IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO 113 OF 2022

STANBIC BANK TANZANIA LIMITED ..... PLAINTIFF

VERSUS

ISAYA AGROVET GENERAL SUPPLIES .....1ST DEFENDANT

ISAYA BUKAKIYE SIMON.....2ND DEFENDANT

STELLA RAPHAEL GWIYAGO.....3RD DEFENDANT

JUDGMENT

Date of Last Order: 25/10/2023

Date of Delivery: 27/10/2023

MATUMA, J.

The 1st defendant obtained from the plaintiff two loan facilities. The first loan **Tshs. 241,273,344.00** was advanced through credit facility letter dated 5th November,2014 as a liquidating credit. Through this credit the 1st defendant was not given cash money but financed for the purposes of buying a motor vehicle ***1X Toyota Land Cruiser Station Wagon VX Automatic High -Petrol.*** It is stated in evidence that this money was paid to the vehicle supplier one Toyota Tanzania Limited after the execution of the credit facility as stated supra which was tendered in evidence as exhibit **P1.**

The second loan Tshs 300,000,000/= was advanced to the 1st defendant as additional working capital through credit facility letter dated 23rd June 2015 exhibit **P4**.

The first loan was secured by joint registration of the vehicle in question **T 501 DCP** and was to be repaid within 36 months with an interest of 23% per annum. The monthly instalments were agreed to be Tshs. 8,910,191.97.

The second loan was agreed to be repaid by the 1st defendant for a period of 36 months on equal monthly instalments of Tshs. 11,457,135.95. This loan was secured by Plot No. 4 Block "A" Medium Density at Mhungula Kahama Urban area valued at Tshs. 375,000,000/= exhibit **P6**. It was also secured by mortgage deed in respect of Plot No. 102 Block "U" High Density Kahama Urban area valued at Tshs. 200,000,000/= exhibit **P7**. It was further secured by unlimited personal guarantee by the 2nd and 3rd defendants as per exhibits **P10** and **P11** respectively.

The plaintiff is now alleging that the 1st defendant and her guarantors and or mortgagors defaulted both facilities by failure to service the loans through monthly instalments. In that respect, the plaintiff is claiming for a declaration that the defendants breached the terms of both facility

agreements, that the 2nd defendant breached the terms of the mortgage deeds, that the 3rd defendant breached the terms of her unlimited personal guarantee, an order against the defendants for payment of **Tshs 695,435,976.24** as of 20th September,2022 and its subsequent interests thereof, an order for payment of interests of 32% per annum from the date of filing the suit to the date of judgment, an order against the defendants for payment of interest at court rate of 12% per annum from the judgment date to the date of satisfaction of the decree, general damages, costs of the suit and any other reliefs.

The defendants in their joint written statement of defence, save for the amount claimed by the plaintiff and the facts alleging default to service the load admitted all other facts. At the final pretrial conference, the parties agreed and the court framed four issues for determination namely;

i) *Whether the first defendant breached the loan facility agreement dated 5/11/2014 and 06/01/2015.*
ii) *Whether the first defendant breached the loan facility agreement dated 23/06/2015.*
iii) *Whether the 2nd and 3rd defendants have breached the terms of unlimited personal guarantee dated 25/06/2015.*
iv) *To what relief the parties are entitle to.*

At the hearing of this suit the plaintiff was represented by Mr. Michael Chahe and M/s Ester Poyo learned advocates. Mr. Isaya Bukakiye Simon stood for himself as the 2nd defendant and for the 1st defendant. The 3rd defendant was absent. I ordered the matter to proceed in the absence of the 3rd Defendant.

