IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 112 OF 2022

BETWEEN

ECOBANK TANZANIA LIMITED.....PLAINTIFF

VERSUS

VEHICLE AND EQUIPMENT

LEASING (T) LTD .....1ST DEFENDANT

PAUL NJERU .....2ND DEFENDANT

WANG'OMBE GATHONDU .....3RD DEFENDANT

VEHICLE AND EQUIPMENT

LEASING (KENYA) LTD .....4TH DEFENDANT

JUDGMENT

Date of last order: 15/09/2023
Date of Judgment:22/09/2023

AGATHO, J.:

The plaintiff **ECOBANK TANZANIA LIMITED** knocked at the doors of this court fully armed with a plaint which she has preferred against the defendants. She is praying for judgment and decree against the defendants jointly and severally as follows:

i) Payment of the sum of TZS 6,308,813,844 and USD 1,620,798 being outstanding amount on account of the credit facilities

ii) Interest on the outstanding amount specified in (i) at the rate of 9% per annum on the foreign currency and 19% per annum for local currency from the date of institution of the suit to the date of judgment.

iii) Interest on the decretal amount at the rate of 7% from date of judgment to the date of payment in full.

iv) Costs of the suit.

Upon being served with a copy of the plaint the Defendants filed their Written Statement of Defence (WSD). Later with leave of the court, they filed amended WSD. In their defence the defendants protested the suit alleging that the credit facilities were fully paid. They prayed that the suit be dismissed with costs.

The facts of the case are not hard to grasp. The parties had executed three credit facilities (exhibit P1 collectively). The plaintiff extended the facilities to the 1st defendant while 2nd, 3rd and 4th defendants were guarantors. To secure the credit facilities, there was joint registration of

motor vehicles, and the 2nd and 3rd defendants executed personal guarantees while the 4th defendant executed corporate guarantee and indemnity.

The three credit facilities extended to the 1st defendant were: the 1st credit facility, a term loan revolving credit facility to the tune of USD 2 million dated 19/04/2013. The 2nd credit facility was a documentary import line of credit of USD 2 million dated 13/05/2014. And the 3rd credit facility was additional documentary import line of credit of Euro 630,710 dated 05/01/2014.

The terms of these three credit facilities were:

(a) the facilities were to be secured by:

i. Joint registration of motor vehicles in the name of the 1st defendant and the plaintiff.

ii. Charge over TZS and USD collection accounts and machinery and heavy equipment.

iii. Assignment of lease rental proceeds.

iv. Personal guarantee and indemnity by the fourth defendant.

(b) Interest in the 1st facility 22% per annum (TZS), 9% per annum (USD). Interest on the 2nd facility 21% per annum on TZS and for the 3rd facility charged at 19% per annum.

It should be noted that it was the term of facility that interest will be subject to review from time to time inline with prevailing market conditions. As for the days: it was agreed to be 365 days if payable under TZS credit facility, and 360 days payable under USD credit facility.

The 1st defendant defaulted in repaying the principal amount on the date agreed under the facilities. The amount due as of 01/06/2017 was USD 608,329.87 and TZS 1, 811,793, 989.94. For that reason, the plaintiff demanded repayment.

On 15/04/2019 the parties agreed to restructure the loan and settlement deed was signed (exhibit P7). The defendant admitted being indebted to the plaintiff and committed to pay the restructured amount of TZS 2,772,562,308/= for a period of 43 months. The repayment under the settlement agreement was to be from June 2019 to December 2022 where TZS 64,478,193 was agreed to be paid every month till completion of all the instalments. The guarantors also signed the deed of settlement.

The plaintiff alleged that despite the settlement, credit restructuring and the agreed repayment schedule, the defendants failed to repay the debt as per the instalment plan. As per the parties' settlement agreement, consequence of not honouring the agreed repayment schedule is that the plaintiff is entitled to change the terms and conditions at her discretion. She was at liberty to reapply interest and penalties with the terms of the facilities.

