

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

LAND CASE NO. 175 OF 2017

NCBA BANK (T) LTD.....PLAINTIFF

VERSUS

**YHOVA-YIIRE TANZANIA LTD.....1st DEFENDANT
RENOLD SEMU KOMBE.....2nd DEFENDANT
TUMAINI WILFRED MUNISI.....3rd DEFENDANT
AHOBOKILE DICKSON MWANJOKA.....4th DEFENDANT
KIGAMBONI MUNI IPAL COUNCIL.....5th DEFENDANT**

EXPARTE JUDGMENT IN THE COUNTERCLAIM

10/12/2020 & 04/03/2021

Masoud, J.

This is an ex-parte judgment in the counterclaim raised by the first the above name plaintiff in the counterclaim against the above named first defendant in the counterclaim which was the plaintiff in the suit dismissed for want of prosecution, and the second, third, and fourth defendants who were not parties to the dismissed suit.

The reliefs sought in the counterclaim by the plaintiff herein as against the above defendants in the counterclaim were as follows: Firstly, payment by the defendant of TZS 164,968,142.46 to the plaintiff.

Secondly, interest on the above sum at the rate of 22% per annum from June 2016 to the date of judgment. And thirdly, interest on the decretal amount at the court's rate of 7% from the date of judgment upto the date of payment.

It was with the dismissal of the suit by the first defendant (i.e **YHOVA-YIIRE TANZANIA LTD's**) (the plaintiff in the dismissed suit) against the above named plaintiff (the defendant in the dismissed suit) on 2/12/2019 for non-appearance that leave of this court was sought and granted for ex-parte hearing of the plaintiff's counterclaim against the against the above named defendants. defendants.

The counterclaim had it that the first defendant utilised two facilities which were extended to her by the plaintiff herein. The facilities were in relation to a total loan of TZS 198,000,000/- extended by the above plaintiff in the counterclaim to the first defendant pursuant to the two facility letters with ref CBA/CAD/YHOVA/11/13 dated 12/11/2013 and CORP/9992/166/2016/ek dated 30/8/2016. Notably, the letters in respect of the two facilities were relied on the counterclaim.

It was made clear in the counterclaim that the facilities were secured by the following securities which were duly executed and pleaded in the counterclaim by the plaintiff in the counterclaim.

Firstly, there was a first ranking legal mortgage dated 27/9/2010 over property situated on Plot No. 800, Block "A" Mbezi Temboni, Kinondoni, Dar es Salaam City, with C.T No. 86477, LO No. 408600 registered in the name of the second defendant in the counterclaim who was also the mortgagor in the mortgaged deed. Secondly, there were directors/shareholder personal guarantees and indemnities by the third and fourth defendants at TZS 219,010,000.00 to the credit facilities and any other related costs. And thirdly, there was a personal guarantee and indemnity by the second defendant at TZS 320,000,000.00 to cover the credit facilities and any other related costs at 125%.

It was pleaded in the counterclaim that the first defendant breached the terms and conditions of the two facilities. She defaulted in servicing the facilities. It was pointed out that as of June 2017 the outstanding amount yet to be settled was TZS 164,968,142.46. In the pleadings, the plaintiff in the counterclaim relied on two bank statements confirming

that the loan was disbursed to the first defendant which utilised the said loan and the outstanding amount yet to be settled.

It was further pleaded that the plaintiff exercised her right as a mortgagee by serving the first defendant and the second defendants with statutory default notice demanding them to remedy the breach within sixty days. Unfortunately, it was alleged, the said defendants neglected or refused to settle the outstanding debt. In so far as the foregoing pleadings were concerned, reliance was made on default notice which was accordingly annexed to the counterclaim.

Based on the pleadings in the counterclaim, the issues for my determination were as follow: Firstly, whether the defendants are indebted to the plaintiff to the tune of TZS 164,968,142.46. Secondly, whether the defendants are in breach of the credit facilities under which the loan was granted. And lastly, to what reliefs are the parties entitled.

In relation to the pleadings in the counterclaim and the above issues, PW.1, Lawrencia Ngonyani, a recovery manager working with the

plaintiff testified for the plaintiff and was the only witness. She testified on how the loan in the two facilities was extended to the first defendant for a term loan of TZS 128,000,000/- and overdraft of TZS 70,000,000/- and the manner in which they were secured in compliance with the law. She also testified as to how the loan from the two facilities was to be repaid by instalments through the current account of the plaintiff.