The plaintiff had only one witness Yella Hawonga Mwampamba (PW1) who had earlier on filed his witness statement which was adopted to form part of the proceedings as his evidence in chief. He then tendered at total of fifteen (15) exhibits to wit; Loan agreement/Credit facility dated 5th November 2014 as exhibit **P1**, Resolution by the borrower as exhibit **P2**, Lease Agreement dated 6th January 2015 as exhibit **P3**, Loan agreement dated 23rd June 2015 as exhibit **P4**, Resolution by the borrower made on 25th June 2015 as exhibit **P5**, Mortgage deed relating to Plot No. 4 Block "A" MD Mhungula Kahama as exhibit **P6**, Mortgage deed relating to Plot No. 102 Block "U" HD Kahama Urban as exhibit **P7**, Spouse Consent of Stella Raphael Gwiyago as exhibit **P8**, Spouse Consent in relation to Plot No. 102 Block "U" as exhibit **P9**, Unlimited Personal Guarantee by Isaya Simon Bukakiye as exhibit **P10**, Unlimited Personal Guarantee by Stella Raphael Gwiyago as exhibit **P11**, Bank statement of Isaya Agrovert and General Supplies dated

21st September 2022 as exhibit **P12**, Loan statement relating to Business Loan printed on 20th September 2022 as exhibit **P13**, Default Notice as exhibit **P14** and Notice of Default issued to Stella Raphael Gwiyago on 20th May 2022 as exhibit **P15**.

During cross examination PW1 admitted that the first loan was not given in cash to the first defendant but paid to the vehicle supplier and that he doesn't know the purchase price of the vehicle in question. He also admitted that upon default by the 1st defendant to service the first loan, the plaintiff through her recovery personnel seized the vehicle in question and sold it. He could not however know the sale date and the sale price of the vehicle. He only stated that the vehicle was sold in 2016. PW1 further admitted that throughout the process of sale of the said vehicle the 2nd defendant was not involved.

In his defence DW1 Isaya Bukakiye Simon after his witness statement having been duly adopted in the proceedings as his evidence in chief, he tendered the settlement agreement exhibit **D1** to the effect that the Plaintiff's claim in the plaint is not genuine because despite the fact that the settlement deed duly signed by both parties was a one-sided deed yet it demanded the defendants to pay only Tshs. 320,000,000/=.

He also tendered in evidence the court judgment of the Resident Magistrate's Court of Mwanza in respect of Economic Case No. 17 of 2019 exhibit **D2** to the effect that he was once imprisoned, the imprisonment of which frustrated his business affecting the smooth servicing of the loan.

Having heard the evidence of the parties, gone through the pleadings at hand and exhibits tendered, I am now better positioned to determine the issues as here under.

In respect of the first issue as to whether the first defendant breached the 1st loan facility agreement, I determine it in the negative and I will tell why. The first loan agreement entails that the 1st defendant was advanced Tshs 280,615,006.40 for the purposes of purchasing a vehicle. The plaintiff's witness PW1 made it clear that the 1st defendant was not given such loan in cash but the loan money was paid to the supplier of the vehicle. The witness further admitted that the 2nd defendant deposited **Tshs 56,123,001.20** on 08/01/2015 as a top up money to the credit facility for the purchase of the vehicle which he stated that it was bought in dollars which was equivalent to Tanzania shillings three hundred million plus but could not tell the exact price in which the vehicle was bought.

The evidence on record suggests that the purchase price of the vehicle was a secret info between the plaintiff and the so-called supplier. This is because no purchase document of the said vehicle was either attached to the pleadings or even tendered in evidence. PW1 stated in evidence that the loan was deposited in the first defendant's bank account and then transferred to the Supplier of the vehicle. Even the tendered Customer statement exhibit P12 through which the 1st defendant deposited the money allegedly for topping up to the advanced loan for purchasing the vehicle do not speak of anything about vehicle purchase. It does not speak anything about Toyota Tanzania Limited nor it shows that the said Toyota Tanzania received any amount from the Plaintiff for whatever purpose.

We cannot therefore ascertain the purchase price of the vehicle to substantiate the claim that all the money in the credit facility was indeed used for the purchase of the vehicle in question. Since the credit facility was preconditioned that the loan money be paid to the supplier of the vehicle, the first defendant was legally entitled to be fully involved through all processes of choosing the vehicle and bargaining the price. This is because the credit facility preconditioned the joint registration of the vehicle in the names of the 1st defendant and the plaintiff for the purposes of securing

such loan. But PW1 during cross examination admitted that the plaintiff has no document to establish that the defendants were involved in choosing the supplier. He only averred that they had a list of suppliers including Toyota Tanzania and the defendant chose such supplier orally.