The plaintiff further claimed in her plaint and PW1's testimony that her officers on 11/03/2021 mistakenly and without authority informed the 1st defendant that her liability has been discharged based on the alleged arrangement under which on 12/02/2021 the plaintiff received USD 1,000,000 as full and final payment of the debt. The plaintiff's officers issued a loan clearance letter, an account statement showing the credit entry of USD 1,000,000 into the 1st defendant's loan account No. 7045001189. They also proceeded to release security documents and discharged the guarantors. The plaintiff alleges that no funds amounting to USD 1,000,000 were credited into the 1st defendant's current or loan account on 12/02/2021 as mistakenly communicated by her officers to the 1st defendant.

In a bid to prove her case, the plaintiff brought one witness, Emmanuel Shayo (PW1), who through his witness statement which was adopted as his

testimony in chief testified that: He is a head of Corporate Coverage in the plaintiff's bank. He also tendered nine exhibits: P1 collectively – credit facility letters; P2 collectively - assignment of receivables or proceeds; P3 collectively – personal guarantees of Wang'ombe Gathandu and Paul Njeru; P4 collectively – corporate guarantee and indemnity dated 3rd June 2014 and 11th November 2014; P5 collectively – demand notice/letters dated 01/06/2017, 25/10/2016 and 03/04/2014; P6 collectively – agreed repayment plan dated 15/04/2019 and payment proposal dated 18/12/2018; P7 collectively – settlement agreement on payment plan; P8 collectively – letter of confirmation dated 11/03/2021, security release dated 20/05/2021, and hand over of motor vehicle dated 14/07/2021; and P9 – notice of intention to rectify error in account statement dated 26/05/2022.

PW1 testified that the 1st defendant took three credit facilities [the first dated 19/04/2013, the second dated 13/05/2014 and the third dated 05/11/2014] for procuring various motor vehicles, machinery and heavy earth moving equipment. These were secured by 2nd and 3rd defendants' personal guarantees and indemnity and 4th defendant's corporate guarantee and indemnity. According to him, the 1st defendant defaulted to service the credit facility in 2017. It was PW1's testimony that later in 2019 the credit

facilities were restructured to TZS 2,722,562,308, and the parties executed a deed of settlement. From that deed of settlement, a payment plan was drawn. The same was ending in December 2022. PW1 told the court that contrary to the settlement agreement, the 1st defendant defaulted to pay the instalments. That triggered the plaintiff to reapply the interest and penalties set in the credit facilities which were waived in the settlement.

Intriguingly, exhibit P8 collectively shows that on 12/02/2021, USD 1 million was credited into the 1st defendant's USD account, which is alleged as per the parties' agreement was final and full payment of the outstanding loan. That was followed by the loan clearance letter. Following the crediting of USD 1 million into the 1st defendant's loan account the plaintiff's bank officials issued the 1st defendant with a credit clearance letter date 11th March 2021 discharging the defendants from the liability. And the securities were released. However, the plaintiff through PW1 alleged that that there was an error in crediting USD 1 million into the 1st defendant's loan account as there was no money received. Although the plaintiff contends that the loan clearance letter was issued by mistake, the evidence is scanty to support it.

Moreover, PW1 told the court that the discharging of 1st defendant's liability was erroneous and was done by unauthorized plaintiff's bank

officials. That is why the plaintiff notified the 1st defendant about the error via the letter dated 26/05/2022. Thereafter, she continued demanding for the payment of outstanding amount which by 30/09/2022 stood at TZS 6,308,813, 844/= and USD 1,620,798 and interest continued to accrue as per the terms in the credit facilities. This for a month (from August 2022 to September 2022) skyrocketed to 400%. It is the testimony of PW1 that while the parties agreed in their settlement agreement to waive interest, there was a clause that if the 1st defendant default to repay the credit as per the settlement agreement, the interest in the credit facilities will apply. He added that the plaintiff is entitled to change and reapply the said interest. He clarified that the 1st defendant failure to comply with the repayment plan as agreed via the settlement agreement led to the skyrocketing of the interest as the same included penal interest.