With regard to the securities, she gave their details in the manner that corresponds with the pleadings. She tendered Exhibit P.2 which is the mortgage deed dated 27/9/2010, shareholders guarantee dated 31/8/2016 collectively as Exhibit P.3. It was testified that it was on the basis of the securities that the loan was extended through the first defendant's account. The court was told that the outstanding amount so far is evidenced in the relevant bank statement tendered and admitted as Exhibit P.4.

With reference to Exhibit P.4, she told the court that the outstanding debt as per the date of the statement was as follows. In respect of the overdraft and the term loan the outstanding amounts were TZS 23,174,797.65 and Tshs 141,793,344.81 respectively. My attention was

in respect of the outstanding amounts drawn by PW.1 to page 9 and page 3 of the Exhibit P.4.

As to the duration of the overdraft, she told the court that it was for a duration of two years for the overdraft but she could not recall the duration for the other facility. She tendered the letters in respect of the two facilities, which were eventually admitted collectively as Exhibit P.1 to support the allegation as to credit facilities extended to the first defendant in the counterclaim.

In her further testimony, PW.1 told the court that the two facilities had terms and conditions for defaults which entitled the plaintiff to realise the securities. She told the court that the terms and conditions under which the facilities were extended were not honoured by the defendants. As a result, the plaintiff in the counterclaim reminded the bank and issued her a statutory notice of default to the defendants demanding the payment of the outstanding total amounts within sixty (60) days. The notice was served to the second defendant in the counterclaim who is a shareholder of the first defendant in the counterclaim. The said notice

was dated 5/4/2017 and was tendered and admitted in evidence as Exhibit P.5.

With such evidence, PW.1 asked the court to enter judgment in the counterclaim in favour of the plaintiff in the counterclaim and against the defendants in the counterclaim as set out in the counterclaim.

I recalled the issues that I set out herein above as I considered the evidence adduced in relation to the pleadings in the counterclaim. On the first issue as to whether the defendants are indebted to the plaintiff to the tune of TZS 164,968,142.46, I was satisfied that there were two facilities which were extended to the defendants in the counterclaim as pleaded. This was truly evidenced by PW.1's testimonies and in particular Exhibit P.1 which she tendered in her evidence.

My scrutiny of Exhibit P.1 left me in no doubt that it reflected the agreements between the plaintiff as the lender on one hand and the first defendant on the other as the borrower. The amount involved in the agreements was as reflected in the evidence and pleadings. The terms

and conditions under which the loan was extended are apparent in the agreements.

An addendum credit facility dated 12/11/2013 was part of the Exhibit P.1. It concerned an amount of TZS TZS 70,000,000/- which was to be repaid in 24 months period in equal instalments of TZS 917,000.00 plus interest from the date of disbursement. And the credit facility dated 30/08/2016 which involved term loan (restructure) sanctioned at the limit of 128,000,000/- and which were to be repaid with interests within 24 months, and a term loan sanctioned at the limit of TZS 32,430,000/- which totalled at TZS 160,430,000/-, and which was to be repaid with interest by the expiry date of 30/11/2017.

I am clear that PW.1 testified to the effect that the loan advanced was disbursed through the first defendant's account. In addition to such testimony, PW.1 tendered Exhibit P.4 which was the first defendant's bank statement for the period between 1/1/2014 and 14/6/2017. According to PW.1, Exhibit P.4 evidenced the disbursed loan in the sum of Tshs 70,000,000/- and TZS 128,000,000.00 and the outstanding debt from the two facilities, namely, TZS 23,174,797.65 and TZS

141,793,344.81 totalling at TZS 164,968,142.46. My scrutiny of the relevant exhibit in relation to PW.1's testimony confirmed that the loan was indeed received and spent as evidenced by the record of the bank statement admitted in evidence.

My further scrutiny of the evidence in relation to the pleadings made me to look further at Exhibit P.4. I was satisfied that the said Exhibit 4, is apparent that the outstanding debt totalled TZS 164,968,142.46 as at 14/6/2017. The amount is clearly a result of the loan which was extended in the two facilities and the interests that accrued. This is the total sum claimed and reflected in the pleadings.

It was claimed by the plaintiff in the counterclaim and accordingly testified by PW.1 that the plaintiff had defaulted to repay the loan pursuant to the terms and conditions of the facilities. It was also the testimony of the plaintiff that despite the default and the demand notice issued (Exhibit P.5), the defendants neglected or refused to repay the total outstanding debt. The failure to pay the outstanding is on my part evidenced by the outstanding amounts appearing at page 3 and 9 of the statement (Exhibit P.4).