I find that the business transactions between the plaintiff and Toyota Tanzania were made to deceive the first defendant who was the beneficiary to the transaction which was to be followed by obligations against him. The principle that when the duties and obligations of someone are to be determined, such person must be accorded the opportunity to be heard, applied to the instant case.

As I have said the purchase price of the vehicle was made secret, the purchase documents have been made secret, and even the Registration card of the vehicle is made secret. It is therefore not even ascertained if really the 1st Defendant was registered as a joint owner. In essence, if that could be the case it could have not been easy for the Plaintiff to sale the vehicle and transfer the same to the third party (purchaser) without the signature and stamp of the first defendant, more so, when PW1 testified that in the joint registration the 1st defendant was the owner and the Plaintiff the holder. How was it possible for the holder to sell the vehicle without the sanction of

the owner? I am made to believe that the defendants were deceived in the transaction. Under the circumstances, we cannot justifiably determine whether the whole sum in the credit facility was really used for the purchase of the vehicle, we cannot even rule out justifiably that after the purchase of the vehicle the 1st defendant was registered as a joint owner with the plaintiff to the ownership of the vehicle.

On the other hand, DW1 gave evidence through his statement at paragraph 9 that when he was in detention, the plaintiff took the vehicle, and sold it without disclosing the sale price. This evidence was not contravened by the plaintiff but materially corroborated by the plaintiff's witness PW1 to the effect that they seized the vehicle from the 2nd defendant through their recovery personnel and sold it. He however failed to tell the court at what price they sold the vehicle.

"I don't recall the price we sold the vehicle."

The vehicle is said to have been bought in 2015 and sold in 2016 but the manner it was sold and the sale price is made secret just as it was made on the purchase price from the supplier.

Under the circumstances, I cannot rule out that the 1st defendant breached the first credit facility. It was the plaintiff who breached it by

deceiving not only the 1st defendant but all the defendants. The vehicle might have been even bought with the money deposited by the 1st defendant without the alleged loan and or bought at a lesser amount to the stated loan. But again, the vehicle might have been sold at a higher price than even the stated loan amount. In fact, PW1 admitted that there is no default notice which was issued to any of the defendants in respect of the first credit facility. I therefore conclude the first issue in the negative.

The second issue is whether the 1st defendant breached the second loan facility. I determine this issue in the affirmative and will tell why down here.

It is undisputed facts and evidence by both parties that the 1st defendant obtained **Tshs. 300,000,000/=** as a loan for additional working capital. It is again in evidence that the 1st defendant paid part of the loan thereof but then seized to service it.

PW1 made it clear that the 1st defendant made several payments although he cannot recall the exact figure of the already paid amount up to the time of default. The 2nd defendant who is also the Director of the 1st Defendant admitted in evidence that they are still indebted to the plaintiff to date and have made several efforts to settle the claim. To that effect he has

tendered the settlement deed exhibit **D1** dated 3rd February 2023 in which the Plaintiff wanted the defendants to pay out Tshs. 320,000,000/= for the debt to be settled altogether.

With this exhibit which was signed by both parties, the defendants are in fact admitting that to date the business capital loan has not been fully repaid. Such alone suffices to conclude that the 1st defendant breached the second credit facility agreement because the same ought to have been settled by 30th June 2018 as per clause no. 4.1 of paragraph 4 to the loan agreement/credit facility exhibit **P4**. The second issue is therefore answered in the affirmative.

The third issue is whether the 2nd and 3rd defendants breached the terms of unlimited personal guarantee dated 25/06/2015. This issue cannot detain me much. The unlimited personal guarantee meant, the 2nd and 3rd defendants committed themselves to liabilities upon the 1st defendant defaulting to service the loan and upon the mortgaged properties did not satisfy the loan and its accrued interests.

In the instant matter the plaintiff did not state whether she tried any how to realize the outstanding loan from the mortgaged securities and whether such securities did not satisfy the outstanding amount. Even the 2nd

defendant was not issued with any notice of default relating to his unlimited personal guarantee in accordance to the evidence on record.

Only the 3rd defendant was issued with such notice on 20/05/2022 almost four years after the due date of when the whole loan was to have been settled. In that respect the 3rd respondent who guaranteed the loan in 2015 and being knowledgeable that the end period of the loan was 30/08/2018 ought to have been notified of the default the soonest.

