

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

AT DAR ES SALAAM

COMMERCIAL CASE NO. 120 OF 2013

BETWEEN

TANZANIA AZIMIO CONSTRUCTION

COMPANY LIMITED PLAINTIFF

VERSUS

CRDB BANK LIMITED DEFENDANT

JUDGMENT

A.A. MBAGWA, J

The plaintiff, **TANZANIA AZIMIO CONSTRUCTION COMPANY LIMITED**, by way of a plaint, instituted this suit praying for judgment and decree against the defendants as follows;

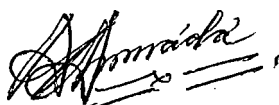
- i) Defendant pays a principal sum of Tshs. 85,666,289.07
- ii) Defendant hands over the certificate of title No. 3136 comprised in Plot No. 181, Block Q to the plaintiff.



- iii) Defendant pays interest of the principal amount in (i) above at the bank rate of 18% per annum counted from the due date provided in the first demand letter of the plaintiff, to the date of judgment.
- iv) Defendant to pay interest on the decretal sum at the court's rate of 12% per annum from the date of judgment to the date of payment
- v) Defendant pays to the plaintiff the general damages as pleaded in paragraph 7
- vi) Costs
- vii) Any other and further orders as this honorable court deems just and equitable.

Upon service, the defendant filed a written statement of defence along with a counter claim disputing all claims by the plaintiff. In the counter claim, the defendant claimed that that plaintiff was indebted to the defendant to a tune of Tshs. 53, 357,679.72 as of 15th August, 2012. Further, the defendant denied to have supervised and or advised the sale of equipment for purposes of liquidating loan. Eventually the defendant through a counter claim prayed for judgement and decree in the following orders namely; -

- i) Payment of Tshs. 53,357,679.72 being outstanding on the plaintiff's account with the defendant unpaid as at 15th August, 2013.

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- ii) Interest at 17% per annum of the Tshs. 53, 357, 679.72 from 15th August, 2013 to the date of full payment
- iii) Interest at the sum above at commercial rate of 22% from the date of filing the counter claim to the date of judgment
- iv) Interest on the decretal sum at court's rate of 12% from the date of judgment till the full payment of the decretal sum.
- v) Costs of the counter claim
- vi) Any other relief that the honorable court may deem fit to grant

In order to appreciate the case of which decision is about to be made, I find it apt to give brief facts leading to institution of this suit. According to the pleadings, the plaintiff and defendant had customer-banker relationship through which the plaintiff, Tanzania Azimio Construction Company applied for and was granted a term loan and overdraft facility by the defendant. It was averred that, on 17th October, 2002, the plaintiff was granted term loan to a tune of Tshs. 163,210,758.98 and overdraft facility to the limit of Tshs. 40,000,000/= by the defendant. The term loan money was intended for purchase of equipment (machines). As security for the said facilities, two houses of the plaintiff and the machines which were bought by using the money under the term loan facility were used to secure the loan. It was the



plaintiff case that, sometimes in 2007 before expiry of the term loan, the defendant advised the plaintiff to dispose of the equipment (machines) procured through a term loan facility for the purpose of liquidating the outstanding loan amount. Following that advise, plaintiff sold its machines and the proceeds thereof amounting to Tshs. 120,000,000/= was realised and subsequently deposited into the plaintiff's bank account on 6th September, 2007. As such, the whole outstanding amount was liquidated. However, the defendant continued to withhold one certificate of title. It was against that background plaintiff instituted the instant suit claiming for payments of Tshs 85,666,289.07 being the money paid by the plaintiff in excess.

Upon service, defendant filed written statement of defence and simultaneously raised counter claim disputing plaintiff's claim and prayed for the payment of the outstanding loan amount. Nonetheless, the said counter claim was dismissed for want of prosecution by this court (Hon. Mruma J) on 28th day of June, 2018 when the main suit (plaint) was pending in the Court of Appeal at Dar es Salaam via Civil Appeal No. 94 of 2015. Upon the determination of Civil Appeal No. 94 of 2015 through the ruling dated 16th March, 2019, the court allowed the plaintiff to file witness statements as



such, the case file was remitted to this court for continuation of hearing and finally determination. Thus, by the time the case file was brought back to this court, the counter claim was no longer existing. It is for this reason, this judgment involves determination of claims contained in the plaint only.

