

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
COMMERCIAL DIVISION

AT DAR ES SALAAM

COMMERCIAL CASE NO 110 OF 2022

INTERNATIONAL COMMERCIAL

BANK (TANZANIA) LIMITED..... PLAINTIFF

VERSUS

NEWCO OIL LIMITED.....1ST DEFENDANT

PETER AUGUSTINO MMASI.....2ND DEFENDANT

NIZAR BHIMJI.....3RD DEFENDANT

GEORGE KRITSOS.....4TH DEFENDANT

JOHN THOMAS MCHETTO.....5TH DEFENDANT

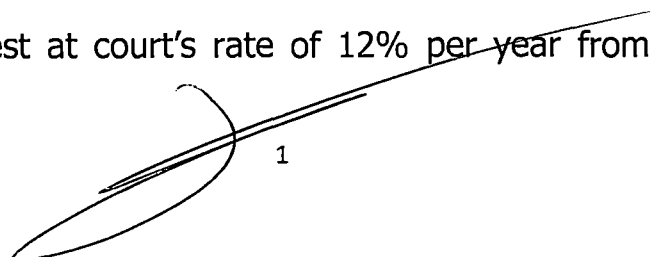
JUDGMENT

Date of Last Order: 16/10/2023

Date of Delivery: 20/10/2023

MATUMA, J.

The plaintiff herein ***International Commercial Bank (Tanzania) Limited*** preferred this suit against the defendants praying for judgment and decree jointly and severally for various reliefs namely; Payment of Tsh. 1,280,817,317.65 being an outstanding amount of the overdraft facility as of 6th August 2022, Payment of commercial interest of 24% on the decretal sum from the date of filing the suit to the date of judgment, Payment of interest at court's rate of 12% per year from the date of

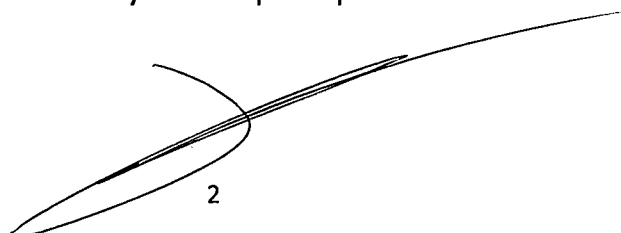


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judgment to the date of full and final payment, General damages to be assessed by the court, Costs of the suit, and any other reliefs the court deems fit to grant.

The brief facts leading to the herein above claims can be summarized as follows; Sometimes in the year 2013, the 1st Defendant obtained from the Plaintiff a Temporary Overdraft Facility of Tsh. 75, 000, 000/= (exhibit P1) which was later enhanced to Tshs. 200,000,000/= as a Secured Overdraft Facility. To that effect see Secured Overdraft Facility with reference no. AA No. 2017/120 (exhibit P6) and Deed of Variation dated 26th October, 2017 (exhibit P14).

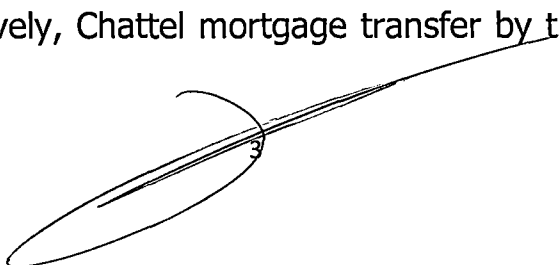
The 2nd, 3rd and 4th defendants as directors of the 1st defendant and the 5th Defendant stood as personal guarantors to the facility and executed various chattel transfers, Directors' guarantee, debentures, certificate of registration of charge and mortgage of a landed property in respect of their own properties to secure the Overdraft Facility in favour of the Plaintiff. See; exhibits P2, P3, P4, P7, P8, P9, P10, and P11. The overdraft Facility was valid for twelve months from 30th November 2017 to 29th November 2018 but it is alleged that the 1st defendant defaulted in servicing the overdraft facility which prompted this suit.



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At the hearing of this case, the plaintiff was represented by Mr. Juventus Katikiro learned advocate while the defendants were jointly represented by Mr. Andrew Job Kannonyele and Mr. Roman Selasini Lamwai learned advocates. Both parties had their respective witness statements filed and each brought one witness for the purposes of tendering exhibits, cross examination and re-examination respectively.