The defendants on their side called one witness, Paul Warenge Njeru (DW1) and through his witness statement adopted in the proceedings as his testimony in chief he testified and tendered three exhibits: D1 collectively – statements of accounts in USD and TZS; D2 collectively – emails; and D3 collectively – consumer report. He told the court that the 1st defendant was granted three credit facilities and the 2nd, 3rd and 4th defendants offered

personal and corporate guarantees and indemnity to secure the said facilities. DW1 also testified that that 1st defendant defaulted in paying the loan. He added in his testimony that the facilities were later restructured, and settlement agreement was signed. The defence witness testified further that the USD 1,000,000 was deposited into the 1st defendant's account number 7045001189. Following that deposit the plaintiff issued exhibit P8, the loan clearance confirmation letter dated 11/03/2021. He added in his testimony that the plaintiff through her officers proceeded to issue Statement of Account (exhibit D1) showing credit entry of USD 1,000,000 dated 12/02/2021. They subsequently released the securities and discharged the guarantors as per exhibit P8.

DW1 vehemently denied the plaintiff's allegations that the crediting of USD 1,000,000 into the 1st defendant account was erroneous. And that the credit clearance letter was issued mistakenly and by unauthorized officers. After closure of the defence case, the learned counsel for the parties were invited to file their final closing submissions which they did.

During final pre-trial conference issues framed were:

1. Whether the 1st defendant fully paid the credit facilities?

2. To what relief are the parties entitled to.

Truly, some facts are undisputed. These include, that the parties executed three credit facilities and guarantees (as per exhibit P1). As of 1st June 2017, the outstanding amount was USD 608,329.87 and TZS 1,822,793,989.94. The defendant defaulted to repay the principal sum and interest as agreed under the facilities. The plaintiff issues several demand letters to the defendants. That prompted various discussions between the plaintiff and the 1st defendant. Eventually, on 15/04/2019 the facilities were restructured, and the settlement agreement was executed. Under that arrangement the loan was restructured to TZS 2,772, 562, 308. All penalties and interests were waived. Further, the parties agreed to the payment schedule of 43 months to end in December 2022. The 1st defendant was required to make monthly instalments of TZS 64,478,193 from June 2019 to December 2022. It was also a term of their settlement deed that in event the 1st defendant fails to make payment as per the schedule, the plaintiff is entitled to change the terms and conditions at her discretion including reverting to the penal interests found in the credit facilities.

What divides the parties in this case is the allegation that USD 1,000,000 was credited into the 1st defendant account No.7045001189 on

12/02/2021. While on the plaintiff side that is claimed to be an error as there was not any crediting of that amount done, on the defence side they argue that the crediting really occurred under the arrangement that it will constitute a final and full payment of the loan.

Undisputedly, the plaint and PW1's testimony are clear that the plaintiff's officers on 11/03/2021 informed the 1st defendant that her liability has been discharged based on alleged arrangement where the plaintiff received USD 1 million credited into the 1st defendant USD account to constitute final and full payment of the debt. It is equally true that the plaintiff's officers went on issuing a loan clearance letter and released the security documents.

Surprisingly, the plaintiff alleges through PW1 that a year later (in 2022) they discovered the error in the account entry (crediting of USD 1,000,000) and the communicated to the 1st defendant about that error. The plaintiff alleges in the plaint that:

(a) No funds amounting to USD 1,000, 000 were credited into the 1st defendant's current account or loan account on 12/02/2021;

(b) the officers who made the entry and issued the loan statement and letter informing the 1st defendant of the discharge of her liability had no authority to do so;

(c) that at all material times, the plaintiff's directors and other senior officers were not aware of these transactions and could not (after exercising reasonable due diligence) have been aware of such transactions; and

(d) there was no consideration or agreement between the 1st defendant and plaintiff to receive a credit of USD 1,000, 000, if any.

In the plaintiff's view the basis of crediting of USD 1,000,000 into the defendant's account was an error in the entry as there was no funds received. Further, the issuing of credit clearance letter was done mistakenly and by unauthorized officers. Through the letter dated 26/05/2022 the plaintiff informed the 1st defendant of the error and went on rectifying it. The defendants through their Written Statement Defence and DW1's testimony disputed the plaintiff's allegations. They declined to admit that the 1st defendant is indebted to the plaintiff. In their view she had fully paid the loan. That is the centre of the tussle in the case at hand.

