

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(LAND DIVISION)  
AT DAR ES SALAAM**

**LAND CASE NO. 214 OF 2021**

**MOHAMED ATHANAS MNYAU..... PLAINTIFF**

**VERSUS**

**DCB COMMERCIAL BANK PLC.....1<sup>ST</sup> DEFENDANT  
MAXCOM AFRICA LTD.....2<sup>ND</sup> DEFENDANT**

**J U D G M E N T**

*Date of last Order:10/03/2023  
Date of Judgment:02/05/2023*

**K. D. MHINA, J.**

The “tug of war” between the parties to this suit is the title deed No. 81586 for Plot No. 163 Block “C” Sinza, currently in the hands of the 1<sup>st</sup> defendant.

In this suit, **Mohamed Athanas Mnyau**, a natural person who is a resident of Dar es Salaam, the plaintiff herein (“the plaintiff”), lodged this suit in this Court on 18 November 2021 against **DCB Commercial Bank PLC**, the body corporate doing banking business as a financial institution (“the 1<sup>st</sup> defendant”) and **Maxcom Africa Limited**, a body corporate

registered under the Companies Act, Cap 212 R: E 2019 ("the 2<sup>nd</sup> defendant")

The background to this matter briefly, as per the pleadings, is as follows that, the plaintiff alleges that in 2014 he offered his Title Deed No. 81586 for mortgaged in favour of the 1<sup>st</sup> defendant being the security for the loan advanced to the 2<sup>nd</sup> defendant, in the form of an overdraft for a period of 12 months. It expired on 17 April 2015.

Again, on 15 May 2015, the new loan was entered for 12 months, to which he consented and signed the new mortgage deed.

On 17 May 2021, through his legal counsel, he wrote a letter to the 1<sup>st</sup> defendant demanding the return of his title deed, but the 1<sup>st</sup> defendant on June 2021, by a letter, informed the plaintiff that he had guaranteed a new loan agreement between the 1<sup>st</sup> and 2<sup>nd</sup> defendants on 2017, while in his side, he alleges that there was never any communication to him and he never consented that loan.

According to the plaintiff, despite several meetings at the office of the 1<sup>st</sup> defendant, he was not given back his title deed; therefore, this triggered

the plaintiff to seek relief from this Court. He now prays for Judgment and Decree against the defendants for the following reliefs;

- i. A declaration that the plaintiff is not part of the loan offered by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant via letter offer with reference no. DCB/MGBR/CR/09/2017 dated 20 September 2017 or any other thereafter.*
- ii. A declaration that the plaintiff never consented to the letter offer with reference no. DCB/MGBR/CR/09/2017 dated 20 September 2017 hence not liable for any liability arising from that letter offer.*
- iii. That the 1<sup>st</sup> defendant be ordered to return the title deed of the plaintiff No. 81586 for Plot No. 163 Block "C" Sinza.*
- iv. Costs of the suit and*
- v. Any other order and relief as this Court may deem fit to grant.*

In their separate written statements of defence, the 1<sup>st</sup> defendant vehemently disputed the claim while the 2<sup>nd</sup> defendant did not dispute the claims, in fact, supported the relief sought; he prayed for the 1<sup>st</sup> defendant to be ordered to return the title deed No. 81586 for Plot No 163 Block "C" Sinza to the plaintiff.

The dispute above put the parties at issue; therefore, on the first day of the hearing, the following issues were framed and agreed upon by the

parties and were accordingly recorded by this court for the determination of this suit namely:

- i. Whether the plaintiff was part of the loan offered by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant via a letter of offer with ref. No DCB/ MGR/CR/09/2017 dated 20 September 2017.*
- ii. If the first issue is answered in the affirmative, whether the plaintiff consented to the loan facility issued via the letter of offer with ref. No DCB/MGR/CR/09/2017 dated 20 September 2017.*
- iii. To what reliefs the parties are entitled.*

The representation of the parties in this matter was Mr. Godwin Musa Mwapongo advocate represented the plaintiff. Mr. Alexander Mzikila, advocate, represented the 1st defendant, while Mr. Suleiman Almasi advocate, represented the 2nd defendant.

