

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**LAND DIVISION**

**AT DAR ES SALAAM**

**LAND CASE NO. 185 OF 2020**

**ANNA INVESTMENT CO. LTD.....1<sup>ST</sup> PLAINTIFF**

**ANNA JEREMIAH KAAYA.....2<sup>ND</sup> PLAINTIFF**

**EMMANUEL LUGANO NGALLAH.....3<sup>RD</sup> PLAINTIFF**

**JEREMIAH SALUNI KAAYA.....4<sup>TH</sup> PLAINTIFF**

**VERSUS**

**NATIONAL MICROFINANCE BANK PLC (NMB BANK).....1<sup>ST</sup> DEFENDANT**

**STARCOM HOTEL LIMITED.....2<sup>ND</sup> DEFENDANT**

**ADILI AUCTION MART LIMITED.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**27/06/2022 & 26/7/2022**

**GWAE, J**

On the 18<sup>th</sup> November 2020 the 1<sup>st</sup> plaintiff, the limited liability company licenced to carry out general supplies business, instituted a suit against the defendants, nevertheless an amended plaint was later on filed in this court joining the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs praying for the following orders;

1. Permanent injunction restraining the defendants, their servants, agents and other person (s) deriving title from them, from entering, mortgaging, selling or order to sale by auction, appoint receiver, leasing or exercising any legal remedy against the properties mortgaged with the 1<sup>st</sup> defendant.
2. The declaration that, the plaintiff's debt stands at the sum of Tshs. 3,560,000,000/= and not the sum of Tshs. 7, 913, 227, 061.30/= as alleged by the 1<sup>st</sup> defendant.
3. An order for restructuring the loan by reducing the interest to the currently prevailing interest rates in the market and the monthly instalments to Tshs. 1,000,000/=
4. Payment of general damages to the tune of Tshs. 300, 000, 000/= for emotional suffering, psychological torture and mental anguish.
5. Costs of this suit be paid by the defendants.
6. Any other relief (s) as the court may deem fit and just.

The basis of the plaintiffs' suit against the defendants is on the loan facilities advanced to the 1<sup>st</sup> plaintiff by the 1<sup>st</sup> defendant. The 1<sup>st</sup> plaintiff alleges that the amount she stands indebted to the 1<sup>st</sup> defendant and her

agent (3<sup>rd</sup> defendant) is to the tune of Tshs.3,560,000,000/= contrary to the amount of Tshs. 7,913,227,061.30/= as wrongly alleged by the 1<sup>st</sup> defendant and her agent. The first plaintiff also complained not to have been served with the sixty (60) days' default notice.

On the other hand, the 1<sup>st</sup> defendant through her amended written statement of defence contended that the 1<sup>st</sup> plaintiff is indebted by the 1<sup>st</sup> defendant to the tune of Tshs. 7,913,227,061.30/= which is the total debt including interests and court broker's fees.

Having thoroughly involved the parties' advocates who appeared for trial on the 22<sup>nd</sup> day of April 2022 namely; Mr. Mashushiri Magie for the plaintiff, Victor Kikwasi for the 1<sup>st</sup> defendant and 3<sup>rd</sup> defendant and Damas Sixtus for the 2<sup>nd</sup> defendant the following issues were framed by the court for proof or disproof by the parties and eventually for the court's determination;

1. Whether the total outstanding loan was at the sum of Tshs. 3, 650, 000, 000/=as of 9<sup>th</sup> November 2020.
2. To what reliefs are the parties entitled to.

In proving the suit through the lead of her counsel to wit; Ngassa Gaja assisted by Hamis Katanga, the plaintiffs summoned two (2)



witnesses to wit; Anna Jeremia Kaaya, 2<sup>nd</sup> plaintiff who is also the director of the first plaintiff (PW1) and one Charles Mallya, an employee to the 1<sup>st</sup> plaintiff as a manager of finance and administration (PW2). The plaintiffs were able to produce the following four (4) exhibits which were received in court for evidence;

1. The letter of offer dated 20<sup>th</sup> November 2016 (PE1)
2. The letter of offer dated 3<sup>rd</sup> July 2018 (PE2)
3. Statement of accounts of the 1<sup>st</sup> plaintiff dated 30<sup>th</sup> November 2020 (PE3)
4. 14 days' notice issued on 9<sup>th</sup> November 2020 (PE4)