By way of reiteration, the first issue was whether the 1st defendant fully paid the credit facilities extended to her. Section 110 of the Evidence Act [Cap 6 R.E. 2019] requires that he who alleges must prove. It is on record that besides the letter sent to the 1st defendant a year later informing her that crediting of USD 1 million into her account was erroneous and that discharging her from liability was a mistake of fact, we ask is there any other evidence confirming or supporting the claimed error and mistake of fact? It is intriguing that the plaintiff never brought to court her officers who were involved in crediting USD 1 million into the 1st defendant's loan account to testify. Here the court is entitled to have doubt on these allegations. It should be noted that Banks not only owe duty of care to its clients but also have fiduciary duty towards them. See the Ugandan case of **Makau Nairuba Mabel v Crane Bank, Civil Suit No. 380 0f 2009, the High Court of Uganda at Kampala Commercial Division**. In the instant case, the plaintiff through PW1 and exhibit P8 admitted that her officials committed the error which has not been substantiated. The court can hardly be convinced with the plaintiff's story without concrete evidence.

The defendants strongly disputed the plaintiff's claim. Through the testimony of DW1, they contended that they have fully repaid the loan

amount. This is backed by the plaintiff's letter dated 11/03/2021 confirming that the 1st defendant has cleared her credit facilities. The defence also disputed the plaintiff's claim that the letter was issued erroneously. On this they relied on the plaintiff's letter and email to form part of their defence that the loan has been fully repaid.

Interestingly, it is the plaintiff's officials who issued the loan clearance letter acknowledging that the 1st defendant has cleared her loan following the transfer of USD 1 million into the loan account constituting the final payment. As that is not enough, there is an email (part of exhibit D2) from Naomi Ambwene the plaintiff's employee to the 1st defendant's employees (Boniface Ochieng copied to Jackson Gakungu) confirming the loan clearance. That was followed by the release of security documents.

Of significance to note is that the crediting of USD 1 million into the 1st defendant's account was effected in February 2021. And the confirmation of loan clearance letter issued on 11/03/2021 was signed by the plaintiff's head of credit as per exhibit P8.

Another critical point to note is the time between the date of crediting the account and discovery of error and communication of the same to the

1st defendant. While the error in crediting USD 1 million into the 1st defendant's loan account is alleged to be committed in February 2021, the plaintiff's letter informing the 1st defendant about the alleged error and intent to correct it was sent to her on 26/05/2022, which is more than a year later. A glaring question is why it took so long for the error to be reported to the 1st defendant. Why there is no explanation or evidence to show that an investigation was done? Why the plaintiff failed to tender before the court any investigation or audit report to justify these allegations?

In his testimony, PW1 told the court that after the settlement entered on 15/04/2019 the 1st defendant continued to service the loan. He also testified that on 12/02/2021 the plaintiff received USD 1 million from the 1st defendant. This was confirmed by the plaintiff's bank officials via the letter dated 11/03/2021 informing the 1st defendant that the outstanding loan has been cleared.

Although the plaintiff is claiming this letter was issued mistakenly by her officials who had no mandate, she never doubted the genuineness of the said letter. I was not forged. It is perplexing that fraud or forgery was never pleaded in this case. It is equally PW1's testimony that following the clearance of the loan, the plaintiff's bank officials released the securities.

However, without giving any corroborative evidence such as a document, PW1 merely stated that crediting of 1st defendant's loan account was erroneous, and the loan clearance letter was issued mistakenly.

According to PW1 the plaintiff informed the 1st defendant about the error on 26/05/2022 and retracted the loan clearance letter issued on 11/03/2021. The plaintiff rectified the error two days later from 26/05/2022. The plaintiff's counsel submitted that as per Section 110 the Evidence Act [Cap 6 R.E. 2019], the defendant had a burden of proving that USD 1,000,000 was deposited into her USD account. He went on citing the case of **Paulina Samson Ndawaya v Theresia Thomasi Madaha, Civil Appeal No. 45 of 2017 at pages 15-16**, and Sarkar's Law of Evidence 18 Edition. But as will unfold later the plaintiff had a burden of proof that the crediting of USD 1,000,000 was erroneous. She is the one who alleged in the plaint and even through PW1 that her officers erroneously credited that amount into the 1st defendant's account. She thus rectified the error after notifying the 1st defendant about the error on 26/05/2022. Nevertheless, it is the court's firm view that the letter informing about the error is not a proof of the error in the first place.