In support of his case, the plaintiff called two (2) witnesses; Mohamed Athanas Mnyau (the plaintiff), who testified as PW1, and Safia Selembu, the plaintiff's wife, who testified as PW2. In a bid to support his case, the 1<sup>st</sup> defendant called two (2) witnesses; Abdallah Said Myba, the 1<sup>st</sup> defendant Recovery Manager, who testified as DW1, and Godwin Moses Mngulu, the

1<sup>st</sup> defendant Acting Head of Loans Department, who testified as DW2. On the other hand, the 2<sup>nd</sup> defendant brought only one (1) witness, Juma Rajab Furaji, one of the Directors of the 2<sup>nd</sup> defendant, who testified as DW3.

In his testimony (**PW1**), **Mohamed Athanas Mnyau** testified that in 2014 and 2015, he guaranteed the 2<sup>nd</sup> defendant company to take a loan from the 1<sup>st</sup> defendant Bank by providing the Title deed for his house located at Maneti Street Sinza, Plot No. 163 Block C for a period of 12 months, starting from 29 April 2014 up to 17 April 2015. To this effect, he tendered

- i. Deed of variation of mortgage of a right of occupancy for plot No. 163 Block C Sinza Dar es salaam dated 13 June 2014(Mortgage deed) as exhibit P1.
- ii. The letter of offer dated 29 April 2014 as exhibit P2.

He further testified that before signing Exhibit P1, he was not part of any loan between DCB and Maxcom Company. After the first 12 months expired, the 2<sup>nd</sup> defendant requested him to guarantee another loan from 2015 to 2016; therefore, he signed another deed of variation (mortgage deed) and the letter offer dated 15 May 2015. To that effect, PW1 tendered;

- i. Deed of variation (Mortgage deed) dated 19 June 2015 as an exhibit. P3.
- ii. Letter of offer with ref no DCB/MGBR/CR/05/15 dated 15 May 2015 as exhibit P.4

In that deed, he also offered his house as a mortgage for the loan, which was an overdraft renewal.

PW1 went on by testifying that, in exhibits P2 and P4, there were no changes concerning the mortgaged property and the guarantor. The only difference from exhibit P2 to exhibit P4 was; on exhibit. P2, there were only two conditions regarding security for the loan (paragraph 6) while in the exhibit. P4, there were four conditions (para 6). That 2015 loan was to come to an end on May 2016.

Further, he testified that in 2016 he never signed any mortgage deed because he refused to guarantee the 2<sup>nd</sup> defendant to take another loan starting from 2016-2017. When he guaranteed the 2<sup>nd</sup> defendant in 2015, he informed them that would be the last time; therefore, the Director of the 2<sup>nd</sup> defendant promised to return his title deed. Consequently, he did not sign the mortgage deed dated 4 November 2016.

PW1 further testified that his title deed was not returned and decided to go to DCB Bank. At the Bank, he was told that he had guaranteed the Maxcom again and to take another loan, and he was shown a document. Upon perusing that document, he informed them that the signature in the document was not his signature. He decided to return to 2<sup>nd</sup> defendant, who promised that they would change the collateral and give him back his title deed, but nothing happened. Therefore, he decided to take legal action.

He further testified that his advocate wrote the first letter to DCB requesting the return of the title deed because he was not a part of the loan advanced in 2016. The Bank informed the advocate that their record indicated that he guaranteed and consented to the 2<sup>nd</sup> defendant to take another loan; therefore, they could not return the title deed.

