

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO.63 OF 2020

AMALY MEHTA1st PLAINTIFF

AMALY INVESTMENT COMPANY LIMITED.....2ND PLAINTIFF

VERSUS

EQUITY BANK TANZANIA

LIMITED.....DEFENDANT

EX PARTE JUDGEMENT

29th October & 5th November, 2021

MKWIZU, J

This case arises from a credit facility agreement between the 2nd plaintiff and defendant. According to the plaint, 2nd plaintiff had acquired a loan facility of 400,000,000/= as finance working capital requirements of forex business line from the defendant which was supposed to be repaid within sixty (60) months in monthly instalments of Tshs 10, 579,554/= interests charged at twenty percent (20%) inclusive.

Four securities were executed in favour of the defendant, Equity Bank (Tz) Limited. One, is a mortgage over a residential property located on Plot No 55 Bloc D, Shariff Shamba area, Dar es salaam in the name of Amaly Mehta with Title deed No. 57443 L.O No. 334758 in full payment of the whole outstanding amount in respect to the obtained credit facility ; individual guarantee from the 1st Defendant Amaly Mehta for Tanzanian Shillings

four Hundred Million (TZS 400,000,000/=); Director's guarantee from the 1st plaintiff and another person not party of these proceedings named Monica Raphael Kisuma again for Tanzanian Shillings four Hundred Million (TZS 400,000,000/=) and lastly a Debenture by Amaly Investment Company Limited for unspecified amount not exceeding the credit facility amount .

On the process of servicing the loan, on 27th February, 2019, the 2nd plaintiff's Bureau de change business which was one of the plaintiff's sources of income was closed by the government pending investigation. On that state of affairs and in need to generate income to service the loan, 2nd plaintiff lodged several requests with the defendant namely suspension of the loan repayment this was via a letter dated 9/4/2019; restructuring of the outstanding loan payment amount to be repaid at 4 million per month instead of the initial agreed amount and an overdraft to boost its capital. Defendant did not respond to the above requests instead she on 12/6/2019 served the 1st plaintiff with a notice of default for repayment of Tshs. **352,162,378.00/=** being the outstanding amount as at 27th May 2019 to be cleared withing sixty (60) days from the date of the notice or else the Bank shall exercise her right on the mortgaged property.

In view of contesting the move taken by the defendant, on 9th April 2020 plaintiff filed a case against the defendant seeking *inter alia* for a declaration that the notice of default issued to the plaintiffs were premature and null and void, therefore the 2nd plaintiff be allowed to continue servicing its loan; perpetual injunction be issued restraining the defendant, its agent workmen

and or servant from attaching and or disposing off the properties on Plot No 55/D Shariff Shamba with Title No 57443; Ilala Dar es salaam in any manner; general damages and costs of the suit.

Defendants written statement of defence came with a specific denial of all enumerated claims in the plaint. He also filed, through her WSD, a counter claim against the plaintiffs jointly and severally for *inter alia*;

- a) Payment of 352,162,378.00 /=,
- b) Payment of interest at commercial rate of 24% per annual on the principal sum
- c) Payment of interest on the decretal amount at court's rate from the date of judgement to the date of fully payment,
- d) Declaration that plaintiffs are in a breach of credit facility as constituted in the Banking Facility Letter dated 16th November, 2017 thus defendant (plaintiff in the counter claim) is entitled to the realize the mortgage under the Landed property on Plot No 55 Block D located at Shariff Shamba Area, Dar es salaam with certificate of Title No. 57443 L.O No. 226961
- e) An order to enforce personal guarantee executed by the 1st defendant (1st plaintiff in the main suit),
- f) An order for enforcement of the Debenture created by the 2nd defendant (original 2nd plaintiff),
- g) costs of the suit.

All along, the plaintiffs were represented by Mr. Hendry Kishaluli, the learned counsel and defendant had the services of Mr. Zunia'el Kazungu, also learned

counsel. Before commencement of the hearing, the following issues were framed.