Even though the DW1 testified that crediting of bank account will have paper trail in support such as Swift message, deposit slip or cheque, and defendants did not bring any of such documents, it is the plaintiff who told court that her officer erroneously recorded the credit of USD 1,000,000 in the 1st defendant's account. She has a burden of proof. It is axiomatic that the defence discharged the burden through DW1's tendering of exhibit D1, account statement showing crediting of the said amount. If this was an error, then it was the plaintiff to prove that it was indeed an error.

The plaintiff defensively submitted while relying on **Holland v Manchester and Liverpool District Banking Co. Limited**, Reported in Legal decision Affecting Bankers Vol. 2 pages 1900 – 1910 at paragraph 1 that the bank is entitled to correct errors observed in her customers' accounts. She submitted that the defendants are precluded from relying on the credit entry to prove their claim. Much as the court agree with that view that the plaintiff's bank has a right to correct errors noted in her customers' accounts, that must be done within the realm of the laws. In that the alleged errors must be proved and not merely unsubstantiated allegations. Besides that, the corrections should be done promptly to eliminate possible negligence. Undoubtedly, these are in accord with the Bank of Tanzania

(Financial Consumer Protection) Regulations, GN NO.884 published on 22/11/2019 and banking good practices. While not exactly matching the facts of the present case, **Barclays Bank of Kenya v Jandy [2004]1 EA8, Commercial Court of Kenya at Nairobi** contains informative discussion on bank and customer duty of care in correcting bank account errors, mistake of fact in debiting and crediting customer's account.

In the instant case, the court observed that from 11/03/2021 to 26/05/2023 there is a lapse of one year and two months without any explanation from the plaintiff. There is no explanation whether the time lapsed was used for conducting forensic investigation to resolving alleged error in crediting USD 1 million in the defendant's account. It is unclear whether there was any criminal charge preferred against the plaintiff's officials who erred in crediting the said amount into the 1st defendant's account. To the court's dismay the plaintiff did not call upon these officials to testify in court during trial. Moreover, neither audit report nor forensic investigation report was tendered in court to substantiate the plaintiff allegation of error committed by its officers. In the court's view, there ought to be evidence of some sort to support the alleged error or mistake of fact.

Without evidence to support the plaintiff's allegation of error or mistake of fact the same is incredible and unbelievable.

The plaintiff has poised that her officials who issued the loan clearance letter to the 1st defendant were unauthorized. But exhibit P8 reveals that those who signed the said letter were head of legal department and head of credit department. Moreover, during cross examination PW1 admitted that the head of legal department and the head of credit both report to the Managing Director. Therefore, and in the absence of evidence to the contrary these cannot be said to be without authority to sign the credit clearance letter. The PW1 also admitted that the head of credit can tell him a particular customer has repaid his loan.

When pressed further with questions on bank statement that could have proved the alleged error in crediting USD 1,000,000 into the 1st defendant's account, PW1 revealed that if he had a bank statement, he could have tendered it before the court. It means he did not have one at the trial.

As for repayment done by the 1st defendant, PW1 testified that there are several repayments the 1st defendant did. For instance, on 13/03/2014 the client (1st defendant) transferred USD 110,000. Another repayment was

done on 17/02/2014 amounting to USD 689,562.50 value date was 28/12/2013. He added that, repayments done were many. He further testified that even after the settlement agreement the 1st defendant continued to service the loan.

Asked whether the finance and audit could have detected the error in entry of USD 1 million into the 1st defendant's loan account, the PW1 testified that the finance and audit departments may detect if there any finance related issues/errors. He added that the audit department do audit at least once in a year. The finance department does inspection financial statements regularly. He further conceded that if the books of accounts have some problems, then audit or finance departments may detect it and they are expected to notify the bank. That clearly confirms that input of USD 1 million into the 1st defendant's account was not an error.

It was PW1's testimony in paragraph 22 of his witness statement that the plaintiff official informed the 1st defendant mistakenly and without authority that she has been discharged from liability after USD 1,000,000 as full and final payment. He told the court that he referred to the bank statement ECO-9, annexture to the plaint. But he has not tendered it in court.

