

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(SONGEA DISTRICT REGISTRY)**

AT SONGEA.

CIVIL CASE NO. 6 OF 2019

NMB BANK PLC PLAINTIFF

VERSUS

THE REGISTERED TRUSTEES OF MVIWAMBI

FARMERS GROUP 1ST DEFENDANT
MEINRAD JOHN NCHIMBI 2ND DEFENDANT
PHILEMON INNOCENT MATESO 3RD DEFENDANT
KASIAN ALOYCE MAPUNDA 4TH DEFENDANT
BUNUS HYERA 5TH DEFENDANT
AGATON JOSEPH MBEPERA 6TH DEFENDANT
IMMACULATA JOHN NDUNGURU 7TH DEFENDANT
KASSIAN MAPUNDA 8TH DEFENDANT
CLEMENCE LEMBERE 9TH DEFENDANT
GIDO BEATUS LEMBELE 10TH DEFENDANT
PHILO NDUNGURU 11TH DEFENDANT
SAMWELI NDUNGURU 12TH DEFENDANT
REMIGIUS KAPINGA 13TH DEFENDANT
AROIS KASSIAN MAPUNDA 14TH DEFENDANT
AMOS BLASTUS MAPUNDA 15TH DEFENDANT
DESTERIUS MAPUNDA 16TH DEFENDANT

ISACK KINUNDA17TH DEFENDANT
TEOFORD KAPINGA18TH DEFENDANT

Date of last order; 20/10/2020

Date of the judgment; 24/11/2020

EX PARTE JUDGMENT

I. ARUFANI, J.

The plaintiff, NMB PLC filed in this court the suit at hand claiming against the defendants jointly and severally for the sum of TZS 283,128,711.47/= being the total outstanding loan facility advanced to the first defendant and guaranteed by all defendants plus interests, general damages and costs of the suit. The defendants were served with notice to appear in this court and initially were represented by Mr. Gaudence Ndomba, learned advocate who informed the court they were in the process of settling the matter out of court.

Later on the plaintiff prayed to amend the plaint and after the plaint being amended the counsel for the defendants prayed to be served with the copy of the amended plaint so that he can prepare and file in the court the written statement of defence of the defendants. When the counsel for the defendants was served with the copy of the amended plaint he said he was no longer representing the defendants. The court ordered the

defendants to be served through publication of the notice to appear in the court in the newspaper and the defendants were served through Nipashe local newspaper dated 3rd July, 2020. However, after the defendants being served neither a written statement of defence filed in the court nor any defendant entered appearance in the court and that situation caused the court to allow the plaintiff to continue to prove their claims ex parte against the defendants.

Although under normal circumstances there was no need of framing issues for determination in the matter because there is no written statement of defence which was filed in the court to object the claims of the plaintiff but the counsel for the plaintiff prayed to propose the issues to be determined in the matter and those issues were adopted by the court as the issues to be determined in the matter. The issues proposed and adopted by the court are as follows:-

1. Whether the plaintiff granted loan facility to the first defendant.
2. Whether the second to eighteenth defendants guaranteed the aforesaid loan facility.
3. Whether the first defendant defaulted to repay the loan.
4. What reliefs the parties are entitled.

The sole witness testified in this matter on behalf of the plaintiff is Mussa Mzee Farahani who testified as PW1. While being led by Mr. Baraka Mbwi, learned advocate he told the court that, he is employed by the plaintiff and is working at Mbinga Branch as a Manager Customers Experience. He said he knows the first defendant is a Cooperative Society and is their customer. He said he used to advance loan facility for agriculture inputs to the first defendant. He said when they started their relationship the first defendant took to them different documents which were Certificate of Incorporation, Certificate of Registration and Trustees Deed which was admitted in the case exhibit P1 collectively.

PW1 said on 3rd January, 2018 they signed a letter of offer of advancing a credit facility of TZS 400,000,000/= to the first defendant and they also signed a deed of understanding between the plaintiff and the first defendant which shows the first defendant agreed were ready to use the loan facility. The bank offer letter dated 3rd January, 2018, NMB General Terms and Conditions to the loan facility and the deed of understanding signed on 5th January, 2018 were admitted in the case as exhibit P2 collectively. He said the loan facility advanced to the first defendant was for one year from the date of signing the loan documents.

PW1 told the court that, the guarantee for the loan was in three categories. He said the first category was personal guarantee whereby the leaders of the first defendant who were the second, third and fourth defendants signed the guarantee forms which were also signed by the plaintiff officials to guarantee the loan facility advanced to the first defendant. Personal guarantee entered by the second, third and fourth defendants on one side and the plaintiff on the other side were admitted in the case as exhibit P3 collectively.