Together with the documentary evidence, the plaintiffs' evidence is in essence to the effect that; in the year 2016 the 1<sup>st</sup> defendant advanced a loan to the 1<sup>st</sup> plaintiff at the tune of Tshs. 500,000,000/=, later on, the 1<sup>st</sup> plaintiff was given another term loan of Tshs. 1,000,000,000/= making a total loan of Tshs. 1.5 billion. It was further testified that sometimes later, the 1<sup>st</sup> defendant bought the 1<sup>st</sup> plaintiff's loans from other banks namely; First National Bank, China Bank and Equity Bank, (Tshs. 3, 300, 000, 000/=) making the total debt to be Tshs. 4, 800,000,000/=. PW1 went on to state that the loan was repaid in instalments and that the total amount which was repaid was Tshs. 2, 040,000,000/= and therefore the

outstanding balance according to the statement of accounts of the 1<sup>st</sup> plaintiff as of 30<sup>th</sup> November 2020 is Tshs. 3,560,000,000/= This piece of evidence is supported by that of PW2 who testified to be the one who prepared the statement of accounts of the 1<sup>st</sup> plaintiff and according to him the report revealed that, the 1<sup>st</sup> plaintiff borrowed from the 1<sup>st</sup> defendant a total of Tshs. 4,800,000,000/= and the amount repaid was Tshs. 2, 042, 432,579. 57 and the outstanding loan was Tshs. 3, 560, 000,000/= as of 30<sup>th</sup> November 2020.

PW1 added that the dispute between the 1<sup>st</sup> plaintiff and the 1<sup>st</sup> defendant is on difference in figures of the outstanding balance, as the 1<sup>st</sup> plaintiff was issued with a 14 days' notice by the 3<sup>rd</sup> defendant, an agent of the 1<sup>st</sup> defendant stating that the outstanding loan plus accrued interest is Tshs. 7,900,000,000/= while PW1 maintains that the amount indebted to the 1<sup>st</sup> plaintiff is Tshs. 3,560,000,000/=.

On cross examination by Mr. Victor, the learned counsel for the 1<sup>st</sup> & 3<sup>rd</sup> defendants if she had any evidence to establish the current outstanding loan plus accrued interests, she replied to the negative. PW1 also admitted that PE3, which is the statement of account of the 1<sup>st</sup> plaintiff was not accompanied with any bank statement which she admitted to be more accurate to demonstrate the plaintiff's status of the



loan. PW1 also stated that she repaid the loan however she had not produced any documentary evidence to effectuate her testimony save for the 1<sup>st</sup> plaintiff's statement of accounts.

On his part PW2 when cross examined by the counsel for the 1<sup>st</sup> and 3<sup>rd</sup> defendants admitted to be aware of the bank guarantee given to the 1<sup>st</sup> plaintiff by the 1<sup>st</sup> defendant. He also admitted that it is the bank statement which reveals repayments, outstanding loan, penalty thereof.

The defence on the other hand, summoned one Rabisante Boko a Relationship Manager for Recoveries who testified as DW1 and on Rena Henry Vegulla, the director to the 2<sup>nd</sup> defendant who appeared in court as DW2.

DW1's testimony is to the effect that in the year 2016 the 1<sup>st</sup> plaintiff secured a term loan from the 1<sup>st</sup> defendant to the tune of Tshs. 1, 500, 000,000/= . DW1 went on testifying that there was a restructuring of the 1<sup>st</sup> plaintiff's previous existing overdraft and the 1<sup>st</sup> plaintiff was given a letter of offer to the tune of Tshs. 3,300,000,000/= whose repayment was for a period of 48 months. DW1 tendered exhibit DE1 which is a loan statement retrieved on the 20<sup>th</sup> June 2022. DE1 revealing the extent of loan disbursed in favour of the 1<sup>st</sup> plaintiff, principal balance and interest being 1,342,077,309.47/= making a total of Tshs. 4,642,077,309.17/=.

DW1 went further to state that on 3<sup>rd</sup> July 2018 the 1<sup>st</sup> plaintiff was granted a letter of offer in form of a bank guarantee worthy Tshs. 1, 000, 000, 000/= and an overdraft of Tshs. 500,000,000/=. DE2 a letter of offer dated 3<sup>rd</sup> July 2018 was tendered and received in court as an exhibit. DW1 also produced bank statement printed on the 20<sup>th</sup> June 2022 (DE3) which shows the purpose of the overdraft and bank guarantee. It was her further testimony that the 1<sup>st</sup> plaintiff was indebted to four facilities namely; Term loan of Tshs. 1,500,000,000/=: Term loan of Tshs. 3,300,000,000/=: Bank Guarantee of Tshs. 1,000,000,000/= and an overdraft facility of Tshs. 500, 000, 000/= making a total of Tshs. 6,300,000,000/= however as of 29<sup>th</sup> June 2022 the total loan amounted to Tshs. 7,920,000,000/= which included accrued interests and penalties.

