **exhibit P1**, are loud and clear that on 14th March, 2016, plaintiff extended the overdraft up to TZS 450,000,000 and the term loan to the tune of TZS 50,000,000. Also **exhibit P2** collectively is clear that the 1st defendant was availed with funded interest term loan of TZS 77,000,000/= and TZS 76,000,000/=. Exhibits P1 and P2 (facility letters) were all duly signed by Mohamed Said Mohamed and Abdulazizi Said Mohamed, the directors of the 1st defendant company on behalf of the 1st defendant and no scintilla of evidence was brought to controvert these documents. In addition, the possession of the securities by the plaintiff confirms the plaintiff's claims otherwise the defendants would not have deposited their securities, had the plaintiff not advanced the loans in dispute. Admittedly, the presence of those securities which are in the names of the 1st defendant's directors is prima facie proof that, the plaintiff extended the loan to the 1st defendant. Thus, the defendants' argument that plaintiff did not extend the loan to 1st defendant is too scanty to convince the Court. The plaintiff's version is, in the opinion of this Court, more credible than that of the defendants. In view thereof, I hereby hold that the plaintiff extended the loan to the 1st defendant.



The second part of the 1st issue is that what were the terms of loan. It should be noted that the terms and conditions of the loan are mainly found in the facility letters signed by the parties. Following what I have decided on the first part of the issue that plaintiff advanced the loan to 1st defendant and having perused exhibit P1 and exhibit P2 collectively the crucial terms of the loan agreement included loan period and interest. For example, in exhibit P1, the term loan was payable within 60 months in 57 monthly instalments and attracted interest of 5% over Bank's Prime Lending Rate (BPLR) or 20% per annum.

Thus, the above mentioned conditions are among the terms and conditions which were breached by the defendants.

The third part of the 1st issue is on the amount of loan extended, it was the plaintiff case that on 14th March, 2016, the plaintiff extended to the defendant a term loan to the tune TZS 50,000,000/= and an overdraft of TZS 450,000,000/=. Further, on 29th December, 2017 and 29th March, 2019 plaintiff advanced funded interest term loan of TZS 77,000,000/= and TZS 76,000,000/=. I have carefully analysed the pleadings and the evidence in particular exhibits P1, P2 and exhibit P10 and it is my findings that the plaintiff advanced to the 1st defendant a total sum of TZS 653,000,000/=.

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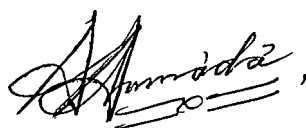
This takes me to the 2nd issue which is whether the said facilities were guaranteed by the 2nd, 3rd, 4th and 5th defendants. The contents of exhibit P3, P4, P5, P6 and P7 are loud and clear that the said facilities were secured by personal guarantees of the 1st to 4th defendants and mortgage of the 5th defendant. However, there was dispute over the legality of the mortgage deed (exhibit P5). The 6th defendant contended that, a legal mortgage over landed property located at Plot No 1, Block 25 Mwananyamala Area in Dar es salaam registered under CT No. 36003 in the name of Delta Vililo Mafie was a matrimonial home between her late father and the 5th defendant. She lamented that the spouse consent of the late Yusuph was not obtained. DW1 tendered marriage certificate between her late father Ally Yusuph and the 5th defendant, Delta Vililo (D1), a letter of appointment of administratrix of the estates of the late Ally Yusuph (D2), a copy of certificate of a right of occupancy (D3) and death certificate of the late Ally Yusuph (D4).