When he went again to DCB for another follow-up, he was given a letter dated 20 September 2017 with ref no. DCB/MGBR/CR/09/2017. After that response, his advocate wrote again a letter to DCB to demand the return of the title deed, but it was not returned. PW1 tendered the following to that effect;

- i. A letter dated 17 May 2021 from Mussa & Associates Legal Consultants & Practitioner to DCB Commercial Bank as exhibit P5.
- ii. A Letter dated 8 June 2021 from DCB Commercial Bank to Managing Partner Mussa & Associated (Ref. NO. DCB/HO/CS/21/042 as exhibit P6.
- iii. Two letters. A letter dated 15 June 2021 from Mussa & Associate to Branch Manager DCB Bank, Magomeni Branch and a letter dated 20 September 2017 (application for Renewal of loan facility) from DCB executive Director Maxcom collectively exhibit P7

He further testified that the letter dated 20 September 2017 (exhibit P7) was an application for renewal of the loan facility advanced to Maxcom by DCB. In paragraph 2, item 6 of that letter, it was indicated that he guaranteed that loan by the letter of offer of 2017, which Maxcom accepted in September 2017.

He concluded by testifying that in exhibit P2, the signatories for Maxcom were Juma Rajab, Ahmed Lusasi, and Nasibu Makassi; in exhibit P4, the signatories were Juma Rajabu, Ahmed Lusasi, and Hashim Lema. While



in exhibit P7, the signatories were Ahmed Salum Lusasi, Hashim Ibrahim Lema, and Lucy Mathew Kanza. He said he had no relation with the signatories in exhibit P 7.

Further, he was uninvolved and did not consent to provide his title deed for the loan facility advanced to Maxcom from 2016 to 2017.

**PW 2, Safiya Selembu** testified to the following effect that she knew her husband was a guarantor for Maxcom when they applied for a loan from the DCB Bank. She remembered it was 2014; the loan was TZS one billion, and it was for one year. Again in 2015, her husband guaranteed another loan for Maxcom for the amount of TZS One billion for one year. She said she was involved because she consented to the deed of guarantee.

She further testified that in 2016 Maxcom requested their guarantee again, but they refused, and she advised her husband to withdraw their title deed from the Bank. That title was for the house located at Plot No. 63 Sinza.

She concluded by testifying that she never consented to the loan advanced the Maxcom in 2016 and 2017. She knew Maxcom through Juma Rajab, her husband's younger brother, and for that reason, she gave consent in 2014.

In defence **DW1, Abdallah Said Myba** testified to the following effect that Maxcom Africa Ltd had been their customer since 2003. In March 2013, they advanced the loan, worth 600,000,000/=, to them. The loan was increased to Tzs 1 Billion in April of the same year. The loan advanced to Maxcom was an overdraft facility for business purposes. The security for that first loan of TZS 600,000,000/= was the title deed for the house located at Block C, Plot 163 Sinza, bearing the name of Mohamed Mnyau.

He further testified that the loan was for one year. After the expiration of one year, the loan was not repaid in full after a year. Therefore, the client requested an extension of the facility renewal for another year, which was granted.

He further testified that the client was yet to repay the overdraft advanced to him in 2013. After that failure, the Bank issued a 60 days statutory notice to the client and the guarantor in 2020 through the post and registered mail. This is because when the overdraft time expires, there are two options: one is to apply for a one-year extension, and two is to pay the amount due for payment to liquidate the debt. Therefore, the notice required the client within 60 days to clear the outstanding balance, and in the event

of failure to liquidate, the bank shall realize the security. To that effect, he tendered:

- i. The notice to pay or perform or observe covenant in the mortgage deed as exhibit D1

DW1 further testified that the overdraft facility operates as a business loan, allowing the client to draw over the amount specified as a limit in the client's account. The limit of the overdraft advanced to Maxcom was TZS. One Billion for a period of one year. Therefore, the claims offered by the plaintiff were unmeritorious because the 2016 overdraft was not repaid. Further, another deed of variation (mortgage deed) was registered to extend the overdraft facility. The deed of variation of 2016 was between Mr. Mnyau and the Bank, and the amount was again TZS One billion.

He concluded by testifying that the plaintiff could not be given back his title deed for the loan advanced to Maxcom in 2017 because the overdraft facility was not yet paid/serviced.