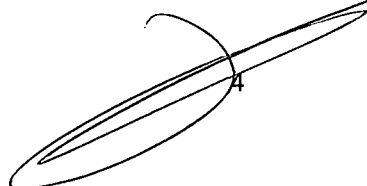
For the Plaintiff it was Jackson Mushi (PW1) who tendered the Plaintiff's exhibits, his witness statement having been adopted as his testimony in chief. He tendered eighteen (18) exhibits to wit; Temporary overdraft facility dated 4/11/2013, Memorandum of acceptance and an extract of the minutes (Boarding Resolution) by the 1st Defendant as **exhibit P1** collectively, Chattel transfer by the 2nd Defendant Mmasi Agustino as **exhibit P2**, Motor vehicle registration card no. 4180181 in the names of Augustino Peter Mmasi as **exhibit P3**, Joint Guarantee dated 12/11/2013 by Mmasi Augustino, Nizar Bhimji and George Kritsos who are the 2nd, 3rd and 4th Defendants as **exhibit P4**, Debenture for present and future assets of the Company and certificate of registration of a charge as **exhibit P5** collectively, Secured overdraft facility dated 17/10/2017, Memorandum of acceptance and its Board Resolution as **exhibit P6** collectively, Chattel mortgage transfer by the 5th Defendant

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John Thomas Mchetto dated 26/10/2017 as **exhibit P7**, Chattel mortgage transfer by Augustino Peter Mmasi dated 26/10/2017 as **exhibit P8**, Mortgage deed between Peter Augustino Mmasi and International Commercial Bank dated 26/10/2017 as **exhibit P9**, Motor vehicle registration card no. 7468918 in respect of John Thomas Mchetto as **exhibit P10**, Certificate of Occupancy no. 141379 in the names of Peter Augustino Mmasi as **exhibit P11**, Affidavit of names in respect of Peter Augustino Mmasi as **exhibit P12**, Spouse Consent of Rose D. Lubuya (2nd Defendant's wife) as **exhibit P13**, Deed of variation **exhibit P14**, 67 cheques as **exhibit P15** collectively, Bank Statement of NEWCO Oil Limited in respect of International Commercial Bank as **exhibit P16**, Demand Letter by International Commercial Bank to the Directors NEWCO Oil Limited dated 16/02/2021 as **exhibit P17** and Account statement of the 1st Defendant printed on 06/08/2022 as **exhibit P18**.

In his witness statement, PW1 testified that he is the Head of Credit Department in the Plaintiff's office and thus dealt with the matter at hand by virtue of his position. Most of his evidence is carried on the brief facts herein above.

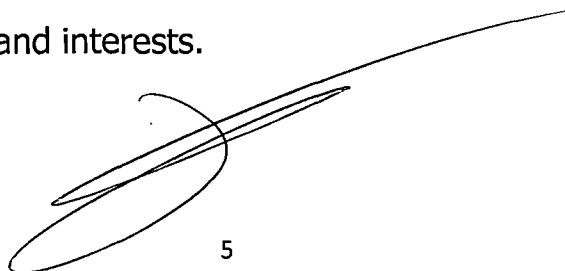
PW1 further testified that in the course of business they had good terms with the 1st Defendant and thus they used even to pay debts of the

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1st Defendant to third parties which were later cleared by the 1st Defendant. That on the same good terms and dealings, in the year 2020 the 1st defendant issued various Plaintiff's cheques with a total sum of Tshs. 658,121,563/= to GAPCO Tanzania Limited who had her Bank account with Dimond Trust Bank and the Plaintiff was made to pay such amount through interbank transactions with the view that the 1st defendant would settle the amount as it used to be but unfortunately this time the 1st Defendant did not settle the amount.

In that regard this witness lamented that the 1st defendant breached the terms of the secured facility thereby making the outstanding balance to stand at the tune of Tshs. 1,072,235,569.42/= and following the continuous breach and default to repay, the outstanding balance as of 6th August 2022 shot up to Tshs. 1,280,817,317.65 vide exhibit P18.

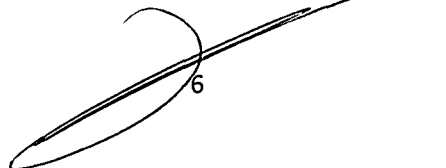
During cross examination by advocate Selasini, PW1 admitted that the total defaulted overdraft facility was Tshs. 200,000,000/= and not Tshs. 475,000,000/= as pleaded in the Plaint. He also made it clear that the total claimed amount in the plaint Tshs. 1,280,817,317.65 results from the claim of an outstanding balance of Tshs. 475,000,000/= plus the total value of the cheques and interests.