I am live to the provisions of section 59(1) of the Law of Marriage Act 1971 that the spouse cannot dispose of a matrimonial home by way of sale, gift, lease, mortgage or otherwise without the consent of the spouse while the marriage subsists. Exhibit P5 (mortgage deed) is very clear that at the time of creating mortgage that is 14th March, 2016, the mortgagor



Delta Vililo was married to Khalifa M. Yusuph. To that effect, Delta Vililo submitted a spousal consent of Khalifa M. Yusuph. In addition, the 5th defendant did not file written statement of defence nor appeared in Court to dispute the plaintiff's contention. DW1 tendered a marriage certificate (exhibit D1) which tells that Ally Yusuph Suleiman and Delta Vililo contracted marriage on 15/05/2002. However, DW1 failed to adduce evidence whether at the time of creating mortgage i.e., 14th March, 2016 Delta Vililo was still married to her father Ally Yusuph Suleiman. This was so important because the title deed is in the name of Delta Vililo and she is the one who introduced Khalifa M. Yusuph as her husband through exhibit P5 (spouse consent). In addition, the death certificate (exhibit D4) is not proof of marriage or existence of marriage. Having evaluated the evidence holistically, I decline to buy the 6th defendant's version on the status of marriage between Delta Vililo (5th defendant) and the late Ally Yusuph. Instead, I am inclined to believe the plaintiff's evidence that the spouse consent of Khalifa M. Yusuph was lawful because he is the one who was introduced by Delta Vililo as her husband.

As such, I see no reasons to fault the mortgage agreement. On the above reasons, the second issue is answered in affirmative that the said facilities were guaranteed by the 2nd, 3rd, 4th and 5th defendants and the argument

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that exhibit P5 (mortgage deed) is null and void is rejected for want of cogent and credible evidence.

The third issue is whether the defendants defaulted to pay loan under the facilities. The plaintiff alleged that since 2021 1st defendant was in default up to the date of instituting this suit. Upon appraisal of the pleadings and the evidence in particular **exhibit P8**, there is no doubt that defendants defaulted to service the loan. It was one of the contractual terms that the 1st defendant should repay the loans by monthly instalments. It was further agreed that, upon failure by the 1st defendant, the 2nd to 5th defendants would clear the outstanding loan. However, none of the defendants discharged this obligation. It is in evidence that even after issuance of default notice to the defendants, the outstanding amount remained unpaid. In view thereof, it is my findings that the plaintiff sufficiently established that the 1st to 5th defendants defaulted to pay loan under the facilities.

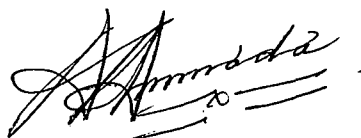
The last issue is "to what reliefs parties are entitled to". The plaintiff is claiming for repayment of the outstanding loan and other consequential orders following the 1st to 5th defendant's failure to discharge their obligations. The learned counsel for the plaintiff urged this Court to grant the reliefs sought in the plaint. On the other hand, the learned advocate

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for the 6th defendant prayed the Court to dismiss the suit with costs. It is settled in contract law that a party who fails to perform his contractual obligations breaches the contract and the remedy is to compensate the other. See Section 73 of the Law of Contract Act and the case of **Simba Motors Limited vs John Achelis & Sohne GMBH and Another**, Civil Appeal No. 72 of 2020, CAT at Dar es Salaam. As such, the 1st to 5th defendants are duty bound to compensate the plaintiff for breach of contract by their failure to repay the outstanding loan amount.

In the event, I am satisfied that the plaintiff has proved its case on balance of probabilities. Consequently, I enter judgment and decree against the 1st to 5th defendants on the following orders, namely:

1. The 1st to 5th defendants jointly and severally are ordered to pay the sum of TZS 918,445,307.58 being the outstanding principal sum plus interest.
2. Payment of interest at the rate of 19% per annum from 25th February 2021 until the date of judgment.
3. Payment of interest on decretal amount under (1) above at the rate of 7% from the date of judgment to the date of full payment.
4. Upon failure of the 1st, 2nd, 3rd, 4th and 5th defendants to satisfy the judgment and decree within 30 days from the date of judgment and



decree, the plaintiff shall exercise its right of sale of the property on Plot 1 Block 25 "A" Mwananyamala Area under L.O No. 117935 in Kinondoni Municipality, Dar es Salaam to satisfy the decree.

5. Costs of the suit be borne by the 1st to 5th defendants.

It is so ordered.

Right of appeal is explained.




A.A. Mbagwa

JUDGE

28/08/2023