PW1 admitted further that he does not have any audit report or finance report showing that the alleged amount of money was not received by the bank. He equally admitted that he does not have any loan account statement which shows that there was not money received. He also said the plaintiff do report to the Bank of Tanzania (BOT). She has a duty to submit financial reports of the bank to the BOT. He conceded that he does not have any report showing that the plaintiff reported to the BOT and indicated that she did not receive the USD 1,000,000 from the 1st defendant.

He also testified that in his witness statement (para 26) he showed outstanding amount to be TZS 2,189, 159, 078.53 and USD 386,660.52. He admitted that the plaintiff did not revoke or vary the settlement agreement, and the settlement agreement was TZS 2, 772,562,308.

Also, the PW1 referring to his witness statement (para 27) he said the plaintiff is claiming TZS 6,308,813,844 and USD 1,620,798 that remained outstanding sum as at 30th September 2022. On paragraph 26 of PW1's witness statement the outstanding amount was TZS 2, 189, 159, 078.53 and USD 386,660.52 as of 3rd August 2022. That indicated contradiction as one month later that is September 2022 the interest has skyrocketed to 400%. PW1 clarified that in the settlement agreement the parties agreed if the 1st

defendant fails to repay the loan, then the terms will be changed and revert to position prior to the settlement agreement to include penal interest. He testified that the settlement was to be finalized in December 2022. He also admitted not to have brought any bank statement to show that the outstanding amount has reached TZS 6,308,813,844 and USD 1,620,798 as at 30th September 2022.

PW1 conceded that there is difference in amount stated on paragraph 20, 26 and paragraph 27 of his witness statement. However, he clarified that the differences in TZS amount between paragraphs 20 (TZS 2,772,562,308) and 26 (TZS 2,189,159,078.53) is that in paragraph 20 there is settlement amount. And in paragraph 26 the amount is a bit low compared to the paragraph 20 because there was certain amount that was repaid by the 1st defendant. She had repaid about TZS 600 million.

As what constitutes the conclusive evidence of indebtedness, PW1 after reading exhibit P1 admitted that the third facility operating condition 18 states that the bank statement and record will constitute conclusive evidence of the indebtedness of the borrower in the court of law. This was however vigorously contested by the Plaintiff counsel in his submission whose view was that the bank statement is one of the records to prove

indebtedness. The court agree with the plaintiff's view that the bank statement is not the only evidence to prove indebtedness especially where such statement is said to have been made erroneously. The plaintiff cited the case of **Exim Bank (T) Limited v Kilimanjaro Coffee Company Limited and Others** (supra). What is glaring though is the absence of evidence from the plaintiff to prove that the entry in the 1st defendant's account statement was made erroneously.

The defence on their side reacted to PW1's allegation of error in crediting the 1st defendant's account with USD 1,000,000. DW1 tendered the two sets of bank statements in USD and TZS currencies, admitted as exhibit D1. He also tendered the email correspondences between Naomi Ambwene (the plaintiff's officer) and Boniface Ochieng the employee of the 1st defendant, attached with it are the bank statement for the 1st defendant between 29/06/2018 to 12/02/2021 that were admitted collectively as exhibit D2. These exhibits were never objected by the plaintiff.

Regarding the consumer report from credit reference of the 1st defendant dated 28/04/2023 tendered by DW1 and admitted as exhibit D3, the defence witness opined that the plaintiff's failure to report the 1st defendant to credit reference bureau discharges her from liability, the court

disagrees with such view as that was a mere opinion of the DW1. Moreover, such failure cannot be regarded a ground from discharging the liability to repay the loan. DW1 conceded that the consumer report is in relation to companies as far as liabilities to the bank is concerned.

Referring to exhibit D2 collectively specifically the statement that is attached to the email, the transaction dated 11/12/2020 the balance outstanding in USD account was USD 386,660.52 He confirmed that the balance that is in the account as of 11/12/2020 is exactly the same as the one indicated on paragraph 26 of the PW1 witness statement.