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The defendants on their side had one witness Agustino Peter Mmasi who testified as DW1. This witness had as well his witness statement filed and adopted as his evidence in chief. He did not tender any exhibit but prayed to rely on ***exhibits P6*** and ***P14***

Materially DW1 admitted to have utilized the overdraft facility of Tshs. 200,000,000/= from the Plaintiff whose interest was being paid monthly between Tshs. 3,000,000/= and Tshs. 4,000,000/= and strongly disputed the plaintiff's claim that they secured an overdraft of 475,000,000/=. He concluded that up to this moment he is acknowledging the debt of Tshs. 200,000,000/= whose interests has already been paid fully through monthly deductions from their deposits and that the reality of such fact could be seen on the 1st Defendant's Bank statement from when the Overdraft facility was obtained to the period of its expiry but the Plaintiff has been reluctant to produce such statement which is in her custody and that is why even in the Plaintiff's case such statement was not tendered.

In respect of the cheques (exhibit P15), DW1 admitted that they were issued by the 1st defendant to GAPCO Tanzania Limited and it is him who endorsed them as the director. He however averred that those cheques were paid by the 1st defendant's money in her account or else



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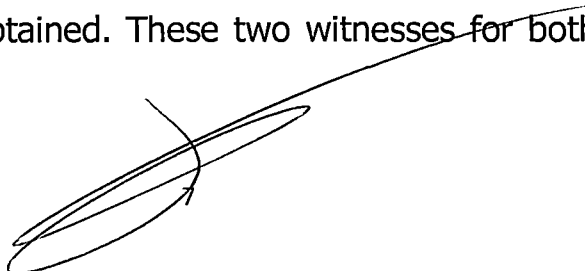
they would have been returned by reason of insufficient fund. He insisted that the monies in the checks were not a loan.

Counsels for both sides opted not to make any closing submissions. It is now for this court to determine the issues framed and I shall deal with them one after another.

1. Whether there were valid overdraft facilities executed and secured by the 1st defendant from the Plaintiff.

This first issue is not difficult to determine. This is because both parties are not at issue that the 1st defendant obtained a temporary overdraft facility (exhibit P1) to the tune of Tshs. 75,000,000/= from the Plaintiff which was later enhanced to the tune of Tshs. 200,000,000/= vide the deed of variation (exhibit P14). These overdraft facilities indisputably were secured by the 1st Defendant by various collaterals executed by the 2nd, 3rd, 4th and 5th Defendants as guarantors.

Although the plaintiff's claims on the plaint shows that the total overdraft facility offered to the 1st defendant was Tshs. 475,000,000/=, her witness PW1 could not identify that facility. He stood at the same side with DW1 that the total overdraft facility was only Tshs. 200,000,000/= which resulted from the enhancement of the temporary overdraft facility which was earlier on obtained. These two witnesses for both sides are

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supported by the contents of exhibit P14 the Deed of Variation which made it clear that;

"DESCRIPTION OF FACILITIES

With effect from the date of this Deed, the Additional Facility secured by the deed of guarantee shall include any outstanding amount on the Facility together with interest and other charges thereon."

Therefore, I determine the first issue to the effect that there were two valid overdraft facilities executed and secured by the first defendant the first one being that of Tshs. 75,000,000/= and the second one being that of Tshs. 200,000,000/= but the two overdraft facilities did not stand independent of each other. They are technically two overdrafts but substantially one overdraft because the later absorbed the former by way of enhancement. In that regard the total overdraft facility was Tshs. 200,000,000/= as indisputably testified by both parties.

The rest Tshs. 275,000,000/= that would have been added to such undisputed overdraft of Tshs. 200,000,000/= to make a total overdraft facility of Tshs. 475,000,000/= as claimed in the Complaint remains a bare assertion which stands unproved. As held in the case of ***The Masters and Owners of Marine Vessels and Others vs. Dar es Salaam Marien Services Ltd, Civil Case No. 123 of 1996*** in that; where a party to a civil suit fails to substantiate its claims the court is empowered

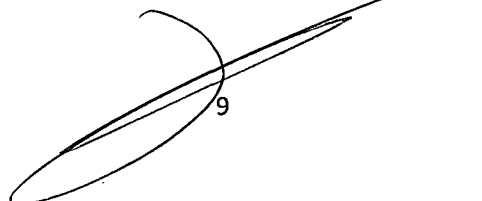
to ignore the same, I do hereby ignore the claims that contends to mean the overdraft facility was of Tshs. 475,000,000/=.

2. Whether there are any terms and conditions on the accelerated overdraft facilities and if they were breached by the 1st defendant.

On this issue I find it that there being undisputed fact that the 1st Defendant obtained and utilized the overdraft facility of Tshs. 200,000,000/= and the same has not yet been paid to date, it is obvious that the terms and conditions for the overdrafts was breached. The overdraft facility was to expire within twelve months as from October, 2017 to October, 2018. In that respect the 1st defendant ought to have settled the overdraft facility in full and its accrued interests. But to date the amount of the said outstanding overdraft facility is yet settled, that is a clear breach by the 1st defendant. The issue is thus answered in the affirmative.