Further, it was not true that the signatures of the plaintiff and PW 2 were forged. The documents were registered; therefore, they could report to the police.

On his part, **DW2, Godwin Mosses Mnguli**, testified that in 2014 documents in relation to the loan advanced to Maxcom were sent to him for analysis and recommendation. At that time, Maxcom had an overdraft of TZS. 600,000,000/=, and they applied for an extension of overdraft to TZS One Billion.

That overdraft had three securities, the house located at Sinza, owned by Mohamed Mnyau; another house also located at Sinza, owned by Furaji, the Director of Maxcom and the third security was a debenture and personal guarantee from the Maxcom Directors.

He further stated that the overdraft facility advanced to Maxcom was not serviced /liquidated, with an outstanding of TZS 651,000,000/= as the unpaid amount. After the loan became non-performing, they sold one security, i.e., the house belonged to Juma Faraji.

In his evidence, he elaborated that an overdraft facility is a loan in which the client is given the limit approved by the bank. Then the client shall pay the monthly payment on the amount he used in that particular month. When the clients deposit the money equal to the amount withdrawn, the loan becomes zero. The Maximum period for an overdraft is one year, and

when the year expires, and the client fails to repay the whole amount, that means the client defaulted the loan. If that happens, the client and the bank can negotiate, and if discovered that the client's cash flow was affected by reasonable reasons, then the overdraft can be renewed.

The amount of TZS 651,000,000/= accrued from 2014, when Maxcom failed to service the facility; in 2015 and 2016, Maxcom requested a renewal. Therefore, the 2017 loan was not a new overdraft.

He concluded by testifying that when Maxcom renewed the overdraft facility, they signed an offer letter and mortgage deed. The facilities were initiated by an application letter, the renewal request from the client, and a spouse's consent, which the wife of Mohamed Mnyau had signed. (Deed of variation marked as ID 1).

The last defence witness is **DW3, Juma Rajab Furaji**, who testified that Mohamed Athanas Mnyau is his relative as he is his uncle's son.

On 29 April 2014, Maxcom signed a loan agreement with DCB Bank. The loan was an overdraft of TZS One billion for one year. The collateral for that loan were personal guarantees, debenture, and his house, and the house belonged to Mohamed Mnyau as guarantor for that loan.

He further testified that in 2015 they requested another loan for the same amount, and again he requested Mr. Mnyau to guarantee that loan, who agreed. He informed the bank, and they proceeded with Mr. Mnyau with the guarantee procedures. The loan was an overdraft of TZS One Billion for one year. When they applied for the 2015 overdraft, the repayment for the 2014 loan was good; that was why they were granted that loan.

In 2016 he wanted to renew the loan contract and contacted Mr. Mnyau. At that time, he was not ready to guarantee because he wanted to do other issues with his property/ title. When he informed the bank about the refusal of Mr. Mnyau, the Bank officials told him they would speak with Mr. Mnyau. Later, they were given the loan facility letter, which they signed, and the overdraft of TZS. One billion for one year was activated. In 2016, the company continued with the business, but there were difficulties in doing business. They communicated with the bank and requested that in 2017 instead of an overdraft facility alone, they also asked for a term loan. Therefore, in 2017 the agreement with the bank was for 50% of the loan to be in an overdraft facility and 50% to be in the form of a term loan for the same amount of TZS One Billion with the same securities. They requested both an overdraft and term loan because of the relief in the term loan

repayment. The 2017 loans were activated, but that year was tough for Maxcom to do business. Then he went outside the country but was communicating with the bank because of the difficulties in servicing that loan.

He concluded by testifying that in 2021 Dr. Mnyau informed him that he received the notification that his house was about to be auctioned, while he refused to guarantee the loan in 2016.

He concluded by testifying that there was no liability for the overdrafts advanced to them in 2014, 2015, and 2016 as there were no challenges in servicing those overdrafts.

Regarding the guarantee for the loan advanced in 2017, he said he did not know anything because it was between the Bank and Mr. Mnyau.