DW1 confirmed that one of the issues between the parties was whether USD 1million was credited in the 1st defendant's account to discharge its liability to the bank. Regarding the error of crediting USD 1 million into the 1st defendant loan account, the DW1 admitted that any bank transaction will have paper trail. He also concurred that for any transaction they will be swift and instructions. If it was cash deposit, there will be deposit slip. If it was cheque, there will be deposit slip. DW1 clarified that other than the aforesaid documents there is bank statement (exhibit D2) and email correspondence (exhibit D2) and a letter dated 11/03//2021 which is exhibit P8 which proves payment of USD 1,000,000. The court has disposed this

issue in that much as any crediting of the bank account will require paper trail, our concern here is whether there is any evidence to prove that the account entry (USD 1,000,000) alleged to be erroneously credited was indeed erroneous. It is the law under Section 110 of the Evidence Act that he who alleges must prove. In **Godfrey Sayi v Anna Siame (as Legal Representative of the late Mary Mndolwa) [2017] T.L.R.136** the CAT held that generally in civil cases, the burden of proof lies on the party who alleges anything in his favour. See also the case of **Barelia Karangirangi v Asteria Nyalwambwa, Civil Appeal No. 237 of 2017 CAT** at pages 7-8. The plaintiff alleging error and mistake of fact had a burden to proof. The reasons are plenty, she is one who alleged that her officers made erroneous entry in the 1st defendants account, she owns the banking system, and she failed to bring any evidence of investigation done to verify the error alleged.

Thus, despite the DW1's admission that the 1st defendant did not bring in court any instructions, swift message, or deposit slip in respect of the USD 1,000,000, that does not eliminate the bank's duty to investigate the errors and bring the evidence before the court. Mistake of fact or error requires proof. That cannot be left in silence. Both the bank and the customer owe

each other duty of care. The bank ought to investigate the error. The story would have been different if the bank could have investigated the error and tabled before this court the investigation report.

In reference to exhibit D2 regarding the bank statement is respect of the period between 29/06/2018 to 12/02/2021, the DW1 testified that the balance was USD 386,660.52 that is at 11/12/2020. He also clarified that the two outstanding balances TZS and USD were cleared by the inward transfer of the USD 1 million that was received by the bank 12/02/2021.

The PW1 testified when cross examined by the defence counsel that clause 18 (g) of the credit facility dated 05/11/2014 part of exhibit P2 states that *the bank's statement and records will constitute conclusive evidence of indebtedness of the borrow in the court of law.* There is no bank statement that was tendered by the plaintiff to prove the debt. The court is bound to enforce the parties' agreement as rightly held in **Simon Kichele Chacha v Aveline M. Kilawe, Civil Appeal No. 160 of 2018 CAT.** Nevertheless, and as stated earlier other records are not divorced as may also constitute proof of indebtedness. In the present case the plaintiff counsel while citing **Exim Bank (T) Limited v Kilimanjaro Coffee Company Limited Commercial Case No. 29 of 2011 HCCD** submitted that the bank

statement may be discredited. But that can only be done if the bank statement was tendered. Here the bank statement was not tendered. It is trite that what has not been tendered cannot be discredited. If the debt existed, the plaintiff's report filed to the Bank of Tanzania should have been tendered to corroborate the claim of existence of the debt.

The plaintiff's allegation that the USD 1,000, 000 is without consideration was unnecessary and without substance as there was an outstanding loan. The said amount was for full and final payment of the loan.

Turning to the plaintiff claim of mistake of fact in account entries, due to scarcity of authorities on this doctrine, it is prudent to refer **Barclays Bank of Kenya v Jandy** (supra) where it was held that mistake of fact is a tort that requires proof. The plaintiff brought nothing before the court to prove the alleged mistake of fact. One could even talk of negligent misstatement on the plaintiff's officers. But that has not been pleaded. This court cannot deal with an issue that has not been pleaded by the parties.