Before commencement of hearing, this court, with consensus of the parties, on 4th April, 2022, framed the following issues for determination;

1. What was the sum advanced to the plaintiff by the defendant as term loan and overdraft.
2. What was the sum paid by the plaintiff to the defendant in liquidation of the term loan and overdraft advanced.
3. Whether under the circumstances, the defendant had a right to withhold the plaintiff's title mortgaged as security for the term loan and overdraft.
4. To what reliefs are parties entitled.

At the hearing, the plaintiff was represented by Jamhuri Johnson, learned advocate whilst the defendant had services of Mpale Mpoki and Emma Mwasakyeni, learned advocates.



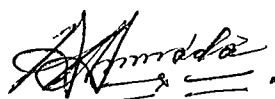
In a bid to prove the claims, the plaintiff brought one witness namely, Allan Dominic Mwoleka (PW1) along with several documentary exhibits which were admitted and marked as exhibit P1 to P20. In brief, the plaintiff's case was that on 17th October, 2002 the plaintiff and defendant, CRDB Bank Limited entered into loan agreement in which the defendant advanced to the plaintiff a term loan of Tanzanian shillings One Hundred Sixty-Three million, Two Hundred Ten Thousand, Seven Hundred Fifty-Eight and Ninety-Eight Cents (Tshs. 163, 210, 758.98) and an overdraft facility of Tanzanian shillings forty million (Tshs. 40,000,000/=) making the total loan amount to Tshs. 203, 210, 758.98 say Tanzanian shillings Two Hundred and Three million Two Hundred Ten Thousand Seven Hundred Fifty-Eight and Ninety-Eight cents .

It was the testimony of PW1 that the term loan was for purchase of back hoe loader, soil compactor, motor grader, two Dong Feng tippers and motor bike. Mwoleka expounded that the term loan money was used to purchase motor grader from M/S Gailey Roberts at Tshs. 127,000,000/=, two tippers and one motor bike from M/S Africarriers LTD at 27,720,000/=, and payment for transport and insurance costs at Tshs. 8, 490, 758.98 which made a total of Tshs. 163, 210, 758.98. The loan period was seventy-two (72) months



that is to say from 1st December, 2002 to 31st November, 2008. However, before the expiry of the loan period, sometimes in September, 2007, the defendant advised the plaintiff to dispose of the machines which were purchased by using term loan money in order to liquidate the outstanding loan amount. Thus, the defendant's officials supervised the sale exercise of the machines from which a total of Tshs. 120,000,000/= was realized and the same was used to settle the outstanding loan amount.

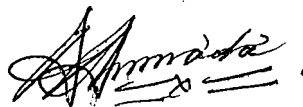
It was further the testimony of PW1 that, the said loan was secured by three certificates of title notably, No. 3136 for Plot No. 101 Block Q, along New Bus Stand, No. 22157 for Plot No. 97 Block Q Shinyanga and No. 1441 for Plot No. 172 Block Q. Upon settlement of the loan, two certificates were returned whilst the defendant continued to withhold one certificate No. 3136 for Plot No. 101 Block Q, along New Bus Stand. Moreso, despite settlement of the full loan amount, the defendant continued to demand further payments from the plaintiff as a result the plaintiff deposited another Tanzanian shilling Eighteen Million, Five Hundred Twenty-Nine, Two Hundred Seventy-Five and Four Cents (Tshs. 18, 529, 275.04). It was the testimony of PW1 that on 29th June, 2009, the defendant informed the plaintiff that there was still an outstanding amount of Tanzania shillings



Thirty-Three Million (Tshs. 33,000,000/=). Consequently, the plaintiff decided to carry out a reconciliation exercise which, in turn, revealed that the plaintiff was no longer indebted to the defendant rather there was excess payment of Tanzanian shillings Thirty-Seven Million Eight Hundred Ninety-Seven Thousand, Five Hundred Ninety-Two and Three Cents (Tshs. 37, 897, 592.03).