The counterclaim proceeded ex-parte as against the defendants as already pointed out herein above. It therefore meant that neither the plaintiff's averments in the counterclaim nor the said plaintiff's evidence adduced in the course of the ex-parte hearing were controverted. In this respect I was inspired by the position in the holding of the Court of Appeal of Tanzania in **Mathias Erasto Manga v M/S Simon Group (T) Limited** Civil Appeal No. 43 of 2013 Arusha (unreported).

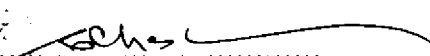

In the circumstances, the question is whether the plaintiff has proved her case on the balance of probabilities. It follows that what I am required to do is to find, on a balance of probabilities, and on the basis of the evidence before him, whether or not the plaintiff has proved her case. In the light of the foregoing findings, I have no hesitation in finding that given the evidence adduced by PW.1, the plaintiff proved her case on the balance of probabilities. She would in the circumstances be entitled to the reliefs sought in her counterclaim. The issues set forth at the beginning are thus answered in the affirmative as follow. Firstly, the defendants are indebted to the plaintiff to the tune of TZS

164,968,142.46. And secondly, the defendants are in breach of the credit facilities under which the loan was granted.

In the upshot, and for above reasons, I must now proceed, on the whole, to enter judgment in the counterclaim in favour of the plaintiff in the counterclaim with costs. Consequently, the plaintiff is entitled to payment by the defendants of TZS 164,968,142.46; interests on the sum of TZS 164,968,142.46 at the rate of 22% per annum from June 2016 to the date of the judgment; and interest on the decretal amount at the court's rate of 7% from the date of judgment upto the date of payment.

It is so ordered.

DATED and DELIVERED at Dar es salaam this 04th day of March 2021.

B. S. Masoud
Judge

**MAHAKAMA KUU YA TANZANIA
(DIVISHENI YA ARDHI)**

ILİYOKETI DAR ES SALAAM

SHAURI LA ARDHI NA. 175 LA 2017

NCBA BANK (T) LTD.....MDAI

DHIDI YA

**YHOVA-YIIRE TANZANIA LTD.....MDAIWA 1
RENOLD SEMU KOMBE.....MDAIWA 2
TUMAINI WILFRED MUNISI.....MDAIWA 3
AHOBOKILE DICKSON MWANJOKA.....MDAIWA 4**

10/12/2020 & 04/03/2021

MUHTASARI WA SHAURI

1. Maelezo mafupi ya shauri

Mdai kwenye madai kinzani (counterclaim) yaliyosikilizwa upande mmoja pasipo kuwepo wadaiwa aliwadai wadaiwa deni lake linalotokana na mkopo aliokuwa amepawa mdaiwa wa kwanza na kudhaminiwa na wadai wa 2 hadi 4. Anadai kuwa wadaiwa walishindwa kurejesha mkopo huo kwa mujibu wa masharti ya mkataba wa mkopo. Mdai akalazimika kuwapa notisi ya siku sitini ambayo pia waliipuuza. Mdai anaomba mahakama iwaamuru wadaiwa wamlipe TZS 164,968,142.46 ikiwa ni deni analowadai tokana na kushindwa kurejesha mkopo na pia tokana na riba iliyotokana na kushindwa kurejesha mkopo huo. Sambamba na madai hayo, mdai anaomba alipe riba tokana na ucheleweshwaji wa kurejeshewa mkopo na pia alipwe gharama za shauri hili.

2. Uamuzi wa Mahakama

Madai ya mdai yanamsingi na yote yamekubaliwa kama yalivyoombwa kwenye hati ya madai kinzani (counterclaim).

3. Sababu za Maamuzi

Ushahidi umethibitisha kuwa wadaiwa walikopeshwa na wakashindwa kurejesha mkopo huo. Ushahidi huo kama ilivyomadai ya mdai haukuanushwa na wadai kwa namna yeyote.

Angalizo:

1. Lengo la muhtssari huu ni kueleza maamuzi ya mahakama katika lugha nyepesi ya Kiswahili.
2. Muhtasari huu ni kwa ajili ya taarifa tu na hivyo hauna nguvu ya kisheria
3. Uamuzi kamili wenye nguvu ya kisheria unapatikana unapatikana katika tovoti <https://tanzlii.org/tz/judgments>