After closing their cases, parties were allowed to file their final written submissions, and for that, I thank both counsel for their research to assist the court.

Having summarized and considered the evidence brought before this court, the following are the deliberations of this Court in the disposal.

Starting with the 1<sup>st</sup> and 2<sup>nd</sup> issues, which are interrelated as to whether the plaintiff was part to the loan offered by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant via a letter of offer with ref. No DCB/ MGRR/CR/09/2017 dated 20 September 2017 (Exhibit P7) and whether he consented to that loan.

According to the evidence on record, the relationship between the parties was actuated by an overdraft facility availed to the 2<sup>nd</sup> defendant. According to the overdraft facility letters (exhibit P2 and P4), six securities secured the facility, but relevant to this suit, it is only one legal mortgage registered over plot no. 163 Block "C" located at Sinza Area, Kinondoni Municipality, registered in the plaintiff's name as a guarantor of the 2<sup>nd</sup> defendant.

Since this suit revolves around the term overdraft, it is imperative to understand what an overdraft means. The Court of Appeal in **Exim Bank (T) Ltd vs. Dascar Ltd and another**, Civil Appeal No. 92 of 2009 (unreported), while quoting Investopedia, had an opportunity to define the term in the following manner;

*"According to INVESTOPEDIA, an "Overdraft" is defined as an extension of credit from a lending institution when an account reaches zero. An overdraft allows the individual to continue*



*withdrawing money; even if the account has no funds in it. Basically, the bank allows people to borrow a set amount of money. As with any loan, you pay interest on the outstanding balance of an overdraft loan.*

*Logically, this means, that an overdraft facility is extended to a customer of a bank to overdraw his current account”.*

In addition to that, the concept of how overdraft operates is briefly highlighted in the **National Bank of Commerce vs. Nabro Ltd and another**, Commercial Case No. 44 of 2002 (HC-Commercial Division) that;

*“Conceptually, an overdraft involves the extension of credit to a customer for a relatively short period of time. The customer is given a ceiling which defines the maximum amount he is allowed to overdraw on his account at any given time”.*

Furthermore, an overdraft facility, like any other contract, in terms of section 10 of the Law of Contract Act, parties are bound by the terms they freely entered see, **Simon Kichele Chacha vs. Aveline Kilawe**, Civil Appeal No. 160 of 2018 (Tanzlii). Therefore, the contract may vary from one another, but they are all subject to the rules of construction of contracts generally.

As I alluded to earlier, the parties' dispute to this suit is over the facility dated 20 September 2017, a letter of offer with ref. No DCB/MGRR/CR/09/2017 (Exhibit P7). This is the center of controversy between the parties. While the plaintiff testified that he was not a party to that loan facility. To prove that he was not a party to that contract, he tendered the letter of offer regarding that loan (Exhibit P7) and testified that he was not involved or consented to that loan. On the other hand, the 1st defendant, through DW1 and DW2, testified that the 2<sup>nd</sup> defendant did not fully liquidate the previous overdraft facilities; therefore, the 2017 loan, which was split into a term loan and overdraft facility, was a renewal of prior facilities to include the previous liability which was yet to be liquidated in full; therefore, the legal mortgaged owned by the plaintiff was still valid.

Historically, according to the evidence on record, the borrowing relationship between the parties (the plaintiff, 1<sup>st</sup> defendant, and 2<sup>nd</sup> defendant) was actuated for the first time by the overdraft facility letter dated 29 April 2014. (Exhibit P2). The amount of that facility was TZS One Billion (1,000,000,000/=), and the facility was to end on 17 April 2015. Therefore, it was for a period of one year. Two registered legal mortgages secured the facility, but relevant to this matter is plot no. 163 Block "C"

located at Sinza Area, Kinondoni Municipality, registered in the plaintiff's name. This is evidenced by the deed of guarantee (Exhibit P1), which was consented to by his wife (PW2)

After one year, on 15 May 2015, the 1<sup>st</sup> and 2<sup>nd</sup> defendants signed an overdraft renewal (Exhibit P4) for one year up to 15 May 2016. The amount in the facility was TZS One Billion. Two legal mortgages secured the facility, and this time, in addition, there were debentures over the company's assets and personal guarantees by the company's directors. But relevant to this matter is plot No. 163 Block "C" located in Sinza Area.