In proving the plaintiff's claims, PW1 tendered several exhibits including approval letter of loan facility as exhibit (P1), term loan agreement as exhibit (P2), invoices as exhibit (P3 and P4) respectively, loan repayment schedule as exhibit (P5), bank statement for account No. 01J/10/583427/00 as exhibit (P6), deposit slips for repayment of loan as exhibits (P11,12 and 13) respectively, reconciliation statement in respect of loan transactions as exhibit (P14), plaintiff's dispatch book as exhibit (P19), plaintiff's visitor's book as exhibit (P17) and various correspondences between the plaintiff and the defendant. On that note, PW1 prayed that this suit be allowed as prayed in the plaint. This marked the end of plaintiff case.

On the contrary, the defendant fended its case through Mr. Luther Mneney, Branch Manager, CRDB Shinyanga (DW1) who stood as a solo defendant's witness. DW1 stated through his witness statement that the defendant



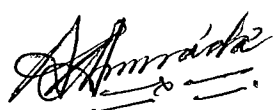
advanced to the plaintiff a total amount of Tanzanian shillings Two Hundred Forty-Three Million, Seven Hundred Eighteen Thousand, Eight Hundred (Tshs, 243, 718, 800/=). It was further stated that after disposal of the equipment and deposit of Tshs 120,000,000/= into the plaintiff's account, there remained an outstanding balance of Tshs 53, 357, 679.72. During cross examination, DW1 admitted that the term loan money was not directly disbursed to the plaintiff's account rather it was paid directly to the suppliers namely, M/S Gailey Roberts and M/S Africarriers Ltd. In further cross examination, the defendant's witness agreed that according to the invoices only Tshs. 163,000,000 was paid in respect of purchase of equipment and that the equipment was registered in the name of the customer/plaintiff and the defendant because they were part of collaterals to the loan.

DW1 further stated that, the plaintiff had three accounts to wit, No. 01602584342700 for principal amount of the term loan, No. 0160058342700 for interest accruing from the term loan and No. 01J1058342700 which the plaintiff was using for daily bank transactions. Nonetheless, DW1 did not tender the bank statements in respect of the three mentioned accounts. On the basis of his evidence, DW1 prayed for the dismissal of plaintiff case with costs and this marked the end of defendant case.



The learned advocates for parties prayed for and were allowed to file final submissions pursuant to rule 66(1) of the High Court (Commercial Division) Rules, G.N.250 as amended by G.N. 107 of 2019. I have had time to go through the rivaling submissions, and I commend both counsel for their industrious inputs on the matter. Mr. Jamhuri Johnson, learned advocate for the plaintiff, strongly submitted that, the plaintiff's claims were sufficiently proved because the only bank statement that was tendered in evidence was for account No. 01J/10/58342700 (exhibit P6). Expounding on exhibit P6, the learned counsel for plaintiff submitted that, the bank statement (exhibit P6), was reading 00.00 balance as of 7th September, 2007. In the learned counsel's view, the balance of 00.00 connotes that the outstanding debt was fully liquidated. He thus concluded that continual withholding of certificate of title by the defendant is illegal. Furthermore, Mr. Jamhuri Johnson submitted that DW1 admitted that it is only Tshs. 203,210,758.98 which was disbursed to the plaintiff and not Tshs. 243, 718, 800/=.