He said the second category of the guarantee was for mortgage deed whereby the guarantors who were fifth to eighteenth defendants issued their immovable properties which were land as a commitment for the first defendant to repay the loan. Thirteen spouses consent mortgage deeds dated 3rd January, 2018 for the mortgaged immovable properties were admitted in the case as exhibit P4 collectively. The said spouse mortgage deeds were signed by husbands and wives. He said another guarantee was chattel or movable properties whereby the first defendant pledged the crops collected from their famers to be used as a security for repayment of the loan facility. The chattel mortgage dated 3rd January, 2018 was admitted in the case as exhibit P7.

PW1 went on telling the court that, after the first defendant being granted the loan facility they defaulted to repay the same. He said up to when the suit was filed in the court the outstanding loan which had not been repaid was TZS 283,128,711.47. PW1 said that, before filing the suit in the court they reminded the first defendant about their debt and the first defendant notified them they know their debt and written to them a letter of showing their commitment to pay the debt. The letter dated 27th August, 2018 from the Board of Trustees of the first defendant to show commitment of the first defendant to repay the loan facility where is stated the first defendant would have finished to repay the loan facility by 30th September was admitted in the case as exhibit P5.

He said that, despite the aforesaid commitment of the first defendant to repay the loan but the first defendant failed to repay the loan. PW1 said that, they wrote a demand note to the first defendant and the through their advocate, (Gaudence Ndomba) the first defendant informed them they were still remembering their debt and promised to pay the same. The demand note dated 7th December, 2018 and the reply from the counsel for the first defendant dated 9th May, 2019 were admitted in the case as exhibit P6 collectively.

PW1 said that although their debtor is the first defendant but they have joined the second to eighteenth defendants in the suit as were guarantors of the first defendant in the loan facility advanced to the first defendant. At the end he prayed the court to allow their claims and order the defendants to pay their debt and interests together with the costs of the suit.

Having heard the evidence of PW1 the court has found proper to start with the first issue which states whether the plaintiff granted banking loan facility to the first defendant. The court has found the evidence of PW1 is very clear that on 3rd January, 2018 the plaintiff issued an offer letter of advancing banking loan facility of TZS 400,000,000/= to the first defendant. The court has found as stated by PW1 in his evidence and stated in the offer letter which was admitted in the case as exhibit P2 the loan facility was for purchasing coffee inputs for the season of 2018/2019 and was to be repaid within one year from the date of signing the loan facility's documents.

The court has also found that, PW1 stated clearly in his testimony that, first defendant through its leaders accepted the offer and on the same date the leaders of the first defendant signed the offer letter, general

terms and conditions applicable to the facility and deed of understanding which were collectively admitted in the case as exhibit P2. The above stated evidence make the court to find that, as there is no written statement of defence filed in the court by any of the defendants and there is no any defendant appeared in the court to dispute the first defendant was not granted the above stated loan facility the court has found there is no any reason which can make it to find the first issue cannot be answered in affirmative. In the premises the first issue is answered in affirmative.

Having found the answer to the first issue is in affirmative the next issue to determine is whether the second up to eighteenth defendants guaranteed the loan facility granted to the first defendant by the plaintiff. The court has found that, PW1 stated clearly in his evidence that, in showing commitment of the first defendant to repay the loan the second, third and fourth defendants who were leaders of the first defendants guaranteed the loan facility by signing personal guarantee which was admitted in the case as exhibit P3.

The evidence of PW1 shows further that, apart from the guarantee of the leaders of the first defendant to the loan facility made through exhibit P3 the fifth up to eighteenth defendants mortgaged their immovable

properties to guarantee the loan facility advanced to the first defendant and signed the spouse consent mortgage documents which collectively were admitted in the case as exhibit P4. The court has found that, there is no any of the defendants filed any defence in the court or appeared in the court to dispute what is averred by the plaintiff in the amended plaint that the second up to eighteenth defendants guaranteed the loan facility granted to the first defendant.

That being the position the court has failed to see any reason which can make it disbelieve what is averred in the amended plaint and what was said to the court by PW1 when he was giving his testimony to the court that the second up to eighteenth defendants guaranteed the loan facility granted to the first defendant. In the premises the court has found the second issue is equally supposed to be answered in affirmative that the second up to eighteenth defendants guaranteed the loan facility granted to the first defendant.

As for the third issue which states whether the first defendant defaulted to repay the loan facility advanced to them the court has found that, the evidence of PW1 as demonstrated hereinabove shows the first defendant defaulted to repay the loan facility granted to them. That

evidence of PW1 is supported by the demand notice written by the plaintiff to the first defendant dated 7th December, 2018 which was admitted in the case as exhibit P6. That demand notice shows the first defendant had failed to repay the loan facility and caused the debt to raise up to TZS 426,734,455. The said evidence of PW1 is also supported by the reply made by the counsel for the defendants to another demand notice written by the plaintiff on 18th March, 2019 and served to the defendants on 12th April, 2019.