The long staying mute of the plaintiff for such approximated four years entitled the 3rd defendant to justifiably think nothing wrong happened to the loan she guaranteed. The default notice exhibit **P15** to the 3rd defendant was therefore an afterthought which was made purposely for this suit because between the period of the said notice and the institution of this suit was almost four months.

Therefore, the plaintiff having not attempted to realize the outstanding loan from the mortgaged properties, having not issued the default notice to the 2nd defendant, and having issued the default notice to the 3rd defendant four years after the last loan period, the 2nd and the 3rd defendants cannot be adjudged to have breached the terms of their respective unlimited personal guarantees. The third issue is therefore concluded in the negative.

The last issue relating to the reliefs which the parties are entitled to is determined through the reliefs sought by the parties in their respective pleadings.

The plaintiff has at page 6 of the plaint prayed for a declaration that the 1st defendant breached the two facility agreements. This relief is partly allowed to the extent that the 1st defendant breached the second facility agreement on the reasons already stated herein above. I however reject that the 1st defendant breached the first facility agreement, again, for the stated reasons herein above.

The plaintiff on the same page of the plaint prayed for the relief that the 2nd defendant be declared to have breached terms of mortgage deeds dated 30th June 2015 by failure to honor the default notice issued to him on 12th February 2016. This relief is denied. I cannot declare the 2nd defendant to have defaulted the terms of mortgage deeds because the notice referred supra which is exhibit **P14** was not for the default of mortgage deeds but it was directed to the partners of the 1st defendant for default of the loan facility of Tshs. 300,000,000/= itself. The loan facility or loan agreement and the mortgage deed are two different agreements each with its own conditions. Thus for instance, in the case of ***Austack Alphonce Mushi***

versus Bank of Africa Tanzania Limited and Another, Civil Appeal no. 373 of 2020 the Court of appeal of Tanzania held that although the subscribers of the company might be the daily operators of the company's businesses and at last receives benefits realized from such operations of the company, they would still be strangers to whatever contracts by the company and a third party. In that regard they will have no any legal mandate in their individual capacity to claim anything arising from the contract between their company and a third party nor they would be liable for the term and obligations in that contract.

In that respect breach of the terms of contract by the 1st Defendant does not automatically make the 2nd and 3rd defendants liable for the breach even if they are or were ultimately beneficiaries to the outcomes of the breached loan contract. They are by themselves liable to their own contracts such as the mortgage agreements and the unlimited personal guarantees but as I have said earlier, none breached any.

On record we have no evidence that the 2nd defendant tempered with the mortgage properties or in any manner objected or hindered the plaintiff to exercise her rights in selling the mortgaged properties. The 2nd defendant

surrendered the tittle deeds of the two landed properties to the plaintiff and the plaintiff has not given any evidence establishing any default by the 2nd defendant on any of the obligations under the mortgage deeds exhibits **P6** and **P7** respectively. This relief is therefore not granted.

The relief that the 2nd and 3rd defendants be declared to have breached the terms of unlimited personal guarantees is not granted on the already stated reasons when addressing the 3rd issue.

The plaintiff is also praying for the relief that the defendants be ordered to pay the default amount to the tune of **Tshs. 695,435,976.24** as of the 20th September 2022. This relief will be allowed to only a part of it. According to the evidence on record this amount includes the alleged default of the two loan facilities and their respective accrued interest as of 20th September 2022. I have already dismissed the claims in the first loan facility for the reasons already stated supra.

The first credit facility having been rejected or denied in this judgment, its accrued interest is as well rejected. Therefore, the claimed amount of Tshs. 695,435,976.24 having included the default principal sum in both facilities and their respective accrued interests cannot be granted as a whole.

Only the second credit/loan and its accrued interest can be justifiably demanded/claimed and be justifiably granted.