In rebuttal, the defendant's counsel submitted that the plaintiff's case was not proved. He elaborated that the reading of 00.00 balance in the account



bank statement (exhibit P6) does not mean that the debt was liquidated rather it was an internal mechanism of writing off the debt which does not exonerate the plaintiff from repayment liabilities. To fathom his submission, the defendant's counsel cited the case of **National Bank of Commerce Limited vs Stephen Kyando**, Civil Appeal No. 162 of 2019, CAT at Dar es Salaam. The learned counsel added that the plaintiff failed to prove that she is entitled to a sum of (Tshs. 85, 666, 298.07) say Tanzanian shillings Eight Five million, Six Hundred Sixty-Six Thousand, Two Hundred Ninety-Eight and Seven Cents above the outstanding of Tshs. Twenty-Nine million, Nine Hundred Sixty-Five Thousand, Two Hundred and Nine and Thirty-Four Cents (Tshs. 29, 965, 209.34) as excess payment. He concluded that much as the loan had not been liquidated, the defendant has the right to withhold the certificate of title.

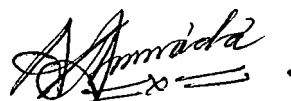
Having narrated the evidence adduced by both parties together with the rival submissions though in a nutshell, I now proceed to determine the issues framed.

The 1st issue was couched that, what was the sum advanced to the plaintiff by the defendant as term loan and overdraft. The plaintiff, through PW1 testified that although she applied for a loan of Tshs 243,000,000/=, she



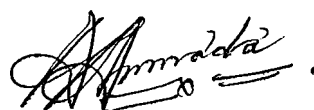
was advanced a total of Tshs. 203, 210, 758.98 only comprising the term loan and overdraft facility. PW1 said that the term loan consisted of purchase price of motor grader from M/S Gailey Roberts at Tshs 127,000,000/=, two tippers and one motor bike from M/S Africarriers Ltd. at 27,720,000/=, transport and insurance costs to a tune of Tshs 8, 490, 758.98 which made a total of Tshs 163, 210, 758.98 plus Tshs. 40,000,000/= being overdraft facility. To buttress its assertion, the plaintiff tendered an approval letter of loan facility of Tshs 243 million (**exhibit P1**), loan agreement dated 17th October, 2002 (**exhibit P2**) and invoices from M/S Gailey and Roberts and Africarriers Limited which were admitted and marked exhibits **P3 and P4** respectively. This aspect was also conceded to by the defendant's witness during cross examination though in his witness statement he mentioned Tshs 243, 718,000.

I have keenly scanned the provisions of the loan agreement (exhibit P2). It is very clear at page 1 under clause 1 that the loaned money under the term loan was (Tshs. 203, 718,000/=) say Tanzanian shillings Two Hundred and Three Million Seven Hundred Eighteen Thousand. Furthermore, the invoice from Gailey and Roberts (P3) shows the purchase price of Tshs 129,600,000/= though it is dated 19th November, 2003, i.e., one year after



the signing of the loan agreement whereas the invoice from Africarries indicates the purchase price of Tshs 36,960,000/= and it is dated 9/08/2002, which is two months before the loan agreement (P2) was signed. The amount in the two invoices alone makes a total of Tshs 166,560,000/= which is different from what the plaintiff is claiming. These three exhibits were tendered by the plaintiff but they are self-contradictory and speak against the plaintiff's version that the total loan amount advanced to the plaintiff was Tshs. 203, 210, 758.98. This is because the amount in the two invoices i.e., Tshs 166,560,000/= plus Tsh 40,000,000/= of undisputed overdraft facility makes a total of Tshs 206,560,000/= which is above the amount stated by the plaintiff.

Besides, the invoices that is exhibits P3 and P4 are doubtful and therefore unreliable for the reasons which shall be apparent shortly. Exhibit P4 is dated 9/08/2002 which is two month period before loan agreement was signed whereas exhibit P3 is dated 19 November, 2003, a year after the loan agreement was signed. Further, the plaintiff could not bring evidence to prove that these invoices are the ones which were submitted to the defendant and acted upon. The plaintiff also failed to produce proof of payments made by the defendant to Gailey & Roberts and Africarries

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Limited for purchase of equipment. It has to be noted that invoices are not proof of payment. See **Ami Tanzania Limited vs Prosper Joseph Msele**, Civil Appeal No. 159 of 2020, CAT at Dar es Salaam and **Box Board Tanzania Limited vs Mount Meru Limited**, Civil Case No. 8 of 2016, HC at Arusha. In **Ami Tanzania Limited** (supra), the Court of Appeal had the following to say at page 16;