In his reply the counsel for the defendants stated categorically in his letter dated 9th May, 2019 which was also admitted in the case as part of exhibit P6 that, on 3rd January, 2018 the plaintiff granted loan facility of TZS 400,000,000/= to his clients and that loan facility was supposed to expire after twelve months from the date of signing the loan instruments. The defendants' counsel stated in his letter that: *'it is also true that my clients had failed to pay all amount withdrawn from their account as a loan at the tune of TZS 285,298,711.47.'*

The court has also found that, the letter of the counsel for the defendants is accompanied by a commitment letter to discharge the loan facility written and signed on 9th May, 2019 by third and 5th defendants as

the leaders of the first defendant which states that: *'on behalf and for MVIWAMBI (first defendant) we would like to inform and assure you that we admit to have outstanding loan balance of TZS 285,298,711.47.'* The author of the said commitment letter stated therein that, they were determined to clear the outstanding debt by 30th October, 2019. All that evidence shows clearly that, up to when the matter was filed in the court the first defendant had defaulted to repay the loan granted to them in full. In the premises and without laboring much in this issue the court has found there is sufficient evidence to establish the first defendant defaulted to repay the loan facility advanced to them by the plaintiff.

Coming to the last issue which states which reliefs the parties are entitled the court has found the plaintiff prays the defendants jointly and severally be ordered to pay the plaintiff the sum of TZS 283, 128,711.47 being the total sum of the outstanding debt arising from the loan facility advanced to the first defendant by the plaintiff. The court has found that, as the defendants have admitted the first defendant has defaulted to pay the said debt then the said claim is granted as presented. As for the claim of 60% of the above stated principal debt of TZS 283,128,711.47 the court has found the counsel for the plaintiff prayed the said prayer to be

abandoned. Therefore that relief is not granted as prayed by the counsel for the plaintiff.

As for the prayer of order of payment of the agreed interest of 20% per annum on the principal amount from the date of filing the suit to the date of judgment the court has found PW1 did not tell the court there was such an agreement between the plaintiff and the defendants. The court has also failed to see anywhere being in the amended plaint or exhibits admitted in this case as evidence stated the parties agreed the alleged interest will be claimed. In the premises the said claim of interest of 20% is not granted as the court has found there is no evidence adduced before the court to support the same.

The plaintiff prays to be granted interest on the decretal amount at the court rate of 11% from the date of judgment till when the decree is fully satisfied. The court has found the position of the law as held in the case of **Njoro Furniture Mart Ltd V. Tanzania Electric Supply Co Ltd**, [1995] TLR 205 is that, interest at court rate on decretal amount from the date of judgment to the full satisfaction is payable at 7%. It can only be granted above that percentage if there is an agreement entered by the parties in writing or by consent of the parties and is not supposed to

exceed 12%. Since the court has not been informed there was an agreement entered by the parties or they had consented for the interest to be charged at 11% on the decretal sum the court has found the interest which can be granted is only 7%.

With regards to the prayer of payment of general damages the court has found general damage is awardable at the discretion of the court. That being the position the court has found as the defendants have breached the terms and conditions of repaying the loan facility advanced to the first defendant by the plaintiff and as there is justifiable reason given to the court for the said default the court has found the plaintiff is entitled to a general damages. Therefore the plaintiff is entitled to a general damages of TZS 10,000,000/= for the default of the first defendant to repay the loan facility within the agreed period of time. The plaintiff is also entitled to the costs of the suit.

In the final result the court has found the plaintiff has proved the claims filed in this court to the standard required by the law hence the judgment and decree is hereby entered in favour of the plaintiff and against the defendants jointly and severally as follows:

1. The defendants to pay the plaintiff the sum of TZS 283,128,711.47 being the total outstanding debt arose from the loan facility advanced to the first defendant and guaranteed by the defendants.
2. The defendants to pay the plaintiff interest on the decretal amount at the court rate of 7% from the date of judgment till when the decree is fully satisfied.
3. The defendants to pay the plaintiff the sum of TZS 10,000,000/= being general damages.
4. The defendants to pay the plaintiff costs of the suit as will be assessed by the taxing master.

Dated at Songea this 24th day of November, 2020




I. Arufani
I. ARUFANI
JUDGE

24/11/2020

Court:

Ex parte judgment delivered today 24th day of November, 2020 in the presence of Mr. Vicent Kassale, advocate for Mr. Baraka Mbwiro advocate for the plaintiff. All defendants are absent. Right of appeal is fully explained.


 **I. ARUFANI**
JUDGE
24/11/2020