In that regard only the principal sum is payable to the plaintiff against the defendants jointly and or severally. The outstanding principal amount in accordance to exhibit **P15** the demand notice to the 3rd defendant is **Tshs. 281,319,435.01.** I therefore decree this amount to the plaintiff against the defendants. Although such demand purports to state that such amount is a principal amount but reading carefully the 1st defendant's customer statement exhibit **P13**, such amount includes the principal loan, the interests thereof, the penalty interest for delay and loan recovery charges as of 20th September, 2022. Therefore, by granting such amount, not only the interests on the loan business is as well automatically granted but also other charges stated above.

Despite of granting interests up to 20th September, 2022 as stated above, I feel it imperative to demonstrate a bit the trend of the plaintiff as a financial institution to unreasonably delay to realize the loan on time from the securities mortgaged for that purpose. It is both the law and practice that once the borrower defaults the loan, the mortgagee is entitled to automatic realization of the outstanding debt and its accrued interests from

the collaterals. In this instant matter, it is on record that the loan was advanced on 31st July 2015 as per exhibit P13 and the default started just few months later on the same year and continued in 2016 and on the subsequent years. That is why exhibit P13 supra indicates even penal amounts and recovery charges from the very year of the loan.

In an untold manner and reason, the plaintiff did not attempt to realize her outstanding debt and its accrued interest at the soonest time after the default nor has she given any evidence as to whether the mortgagor stood as an obstacle to such realization. The plaintiff issued the default notice to the 1st defendant on 12/02/2016 just six months after the advancement of the loan. Had she made any effort to realize the outstanding debt after the expiring of the 60 days default notice, the accrued interests could have been mitigated at the lowest amount as against the interests by 20th September, 2022 and of by today almost eight years later after the default.

In the cases of ***General Tire East Africa Limited vs HSBC PLC (2006) TLR 60*** and ***Yusuph Mwita Marwa vs NMB Bank and Another, Land Case No. 9 of 2017***, it was held that the mortgagee is entitled to enforce the security where there are no triable issues. See also ***Ndabaka Lodge Company Limited vs TIB Development Bank Limited and 2***

others, Land Case No. 7 of 2019, High Court at Shinyanga in which it was held that selling the mortgaged property by the mortgagee is legally justified because the property is mortgaged for the purpose of being sold by the mortgagee or her agents for realization of the loan in question in case of any default to repay such loan.

I cannot therefore see any justification for the plaintiff to have not exercised such right for the period of almost eight years after the default causing the debt to go extremely higher to the extent of superseding the value of the collaterals as evaluated at the time of the mortgage. That for instance, the plaintiff herself pleaded in the plaint at paragraph 11 and 12 respectively that the first security plot no. 4 supra by the time of mortgage was had the value of **Tshs. 375,000,000/=** and the second security plot no. 102 supra had the value of **Tshs. 200,000,000/=.** The two securities thus had a higher value than the loan itself and only one of the securities could realize the whole loan and its accrued interests had it been enforced at the soonest period of the default.

It is thus the firm finding of this court that failure of the mortgagee to exercise the rights to sell the mortgaged properties in accordance to the law to realize the defaulted sum and its accrued interests soon after the expiry

of the default notice, will be estopped from claiming further interests on the defaulted sum for any subsequent period unless it is proved in evidence that the borrower or the mortgagor stood as an obstacle or hindrance to the execution of such rights of the mortgagee to realize the outstanding balance from the mortgaged properties.

It is quite unfair for the financial institution to wait for debt to go extremely higher to unspecified period making it higher and higher than the value of the mortgaged properties. That would not be facilitation of the poor to overcome poverty and the entrepreneurs to raise up their capital but pulling the poor into the deep poverty and the entrepreneurs into poverty. It is in this regard I don't see any justification to grant the interest on default as from the 21st September, 2022 and any such other period subsequent thereto.

The plaintiff has also claimed for interest of 32% per annum of the claimed amount from the date of filing this suit to the date of judgment. This relief is denied because the matter has been delayed in court for reasons occasioned by both parties when they at several times moved the court to adjourn the matter on the ground that they intended to settle the matter out of court. I thus do not see any justification to condemn one of them on

interests for the period the matter has been pending in court up to the date of this judgment.