DW1 admittedly testified that, he issued default notice through her agent (3<sup>rd</sup> defendant) to the 1<sup>st</sup> defendant (DE4) and another to the 2<sup>nd</sup> defendant, Managing Director (DE5) substantiating that, the 1<sup>st</sup> plaintiff had defaulted repayment in the tune of Tshs. 6,633, 009,108.89 as of 10<sup>th</sup> day of January 2019. The 1<sup>st</sup> defendant also admitted that a figure appearing in the demand notice issued by the 3<sup>rd</sup> defendant is indicative of more amount of claim than the actual outstanding loan as it includes the court broker's fess.

During cross examination by Mr. Ngassa the counsel for the plaintiffs, DW1 stated that at the date of issuance of default notice in November 2020 the 1<sup>st</sup> plaintiff had repaid Tshs. 355,000,000/=, in the loan of Tshs. 1,500,000,000/= while in the loan of Tshs. 3.3 the amount repaid as of 11<sup>th</sup> August 2018 was Tshs. 10,922,628,000/= however the loans in respect of overdraft and bank guarantee were not repaid. Therefore, according to DE3 the 1<sup>st</sup> plaintiff was able to repay Tshs. 355,000,000/= up to 20<sup>th</sup> February 2022.

DW2 testimony was basically to establish that she was not aware of the loan facilities advanced to the 1<sup>st</sup> plaintiff. She therefore prayed for the court to order the 1<sup>st</sup> plaintiff to return her Certificate of Title. However, on cross examination by Mr. Ngassa, DW2 admitted to be the guarantor for the 1<sup>st</sup> plaintiff for a loan of Tshs. 500,000,000/= but she denied to have signed documents from the bank.

After close of the parties' case, the advocates for the parties sought and obtained leave to file their closing submissions which I shall consider in the course of determination the issues demonstrated herein above.

Having briefly summarized the parties' evidence, it is now for the determination of the issues herein above, starting with the first issue



which reads, **whether the total loan at the sum of Tshs. 3, 560, 000, 000/= as of 9<sup>th</sup> November 2020.**

Examining the evidence adduced by the parties especially the documents so tendered and received by the court, there is direct evidence which can justify this court to certainly hold that the 1<sup>st</sup> plaintiff was issued with four loan facilities. It is the contention of the plaintiffs that, the loan advanced to the 1<sup>st</sup> plaintiff was in a total of Tshs. 4,800,000,000/= arising from the loan facility of October and November 2016 plus restructured facilities that took the 1<sup>st</sup> plaintiff's loans from other banks by the 1<sup>st</sup> defendant. The plaintiffs through exhibit PE3 which is the statement of accounts demonstrated that the amount repaid by the 1<sup>st</sup> plaintiff to the 1<sup>st</sup> defendant was Tshs. 2, 041, 432,579.57/= making the total loan balance to be Tshs. 3,560,000,000/=.

According to section 110 of the Evidence Act, Cap 6 Revised Edition, 2002 provides for an obligation on a party who alleges existence of certain facts to prove existence of such facts, for the sake of clarity the same is hereby quoted:

*"110 (1) Whoever desires any court to give judgement as any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."*



In the light of the above cited provision of the law, it is the plaintiffs in this case who have burden to prove the fact that the 1<sup>st</sup> plaintiff is indebted at the tune of Tshs. 3,560, 000,000/= as of 30<sup>th</sup> November 2020 and not otherwise. A carefully examination of the evidence adduced by the plaintiff reveals that it is quite certain that the plaintiffs' evidence on the amount of indebtedness that is Tshs. 3, 560,000,000/=is founded on exhibit PE3 which is the statement of accounts of the 1<sup>st</sup> plaintiff prepared by the borrower's accountant.

PW2 who is the author of the PE3 testified that he is the one who prepared PE3 which is a normal statement account whereas on cross examination by the 1<sup>st</sup> defendant's counsel, PW2 clearly stated that, the foundation of exhibit PE3 is the bank statement and he admitted that, it is the bank statement which is more accurate and the one which reveals repayment of the loan. This fact was also supported by PW1 who, on cross examination, admitted that the statement of accounts is not accompanied by the bank statement. Therefore, it is my considered view, the bank statement ought to have been appended for PE3's authenticity. In the absence of such bank statement, the statement of account (PE3) leaves a lot to be desired.

According to this piece of evidence it is with no doubt that it is the bank statement which was more precise to prove the status of the 1<sup>st</sup> plaintiffs' loan with regard to the amount of the loan issued, the amount repaid and the total loan balance. I have also asked myself, If the plaintiffs allege that the 1<sup>st</sup> plaintiff was issued a total loan of 4,800,000,000/= and that the amount allegedly repaid is the tune of Tshs. 2,041, 432, 579.57/= in my firm view, would have been substantiated by necessary documents such as the deposit slips (Pay in-slips), bank statement or bank transfers. Failure of which justifies this court to hold that it is more improbable that the plaintiffs did pay that amount (Tshs. 2,041, 432, 579.57/=) than to its being probable.