3. Whether the plaintiff is entitled to recover the amount to the tune of Tshs. 1,208,817,317.65 or any.

From the evidence of the Plaintiff herself the claim of Tshs. 1,208,817,317.65/= comprises the principal overdraft of Tshs. 475,000,000/=, interests thereof, together with the total amount of money allegedly paid by the plaintiff vide the cheques exhibit P15 to



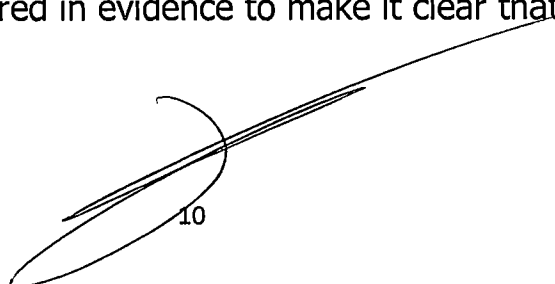
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GAPCO a third party with the honest belief that the 1st Defendant would refund the same with interests, and other charges.

On the other hand, the Defendants' witness testified that the overdraft facility was only Tshs. 200,000,000/= and not Tshs. 475,000,000/=. This evidence was not contravened by the Plaintiff but as I have earlier on revealed above, the Plaintiff's witness supported this position. In respect of the accrued interest on the undisputed overdraft facility of Tshs. 200,000,000/=, DW1 testified that the same was paid fully but the Plaintiff has deliberately holden the Bank Statement of the time that would have shown the 1st Defendant's account operations and the manner in which the monthly pays of the accrued interests was being done.

DW1 also disputed the amount allegedly paid through cheques stating that the cheques were paid by the 1st Defendant's own fund in her account and it was not a debt.

Since the claimed amount by the Plaintiff includes interests on unproved overdraft facility of Tshs. 275,000,000/= and the fact that the bank statement of the 1st Defendant at the time of utilization of the overdraft was not tendered in evidence to make it clear that the monthly

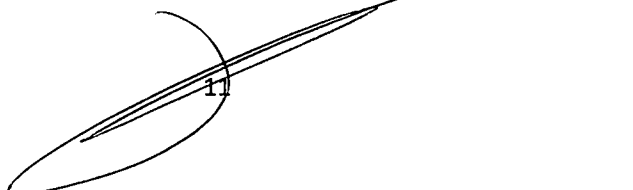


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interests were not being paid accordingly, the claim of that amount of Tshs. 1,208,817,317.65 is unfounded.

Not only that but also as testified by PW1 the Plaintiff's claim includes the principle amount Tshs. 658,121,563/= allegedly paid by the Plaintiff to GAPCO under the instructions of the 1st Defendant and interests thereof. Unfortunately, issues of cheques came through the witness statement and the Plaintiff's Additional list of Documents without having been pleaded in the Plaint. The claim relating to cheques was not part of the instituted suit and therefore cannot be entertained at the middle way. The witness testified out of the pleadings before the court in respect of those cheques and therefore I ignore such evidence. The Plaintiff if at all has any valid claim relating to those cheques is at liberty to commence a separate suit to establish the same.


The Plaintiff is entitled to only Tshs. 200,000,000/= which the 1st Defendant utilized from the Plaintiff but never returned it as admitted by DW1. That carries on board the last issue relating to the reliefs which the parties are entitled to. The Defendants are therefore liable to pay the Plaintiff Tshs. 200,000,000/= as the principle amount utilized by the 1st Defendant from the Plaintiff but remained unpaid to date. I refrain from granting to the Plaintiff the interest of 24% on the decretal amount from




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the date of filing this suit to the date of this judgment as sought in the reliefs because the matter delayed in court for various reasons some out of the control of the defendants but since such money was for business purposes I grant the Plaintiff general damages to the tune of Tshs. 10,000,000/= . The collaterals be sold in accordance to the governing law and rules. The Plaintiff shall be entitled to executed the decree by attachment and sale of any other properties belonging to the defendants until the whole amount of Tshs. 200,000,000/= which the Plaintiff is entitled to, is realized.

In the circumstances, this suit is granted to the extent stated herein above with costs. It is so ordered. Right of appeal is hereby explained.


COURT: **MATUMA**
JUDGE
20/10/2023

This judgment is delivered in the presence of Mr. Andrew Job Kannonyele, learned advocate for the Defendants and in the presence of Mr. Kelvin Ngeleja learned advocate for the Plaintiff.


MATUMA
JUDGE
20/10/2023