By way of restatement, the issues framed were:

1. Whether the 1st defendant fully paid the credit facilities.
2. To what relief are the parties entitled to.

Briefly to answer the above issues and as indicated herein above, the court analysed the evidence adduced by the witnesses, submissions made by the learned counsel and the law. To begin with the first issue whether the 1st defendant fully paid the credit facilities, PW1 testified that there was restructuring of credit facilities and later settlement agreement and payment plan was executed in April 2019. He also testified that on 24th August 2022 the plaintiff's lawyers sent demand notice to the 1st defendant. Contradictorily, PW1 testified that all along the 1st defendant has been servicing the loan. It was his further testimony that on 11th March 2021 the plaintiff informed the 1st defendant via a letter that she has cleared her credit facilities through transferring USD 1million to the loan account. The transfer was done on 12th February 2021. He thus tendered the credit clearance letter which was admitted as exhibit P8 collectively. Surprisingly, he also told the court that there was a mistake in crediting the loan account USD 1million because no such money was received. On 26th May 2022 the plaintiff through her officers, the head of credit, and head of legal wrote to 1st defendant informing about the error and intention to rectify it. The same was rectified. However, what was not explained by the PW1 is why it took so long to rectify the error. And why there is no audit or forensic investigation report indicating

such detection of error or why no bank statement was tendered to show the USD 1 million was never received. Here the plaintiff is the one alleging mistake of fact or error committed by her own officials, but she failed to provide evidence to convince the court that there was indeed an error in crediting USD 1 million in the 1st defendant's loan account. It is trite under Section 110 of the Evidence Act [Cap 6 R.E. 2019] that he who alleges must prove. The production of the letter informing the 1st defendant about the error is by far too weak evidence to discharge the burden of proof. The court expected something concrete. Moreover, those who are said to have committed the error or mistake were not brought to testify. These officers are Mbwezeleni Kambangwa, the head of credit, and Hope Liana, head of legal department. Kambangwa signed loan clearance letter dated 11th March 2021. Moreover, Kambangwa and Liana handed over motor vehicle registration card to the 1st defendant. This issue of mistake of fact or error is incredible.

The defence witness, DW1 testified that the 1st defendant has fully repaid the credit facilities as confirmed by exhibit P1 collectively. It contains credit clearance letter, email correspondences, and securities release.

Based on the evidence produced by the parties, it is the court's considered view that the plaintiff has failed to prove her case on the balance of probability. The evidence brought especially exhibit P8 collectively, the credit clearance letter, the exhibit D2 (entailing loan account statement, and email conversation between the plaintiff's bank officials and the 1st defendant) confirmed that the USD 1million was deposited into the loan account. And that the 1st defendant was discharged from liability. The alleged error in crediting the 1st defendant loan account was not proved. The letter sent to the 1st defendant alleging that there was an error in crediting her loan account cannot be said to be evidence to prove that there was indeed an error. The bank failed to plead there was fraud or forgery. The court cannot base its decision on unsubstantiated allegations. It was held in **The Masters and Owners of Marine Vessels and Others v Dar es salaam Marine Services Ltd, Commercial Division Manual Reports [2005] Commercial Division Manual Report (CDMR)** pages 50-52 that where a party to a civil suit fails to substantiate its claim the court is empowered to ignore the claims. In the present case, there was no forensic investigation report nor audit report indicating that the purported error was indeed detected. There is no evidence that those who are said to have committed

the error were prosecuted. Moreover, the allegation that these bank officials were unauthorised persons was disapproved by the PW1's testimony. They were authorised as they are senior bank officials who report to the Managing Director. That leads to one conclusion that the 1st defendant full paid the credit facilities. Therefore, the first issue is answered in the affirmative.

From the foregoing, the second issue as to what reliefs are the parties entitled to, and having found the plaintiff's case lacking merit due to unsubstantiated claims, it goes without saying that the defence has substance. Consequently, the suit is dismissed with costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 22nd Day of September 2023.

U. J. AGATHO

JUDGE

22/09/2023

Date: 22/09/2023

Coram: Hon. U. J. Agatho J.

For Plaintiff: Samah Salah, Advocate

For Defendant: Stella Rweikiza, Advocate.

C/Clerk: Mustafa

Court: Judgment delivered today, this 22nd September 2023 in the presence of Samah Salah, counsel for the Plaintiff, and Stella Rweikiza, advocate for the defendant.

THE HIGH COURT OF TANZANIA
COMMERCIAL DIVISION

U. J. AGATHO

JUDGE

22/09/2023