According to the plaintiff (PW1), he guaranteed this facility as evidenced by a deed of guarantee (Exhibit P3). Also, this was consented to by PW2.

Therefore, from the evidence above, the pillars of the borrowing relationship between the parties in relation to the title deed No. 81586 for plot No. 163 Block "C" located in Sinza Area were; **one**, letter of offer between the 1<sup>st</sup> and 2<sup>nd</sup> defendants, **two**; Mortgaged deed between the plaintiff and the 1<sup>st</sup> defendant, for the plaintiff to guarantee the loan

advanced to the 2<sup>nd</sup> defendant. The two documents were the creators of the borrowing relationship between the parties.

When the parties entered a borrowing relationship in 2014, they signed the letter of offer dated 29 April 2014 (Exhibit P2) and a mortgage deed dated 13 June 2014 (Exhibit P1).

Likewise, in 2015, two documents were again signed a letter of offer dated 15 May 2015 (Exhibit P4) and a mortgage deed dated 19 June 2015 (Exhibit P3).

The letter of offer of 2014 (Exhibit P2) was titled "**Application for an overdraft**" for the amount was TZS One Billion, and the letter of offer of 2015 (Exhibit P4) was titled "**Application for overdraft renewal of TZS. One Billion.**" According to exhibit P4, the overdraft facility was to expire on 15 May 2016.

Also, from the records, nothing was tendered to reveal if, in 2016, parties had signed any document concerning their borrowing relationship.

Regarding the split loan of 2017, which is the epitome of the dispute between the parties, on his side, the plaintiff (PW1) tendered the letter of offer dated 20 September 2017 (exhibit P7) and testified that he neither

consented nor signed a mortgage deed in respect of the loan facility. That he was not the party to that contract after, in 2016, he refused to guarantee the 2<sup>nd</sup> defendant anymore.

That letter of offer (exhibit P7) is titled "***Application for renewal of loan facility TZS. One Billion.***" In that application, the renewal was granted, and the facility was split into a term loan for 24 months and an overdraft facility for 12 months.

According to the testimony of DW2, the unpaid outstanding was TZS 651,000,000/=, and it accumulated from 2014 and the renewal of 2015 and 2016; therefore, the 2017 facility was not a new loan. On his part, the 2<sup>nd</sup> defendant through DW3, who was one of the Directors, testified that in 2016, the plaintiff refused to guarantee them, and when he informed the 1<sup>st</sup> defendant, they promised to speak with the plaintiff themselves. Further, he testified that there were no previous liabilities for the facility advanced to them in 2014, 2015, and 2016 as there was no problem in servicing the facility. The problems started in 2017 due to business difficulties they faced that year.

From the above pieces of evidence from the parties, defining what the term "renewal" means and its implication in the loan contacts is essential. This is because the term is used in the letter of offer of 2015 (Exh. P4) and the letter of offer of 2017 (Exh. P7). Further, when testifying DW2, the Bank Officer, clarified that renewal of an overdraft facility does not mean a new loan.

The **Black's Law Dictionary**, 10<sup>th</sup> Edition at page 144, defined the term to mean.

*"the re-creation of a legal relationship or the replacement of an old Contract with a new contract, as opposed to the mere extension of a previous relationship or contract".*

Further, regulation 7(2) and (3) of **the Banking and Financial Institutions (Management of Risk Assets) Regulations, 2014** provides that;

*"2. Any matured or expired performing overdraft facility may be extended, renewed, or rolled over and remain in the same classification category, provided there is no evergreening or hard core elements and all interest and charges due have been paid.*

*3. A matured or expired non-performing overdraft facility may be extended, renewed or rolled over provided that it shall not be upgraded into a better classification until it has satisfactorily performed for a two consecutive quarters.*

From the above provision of law, a renewal may be in respect of a performing or non-performing overdraft facility by replacing the old contract with the new contract. Therefore, what is essential is the terms of that new contract; this is because it is common knowledge that parties to a contract are bound by the terms of their contract; see **Lulu Victor Kayombo vs. Oceanic Bay Ltd**, Consolidated Civil Appeal No. 15 and 22 of 2020, CAT (Tanzlii). This principle also binds the loan/ overdraft facility as a contract.