- 1) Whether the plaintiffs are indebted to the defendant to the tune of 352,162,378=Tsh
- 2) Whether the default notice issued on 27th May 2019 was valid
- 3) To what reliefs are the parties entitled to.

When the matter came for hearing on 29/10/2021, neither plaintiff nor his advocate who were all aware of the hearing date appeared in court. The plaint was for that reason dismissed for want of prosecution and the counter claim was ordered to proceed *ex parte*, hence this *ex-parte* decision in respect of the counter claim whose parties are **EQUITY BANK (TANZANIA) LIMITED, the PLAINTIFF** and **AMALY MEHTA and AMALY INVESTMENT COMPANY LIMITED, First and second defendant** respectively. However, to avoid confusion I will refer the parties by their original Titles appearing in the dismissed plaint.

Proof of the counter claim was by a single witness, MR. JOHN MOLGENCY NDUNGURU who testified as PW1. His testimony was simple and clear. He said, the Bank offered and approved in favour of the 2nd plaintiff(2nd defendant in the counter claim) credit facility amounting to Tanzania Shillings four hundred Million only (Tshs. 400,000,000/=) a capital to his general merchandise business. The credit facility was executed through a Credit Facility Letter dated 16th November, 2017 which was to be repaid in 60 months plus 20% interest at an installment of 10,597554/= paid on every 25th date of the month. The Credit Facility Letter was admitted as Exhibit P1

PW1 said, the said facility was secured by: mortgage over a residential property located on Plot No 55 Bloc D, Shariff Shamba area, Dar es salaam in the name of Amaly Mehta with Title deed No. 57443 L.O No. 334758; an individual guarantee from Amaly Mehta; Director's guarantee from Amaly Mehta and Monica Raphael Kisuma and a Debenture by Amaly Investment Company Limited. The securities deeds were tendered and admitted as Exhibit P4, P5, P6 and P7 respectively

PW1 further testified that, the Bank disbursed the money to Amaly Investment Company Limited account on 3/1/2018. He tendered in court a Bank statement which was admitted as exhibit P2. Speaking of the details of the Bank statement (exhibit P2) PW1 said, the borrower, Amaly Investment Company limited managed to repay the loan for 14 months only out of the agreed 60 installments. That is from 25/1/2018 to 25/1/2019. Things changed from February 2019 where the payment was done in portions. Giving clarification on this he said, on 25/2/2019, the borrower (2nd defendant in the counter claim) deposited in his account 577,688/ Tsh and the rest of the amount of 10,026,389/= was paid on 28/2/2019. On 25/3/2019, Tsh 473,613 was paid and no payment were made in April and May, 2019. This led to service to Amaly Mehta a default notice requiring him to pay the outstanding amount of the credit at the tune of Tsh. 352,162,378 /= as of 27th May, 2019 but whose interest was on a daily accrual. According to PW1, this notice was issued on 27/5/2019 but served to Amaly Mehta on

12/6/2019. Notice of default, Land form No. 54A was tendered and admitted as exhibit P3.

After the Default Notice, Amaly Mehta made some other several payments as follows; 27,000/= on 4/7/2019; 4 million on 5/10/2019;900,000 on 11/11/2019; 600,000 on 21/11/2019; 2,150,000 on 23/11/2019;400,000/= on 30/11/2019 and last payment was on 8/4/2020 where the sum of 100,000 /=was paid. PW1's evidence was to the effect that, according to exhibit P2, up to 20th September, 2021, the outstanding credit amount was gauging at Tsh. 479,026,190/= being a principal amount, normal interest at 20% and penal interest of 6 % all calculated together.

In his further evidence, PW1 stated that, the Notice of default was issued to the plaintiffs after they have failed to honour their obligations. He at the end prayed for the court to order the payment of the whole of the outstanding amount by the plaintiffs or the defendant be ordered to execute the mortgage deed in realization of the credit amount as agreed.