In respect of interest at court rate of 12% of the amount claimed from the date of judgment to the date of satisfaction of the decree, I grant only 7% of the decretal sum. This interest rate shall however be chargeable after an expiry of one month from the date of this judgment if the defendants shall have not been paid the decretal sum in full to the plaintiff. In that respect the defendants are given one-month grace period to pay the decretal sum without any interests. After such period and if payment is not yet made, the plaintiff shall be at liberty to auction the collaterals at the very fair and legal auction.

The plaintiff then prayed as well for general damages. In the circumstances of this matter, I find it equitable to allow this relief. The defendants are condemned general damages to the tune of Tshs. 7,000,000/= in favour of the plaintiff.

The defendants on their part claimed for several reliefs most of which have already been determined herein above which relates to the prayers for declaration that there was no breach to the first loan facility, the second loan

facility, the terms of mortgage deeds and the terms of unlimited personal guarantees.

The defendants further prayed that this court declare them to have already paid to the plaintiff Tshs. 250,000,000/=. Unfortunately, this relief was not covered in the defence evidence to subject the same to be cross examined by the plaintiff. I cannot therefore declare the defendants to have paid such amount despite the fact that PW1 admitted during cross examination that the defendants up to the time of default had already paid some amount to the plaintiff. This witness however could not recall the exact figure paid by the defendants;

> *"I have no exact figure of the amount you have already paid up to the time of default. It is not true that you didn't pay anything to the loan."*

In that regard both parties did not establish the exact figure paid by the 1st defendant to the plaintiff. We have therefore no base to declare payment of Tshs 250,000,000/= as prayed by the defendants.

The claim of specific damages to the tune of Tshs 20,000,000/= has not been established by the defendants and thus rejected. For the prayer of any other relief that which the court may deem fit to grant, I find it equitable,

fair and justifiable to order the plaintiff to return back to the 1st defendant **Tshs 56,123,001.20** she entrusted her so as to top up the 1st loan facility for the purposes of buying the vehicle.

Since I have already determined supra that the whole process of buying the said vehicle, the purchase price and even its subsequent sale price has been made secret by the plaintiff not only against the defendants but also to this court, and in the absence of the purchase receipt or agreement showing that the 1st defendant's money above was spent for the intended purpose, the same is due payable back to its owner. I therefore order the plaintiff to reimburse the 1st defendant such amount of money. For that reason, the defendant is entitled to general damages to the tune of **Tshs 5,000,000/=** against the plaintiff for screwing her into the vehicle business deceitfully thereby gaining the 1st defendant's money which has not been sufficiently account for.

The defendant's decretal sum supra plus the granted general damages shall be settled off from the plaintiff's decretal amount. In that respect, the amounts payable to the plaintiff by the defendants is Tshs 227,196,433.81.

In relation to the costs of the suit as claimed by both parties, I find it justifiable to refrain from granting this relief to either party. I have several

reasons for such denial. One, the plaintiff in instituting this case exaggerated the claims in the plaint which attracted the filing fees to be **Tshs 10,260,000/=.** Her claims having not been wholly granted, if I grant her costs, the defendants shall suffer to refund this amount which resulted from an exaggerated claim beyond their control to have made the plaintiff present in court only such genuine claims which would have attracted less filing fee.

Two, the defendants were subjected to deceitful business relating to the vehicle and the proceeds of the vehicle after its sale to a third party has not been made known. The defendants cannot thus be condemned costs on top of secret proceeds which they ought to have known. Three, the defendants are also denied costs of the suit because it has been established at least that indeed the terms of the second loan facility were breached.

This suit is thus allowed to the extent herein above decreed. The right of appeal is here by explained to the parties.

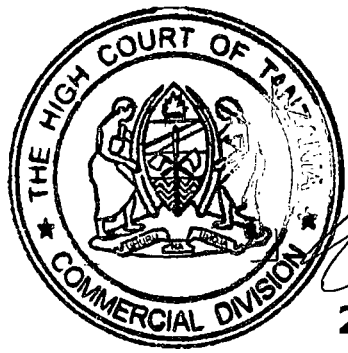
It is so ordered.

MATUMA

JUDGE

27/10/2023

Court; Judgment delivered in the presence of Mr. Michael Chahe learned advocate for the plaintiff and in the presence of the 2nd defendant in person and advocate Athumani Athumani for all defendants.



MATUMA

JUDGE

27/10/2023