I have thoroughly reviewed the relevant document, the letters of offer, i.e., exhibit P4 and P7, but I could not locate anywhere if the new letters of offer contain the term or information that there was an unpaid outstanding amount or the facilities were not serviced and that outstanding is carried in the renewal loan. The terms of both renewal loans are silent on that issue.

As alluded to earlier, the Bank though DW2, stated that the unpaid outstanding was TZS 651,000,000/=, which accumulated from 2014, and the renewal of 2015 and 2016; hence 2017 facility was not a new loan.

But from the discussion above, I am not persuaded by the evidence of DW2 because since there were written agreements between the parties, then parties are bound by those written agreements. Generally, the written agreement prevails over the oral evidence in terms of 101 of the **Tanzania Evidence Act**, Cap 6 RE 2019.

Therefore, flowing from above, based on the evidence on record, the facility of 2017 vide letter offer dated 20 September 2017 (Exhibit P7) is a new agreement independent from the previous liability, if any. This is because there is no document to prove that there were liabilities accrued from the overdrafts of 2014, 2015, and 2016. In the absence of express terms and conditions in the letter of offer of 2017, it is very difficult to speculate if there was an outstanding unpaid loan accrued from the former overdraft facilities or failure to service the prior facilities, which the plaintiff had guaranteed, as there is no evidence of carried forward of the unpaid debt. Even the letter of offer of 2017 (Exhibit P7) does not reveal how much was carried out from the previous loan facilities.

In general, there is no document indicating if the overdraft facilities the plaintiff had guaranteed were non-performing or were not liquidated in



full, to what extent, and the amount of money involved/ not liquidated. Both letters of offer tendered in this Court do not reveal the issues above.

The 1<sup>st</sup> defendant even failed to tender any Bank statement regarding what the DW2 alleged to indicate the cash flow in the overdrafts facilities the plaintiff had guaranteed.

In further determination, I find that neither the plaintiff nor the defendants tendered any deed of mortgage or deed of guarantee to prove that the plaintiff was involved in the 2017 renewal loan facility and the loan restructuring by splitting it into a term loan and overdraft facility. Nothing was tendered to prove that he guaranteed the 2<sup>nd</sup> defendant in 2017. The effects of this are as follows;

**One**, there is no evidence that the plaintiff guaranteed the loan facility of 2017; therefore, there is no proof that he participated, consented, and signed the mortgage deed in respect of that split facility.

**Two**, the loan facility of 2017 changes the nature of the terms of the contract between the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant. The facility was split into a term loan for a period of two years and an overdraft facility for a term of one year. In law, this is not acceptable, as Sir Charles Newbold held

on page 520 In **Harilal & Co. Ltd. v. Standard Bank Ltd. [1967]E.A. 512**, in the following words

*"I do not accept the submission that those words would entitle the bank to change the whole nature of the account which the guarantor guaranteed and nevertheless impose upon the guarantor a liability arising in circumstances different from those which were in the contemplation of the parties at the time the guarantee was given."*

Therefore, from the above discussion, even for the sake of argument, if we take into consideration the evidence of DW1 and DW 2, that the loan agreement of 2017 was the result of the outstanding debt accrued from the previous overdraft from 2014 but still the plaintiff was not involved in that loan agreement, which as I said earlier there is no deed of mortgage tendered in this Court as it was done in the 2014 and 2015 overdrafts facilities.