I have carefully examined the pleadings and the evidence by the defendant (plaintiff in the counter claim) in support of the counter claim. It is not in dispute that the credit Facility amounting to 400,000,000/= was granted to Amaly Investment Co Limited by the Bank (plaintiff in the counter claim) on the terms and conditions in the Credit Facility Letter dated 16/12/2017, exhibit P1. It is apparent from exhibit P1, Credit Facility Letter that, borrower was required to repay the loan within a period of sixty (60) months in equal monthly instalments. According to the Bank statement (exhibit P2), Amaly Investment Co. Limited(borrower) managed to service the loan at the agreed

term up to 25/1/2019. And no single repayment was done in April and May 2019 while February, 2019 instalment was made in two portion and the instalment of march was made partly. It is also clear that the amount due on 27/5/2019 was 352,162,378= This is so obvious in the Bank statement (exhibit P2) as well as the Default notice (exhibit P3). The amount stated above however, is in exclusion of the payment made by the plaintiffs (defendants in the counter claim) on 4/7/2019 (27,000/=);5/10/2019 (4 million/=);11/11/2019 (900,000/=);21/11/2019 (600,000/=);23/11/2019 (2,150,000/=); 30/11/2019 (400,000/=) and 8/4/2020 (100,000/=).

The obvious truth therefore is, Amaly Mehta and Amaly Investment Company Limited dodged their obligation. They were on 27th May, 2019 indebted to the defendant (plaintiff in the counter claim) to the sum of Tsh **352,162,378/=** stated above. The first issue is for that reason confirmed.

The second issue is a complaint on the validity of the default notice issued on 27th May 2019. The credit facility letter will have an answer to this issue. Section one of the Credit Facility letter, entered into by the parties herein, exhibit P1 provides for the covenant to pay and **events of default**. Here are some of the pacts;

Covenant To Pay: *The mortgagor hereby covenants to pay the Bank in case the Borrower fails to pay the amounts outstanding on the Facilities secured hereunder on due dates of payment and discharge all obligations and liabilities whether actual or contingent now or*

*hereafter due owing or incurred to the **Bank** by the **Borrowers** in whatever currency denominated whether on all current or other account or otherwise in any manner whatsoever in connection with the Facilities and upon such other terms as may from time to time be agreed upon between the **Borrowers** and the **Bank** and all commission fees and other charges and all legal and other costs and expenses incurred by the **Bank** in relation to the **Borrower** or the property hereby charged.*

1.01. Events of default: *The **Bank** shall cease to be under any further commitment to the **Mortgagor** and the **Borrowers** and all moneys obligation and liabilities hereby secured shall become due and payable on demand by notice of two months and the **Mortgagor** shall pay, on demand all contingent liabilities of the **Mortgagor** or **the Borrowers** to the **Bank** and for all Notes or bills accepted endorsed or discounted and all bonds guarantees indemnities documentary or other credits or any instruments whatsoever from time to time issued or entered into by the **Bank** or at the request of the **Mortgagor** on the occurrence of any of the following events of fault (each an "Event of Default"), namely:-"*

In section 1.01 above, Mortgagor agrees to pay the Bank in case of default by the Borrower. The covenant here is for the Mortgagor to pay the amounts outstanding on the Facilities secured on due dates of payment and discharge all obligations and liabilities. Section 1.02 is a specific provision permitting

the issuance of a two months' notice to the Mortgagor for payment of all contingent liabilities of the Mortgagor or the Borrowers to the Bank in the event of default. The section goes further to designate "***the events of default***" in items (a) to (i) appearing at page 5 and 6 of the Credit facility letters, of relevance to this case is item (a) which says:

*(a) If the borrowers fail to pay on the due date any money or to discharge any obligation or liability payable by it from time to time to the **Bank** or fails to comply with any term, condition, covenant or provision of this mortgage or to perform any obligation or liability of the Borrowers or the Mortgagor to the Bank or if any representation, warrant or undertaking from time to time made to the Bank by the **Borrowers** or the **Mortgagor** is or becomes incorrect or misleading in any material respect."*

So any breach to the terms and condition of the Credit Facility or mortgage deed is ascribed as one of the events of default warranting the Bank to issue 60 day notice to the Mortgagor.