'We are of the similar view that, in absence of receipts, bank transfer of money or letters of credits by the respondent to the supplier of the cargo, the invoice cannot be taken to be the proof of payment as it was a mere advice of the amount to be paid, it was a mere bill'

Since the invoices are not proof of payment and given that the loan money was directly disbursed to the suppliers, the plaintiff was duty bound at least to produce proof of payment to the suppliers namely, Gailey & Roberts and Africarriers Limited such as bank statement, transfer forms or TISS messages to substantiate its allegations on the disbursed amount. In absence of such evidence, no way it can be conclusively determined in favour of the plaintiff because she opted not to call any supplier or tender the record to support the claim that total loaned money was TZS.203,210,758, a fact which was seriously disputed by the defendant. The plaintiff left the claim hanging on its part. It is worth noting that the onus of proof lies to the party who alleges.

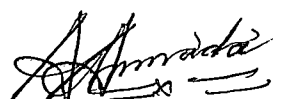
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The provision of Section 110(1) and (2) of Tanzania Evidence Act, [Cap 6 R: E 2019] provides that: -

'Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of a facts which he asserts must prove that those facts exist'.

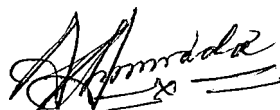
The same legal position has been restated by the Court of Appeal of Tanzania in several cases including **Wolfango Dourado vs Tito Da Costa**, Civil Appeal No. 102 of 2002, CAT at Zanzibar and the case of **The Registered Trustees of Joy in the Harvest vs Hamza K. Sungura**, Civil Appeal No. 149 of 2017, CAT at Tabora where the court insisted that; "Whoever alleges a fact, unless it is unequivocally admitted by the adversary has to prove it, albeit on the balance of probability. Guided by the above cited legal principle It necessarily follows that, a burden of proof of payment to suppliers raised in the plaint, lies on the plaintiff".

It was stated by the defendant that the plaintiff had three accounts to wit, No. 01602584342700 for principal amount of the term loan, 0160058342700 for interest accruing from the term loan and No. 01J1058342700 which the plaintiff was using for daily bank transactions. The plaintiff, on its part, tendered only one account bank statement (exhibit P6) purporting to show

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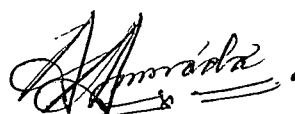
that the debt was fully liquidated. However, according to the deposit slips, exhibits P11, 12 and 13, the money for loan repayment was being deposited into different accounts from exhibit P6. This tells it all that the plaintiff wanted to mislead the court that the loan repayments were being made into account No. 01J/10/583427/00 (exhibit P6), a fact which is not true. Thus, it cannot be said with certainty that plaintiff discharged his obligation of proving that the total disbursed amount was Tshs. 203,210,758 because the contents of exhibit P1 are loud and clear that the defendant approved loan facility of Tshs. 243 million comprising Tshs. 203, 718,000 for term loan and Tshs. 40,000,000/= for overdraft. And following this approval, on 17th October, 2002, the plaintiff and defendant signed a term loan of Tshs. 203, 718,000/=.

Under the circumstances, it is my findings the plaintiff failed to establish, on balance of probabilities, that the total loan amount advanced by the defendant was Tshs. 203, 210, 758.98= . Instead, I am of the firm view that the defendant advanced at total of Tshs. 243, 718,000 comprising term loan and overdraft facility as indicated in the term loan agreement (P2) and approval of loan facility (P1).