Ergo, the construction of the 2017 split loan facility, which varied the terms of the contract he prior guaranteed without the consent and knowledge of the plaintiff, prejudiced the plaintiff and affected his guarantor relationship with the Bank. This position is well articulated by the Court of Appeal in **Exim Bank (T) Ltd vs. Dascar Ltd and another**, Civil Appeal No 92 of 2009 (unreported), where it held that;

*"Under our Law of Contract Act, a surety can only be discharged from his liability under six conditions: -*

- i. When the terms of the contract between the principal debtor and the creditor are varied without the consent of the surety*
- ii. ....".*

As discussed earlier, the 1<sup>st</sup> and 2<sup>nd</sup> defendants in 2017 varied what the plaintiff agreed to guarantee in 2014 and 2015 without his consent and knowledge.

Therefore, with the crystal-clear evidence on the record and from the discussion above, the 1<sup>st</sup> and 2<sup>nd</sup> issues are decided in the affirmative that the plaintiff was not a party to the loan offered by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant via a letter of offer with ref. No DCB/ MGRR/CR/09/2017 dated 20 September 2017 (Exhibit P7); therefore, he did consent to that loan.

From the above-revealed circumstances, my observations are; it seems the Bank Officials were working under the assumption that they could continue to use the deed of mortgage to guarantee the renewal of the loan with varied conditions without the consent and the signing of the guarantor after the expiration of the period of guarantee.

Therefore, I wish to remind the financial institutions that it is vital to make sure that all terms of the loan facilities are expressly and explicitly contained in the loan contracts and that all necessary documents concerning that particular loan must be consented to, dated and signed by all parties involved in that borrowing contract. In the absence of express provisions in the loan contracts, to counter or to add a new issue orally is an afterthought, as that oral testimony cannot prevail over the written agreement.

Turning to the 3<sup>rd</sup> and last issue for determination is on reliefs the parties are entitled. Since I hold that the first and second issues are decided in affirmative, it is clear that the reliefs to be scrutinized are what the plaintiff prays in his plaint. Therefore, for clarity, I will deal with each relief claimed.

In the first and second reliefs, the plaintiff prayed;

- i. A declaration that the plaintiff is not part to the loan offered by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant via letter offer with reference no. DCB/MGBR/CR/09/2017 dated 20 September 2017 or any other thereafter.
- ii. A declaration that the plaintiff never consented to the letter offer with reference no. DCB/MGBR/CR/09/2017 dated 20 September

2017 hence not liable for any liability arising from that letter offer.

Since I have found, as I elaborate above, that the plaintiff was not involved in a loan dated 2017, he was neither a party nor did he not consent. Therefore, I declare that;

- i. The plaintiff was not part to the loan offered by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant via letter offer with reference no. DCB/MGBR/CR/09/2017 dated 20 September 2017 or any other thereafter.
- ii. The plaintiff never consented to the letter offer with reference no. DCB/MGBR/CR/09/2017 dated 20 September 2017 hence not liable for any liability arising from that letter offer.

For the 3<sup>rd</sup> prayer, i.e

- i. That the 1<sup>st</sup> defendant be ordered to return the title deed of the plaintiff No. 81586 for Plot No. 163 Block "C" Sinza.

As I elaborated above, since I have found that the plaintiff was not a part of the loan, and he did not guarantee that loan of 2017 between the 1<sup>st</sup> and 2<sup>nd</sup> defendant, therefore holding the plaintiff's title deed for the loan,

which he was not involved and consented is not proper and unlawful. That loan was between the 1<sup>st</sup> and 2<sup>nd</sup> defendants. Therefore, I so order that;

- i. The 1<sup>st</sup> defendant to return the title deed with No. 81586 for Plot No. 163 Block "C" Sinza to the plaintiff, the owner.

In conclusion, the judgment and decree are entered in favor of the plaintiff as elaborated above with costs.

I order accordingly.



A handwritten signature in blue ink, appearing to read "K. D. Mhina".

**K. D. MHINA**  
**JUDGE**  
**02/05/2023**