As concluded while determining the first issue above, plaintiffs (defendants in the counter claim) failed to comply with the terms and conditions of the said loan facilities. The evidence gave details of the alleged defaults. It was stated that the plaintiffs (defendants in the counter claim) made complete installment from January 2018 to January 2019 and defaulted the terms for

the rest of the months. This, according to the quoted party of the Credit Facility letter above, entitles the Bank to issue the 60 days' notice.

The evidence is to the effect that the default notice (exhibit P3) was served upon Amaly Mehta on 12/6/2019. This was after the borrower had failed to perform her obligations for the month of March, April and May, 2019. That notice gave the plaintiffs 60 days period to repay the outstanding amount mentioned therein from the date of the receipt of the said Notice. The said letter reads:

*"This **letter is to notify you of your default to honour your obligations, covenanted under the mortgage, namely to assure the payment of the loan extended to AMALY INVESTMENT COMPANY LIMITED which was secured by a mortgage over the property that you own.** You have defaulted the obligation to pay the principal amount plus interest thereon totaling TZS 352,162,378.00 as of 27th May, 2019 which continue to accrue interest on daily basis.*

***BE FURTHER NOTIFIED THAT** in the event that **AMALY INVESTMENT COMPANY LIMITED** does not rectify the default stated above withing **SIXTY (60) DAYS** from the receipt of this notice we may exercise our right to sell the mortgaged property cited above, or appoint a receiver, or lease the property, or enter into possession*

Dated at Dar es salaam this 27th day of May 2019" (emphasis added)

Being a mortgagor, Amaly Mehta was, in my view properly served with the Notice of default in accordance to the terms and condition of the contract which he himself accredited.

On the strength of the terms and condition of the credit Facility Letter which was dully executed, I find nothing wrong done by the bank. The issuance of the default Notice by the Bank was permitted by the contract signed by the parties, plaintiffs inclusive on their own volition, thus, the Bank is unimpeachable. The second issue is for that purpose concluded in affirmative.

The last issue is on the reliefs. The Bank (plaintiff in the counter claim) seeks for a declaratory order that defendants (plaintiffs in the main case) are in breach of the terms of the credit facility, payment of Tanzania shillings *TZS 352,162,378.00* against plaintiffs (defendants in the main suit) together with commercial interest at the rate of 24% from the date of default to the date of judgment and further interest on the decretal sum until payment in full; general damages and costs of the suit. Given the conclusion of the two issues above, the prayers by the plaintiff in the counter claim are allowed except for the general damages prayer on the reason to be given herein after.

Given the conclusion on the two issues above, a judgement is entered against the plaintiffs (defendants in the counter claim) - Amaly Mehta and Amaly Investment Company Limited (defendants in the counter claim) jointly

and severally in favour of the Equity Bank Tanzania Limited and it is hereby decreed that: -

- 1) Plaintiffs (Defendants in the counter claim) are in a breach of credit facility terms as constituted in the Banking Facility Letter dated 16th November, 2017
- 2) Plaintiffs (defendants in the counter claim) shall jointly and severally pay the Bank Tanzania shillings ***TZS 352,162,378.00/***
- 3) Plaintiffs (defendants in the counter claim) shall jointly and severally pay the Bank contractual interest rate of 20% per annual on ***352,162,378*** Tshs to be charged from 27th May 2019 to the date of judgment. The calculation in this item shall take into account the amount of ***Tshs 8,177,000/*** paid by the plaintiffs (defendant in the counter claim) between 4/7/2019 to 8/4/2020.
- 4) The Plaintiffs (defendants in the counter claim) shall also jointly and severally pay the Bank (plaintiff in the counter claim) interest rate of 7% per annum on the decretal amount from the date of judgment to the date of full payment
- 5) The plaintiffs (defendants in the counter claim) shall jointly and severally pay the Bank costs of the suit which shall be taxed.

Since the above costs covers the loss caused by the defaulting party, General damages prayer is specifically declined. It is so ordered.

Dated at Dar es Salaam this 5th day of November, 2021.


E.Y. MKWIZU
JUDGE
5th November, 2021.

Court: Right of appeal explained.




E.Y. MKWIZU
JUDGE
5th November, 2021