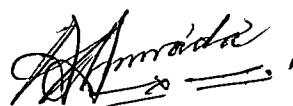
The 2nd issue was what was the sum paid by the plaintiff to the defendant in liquidation of the term loan and overdraft advanced. It is undisputed throughout the evidence that on 6th September, 2007 the plaintiff's machines were disposed of and a sum of Tshs. 120,000,000/= was realized to settle the outstanding debt. The plaintiff stated that the deposit of Tshs. 120,000,000/= fully liquidated the entire outstanding debt whereas the defendant stated that after deposit of Tshs. 120,000,000/= there remained a certain outstanding amount. The plaintiff relied on the transaction dated 7th September, 2007 appearing in the account bank statement (exhibit P6) which indicates zero balance. However, the plaintiff could not tell this court what was outstanding debt amount before deposit of Tshs 120, 000,000/=.

The plaintiff only tendered three bank slips namely, exhibit P11 dated 07/05/2007 for Tanzania Shillings Four Million (Tshs, 4,000,000/=), exhibit P12 dated 05/08/2006 for Tanzanian Shillings Ten Million (Tshs 10,000,000/=) and exhibit P13 dated 02/08/2006 for Tanzanian Shillings Fifteen Million, Two Hundred Thirty-Nine Thousand, Four Hundred Seventeen and Twenty-Nine Cents (Tshs. 15,239,417. 29/=). According to exhibits P11, 12 and 13, the plaintiff was depositing money for repayment of loan into account Nos. 0161058342700 and 0162058342700 and not

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account No. 01J/10/583427/00 which is indicated in the bank statement (exhibit P6). This explains that exhibit P6 is not a relevant and reliable piece of evidence to show the loan amount that the plaintiff owed the defendant nor can it be used to prove the repayment trend thereof. In addition to that, the argument that plaintiff is not indebted to defendant because exhibit P6 reads zero balance, with due respect to learned counsel for plaintiff, was raised out of ignorance because it appears that plaintiff was not aware that writing off debts in the plaintiff bank account to read zero cent was just a mere accounting procedure which is allowed by the Bank of Tanzania which requires write off of bad debt. As such, what is indicated on exhibit P6 does not mean that plaintiff has discharged his liability. In the case of **National Bank of Commerce vs Universal Electronics and Hardware & 2 Others [TLR] 2005 at page 258**, the court held that: -

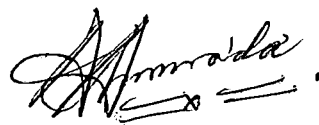
"The writing off debt was just mechanism intended to clear bank books but not to discharge debtors from liability, it was an exercise allowed by the bank deadline vide GN 39 of 2001 proving debt or loss write off but they do not discharge customer liabilities"

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Cognizant of the above authority, it is worth noting that what is indicated in exhibit P6 is an internal procedure of the Bank and does not mean that the debt was liquidated.

Moreso, the account numbers indicated in exhibits P11, P12 and P13 support the evidence of DW1 who testified that the plaintiff had three accounts to wit, No. 01602584342700 for principal amount of term loan, No. 0160058342700 for interest accruing from the term loan and No. 01J1058342700 which the plaintiff was using for daily bank transactions. From the above observation, it goes without saying that the plaintiff failed to prove the sum she paid to liquidate the outstanding debt. Consequently, this court cannot agree with the plaintiff that the debt amount was fully liquidated as of 6th September, 2007.

The 3rd issue is whether under the circumstances, the defendant had a right to withhold the plaintiff's title which was mortgaged as security for the term loan and overdraft. Following what I have decided in the second issue namely, that the plaintiff has failed to establish that the loan amount was fully liquidated, it is my considered opinion that that the defendant is legally entitled to withhold the plaintiff's certificate of title which was mortgaged for the term loan and overdraft facilities for there still outstanding loan amount.

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The 4th issue relates to reliefs which parties are entitled to. As deliberated herein above, the plaintiff failed to prove that the loan amount advanced was Tshs. 203, 210, 758.98 and not Tshs. 243,000,000/=. She also failed to prove that the said loan was fully liquidated. Consequently, I am inclined to hold that the plaintiff has failed to prove the case on the balance of probabilities, the consequence of which is to dismiss it with costs.

Thus, I hereby dismiss the suit with costs.

It is so ordered.

The right of appeal is explained.




A.A. Mbagwa

JUDGE

16/03/2023