To this end, I am of the firm view that the plaintiffs' evidence does not warrant this court to hold that the plaintiffs are indebted at the tune of Tshs. 3, 560,000,000/= to the 1<sup>st</sup> defendant and not more than Tshs. 7 Billion. In the case of **Manager NBC Tarime vs. Enock M. Chacha** [1993] TLR 228 it was judicially held that;

It is a cardinal principal of law that;

*"It is a cardinal principal of law that in civil cases there must be proof on the balance of the probabilities. In this case, it cannot be said that the scanty evidence adduced in this court proves in any way what is alleged in the*

*plaint. There must be proof of the case on the standard by law which is on the balance of the probabilities even when a case proceeds ex-parte like in this case....."*

I have also observed the 1<sup>st</sup> defendant's claims against the 1<sup>st</sup> plaintiff. It is the contention of the 1<sup>st</sup> defendant that the amount claimed by plaintiff covers only two term loans that were issued by the 1<sup>st</sup> defendant, and that the same does not include the overdraft facility and bank guarantee as indicated in exhibit DE2. According to the 1<sup>st</sup> defendant the 1<sup>st</sup> plaintiff was issued with two term loan, an overdraft facility and bank guarantee making a total loan balance of Tshs. 7,913,227,961.30/= including the broker's commission as reflected in the demand notice dated 9<sup>th</sup> November 2020 (PE4).

According to the evidence adduced by the parties, I am of the increasingly view, that, though our courts ought to be accessible to the general public, however it is advisable for the litigants to ensure that some of preliminary steps or investigations are adhered to before coming to our courts for example in this particular case, the plaintiffs ought to have done the following before prematurely instituting this suit;

- (a) To have collected their pay-in-slips regarding repayments of loan, if any,



- (b) To have applied for being availed with the bank statements from the 1<sup>st</sup> defendant
- (c) To make comparisons from pay in- slips and bank statement (s)
- (d) In the event of non-reconciliation of the pay-in slips and bank statement (s), the plaintiff would have tabled or submitted their complaints to the 1<sup>st</sup> defendant's responsible authority
- (e) In case of failure to resolve or reconcile the difference, the matter would then be due for an institution and adjudication thereof.

The 1<sup>st</sup> defendant's claims are clearly substantiated through exhibits D1 D2 and D3, however as correctly argued by the counsel for the plaintiffs in his closing submission that the 1<sup>st</sup> defendant did not raise any counter claim in her written statement of defence, this court has also observed that the defendants did not raise any counter claim pursuant to Order VIII rule 9 of the Civil Procedure Code Cap 33 Revised Edition, 2019 and therefore, this court cannot grant what has not been prayed for. Hence, the 2<sup>nd</sup> defendant's claim that her Certificate of Title be returned by the 1<sup>st</sup> plaintiff is unfounded since the same was not raised in the way of counter claim. Parties' evidence and prayers must emanate from their pleadings and nothing can be granted out of such pleadings. My holding is fortified in the case of **Makori Wassaga v. Joshua Mwaikambo and**

**Another** (1987) TLR 88 where the Court of Appeal of Tanzania had these to say;

*"In general, and this is I think elementary, party is bound by his pleadings and can only succeed according to what he has averred in his plaint and proved in evidence; he is not permitted to set up a new case.*

See also foreign jurisprudence in **Lim v. Camden Health Authority** [1979] 2 All ER 910 and Order VI Rule 7 of CPC).

In the similar vein, the plaintiffs' prayer that, the 2<sup>nd</sup> defendant be ordered to pay Tshs. 750,000,000/= as she was given half of the loan at the rate of Tshs. 1.5 billion is found to have been inappropriately prayed since the same was never pleaded through the plaintiffs' amended plaint save during PW1's testimony (See a decision of the Court of Appeal of Tanzania in the case of **Melchiades John Mwenda vs. Gizelle Mbaga** (Administratrix of the estate of the late John Japhet Mbaga, **and two others**, Civil Appeal No. 57 of 2018 (Unreported)).

On the last issue, **to what extent of reliefs are parties entitled to**. As already elucidated above, the plaintiffs have failed to prove their case on the balance of probabilities. They cannot therefore be entitled to any relief sought in the amended plaint.




Consequently, the plaintiff's suit is hereby dismissed for want of merit. Costs of these proceedings shall be borne by the plaintiffs.


It is so ordered.

Dated and delivered through video conference this **26<sup>th</sup> July, 2022**



  
**M. R. GWAE**  
**JUDGE**  
**26/07/2022**

**Court:** Right of Appeal to the Court of Appeal fully explained

  
**M. R. GWAE**  
**JUDGE**  
**26/07/2022**