

TANZANIA / JUDGMENT

diamond trust bank tanzania limited vs diana complex limited and 3 others 2021 tzhccomd 3438 25 august 2021

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA COMMERCIAL DIVISION AT
DAR ES SALAAM COMMERCIAL CASE No 118 OF 2019 BETWEEN DIAMOND TRUST BANK
TANZANIA LIMITED..... PLAINTIFF VERSUS

1. DIANA COMPLEX LIMITED.....FIRST DEFENDANT
2. KINGSWAY APPARTMENT LTD..... SECOND DEFENDANT
3. MEHBOOB KASAMALI POPTANI.....THIRD DEFENDANT
4. HUSSEIN GULAMHUSSEIN DAMANI..... FOURTH DEFENDANT

JUDGMENT

MRUMA, J. The Plaintiff and Defendant entered into an agreement whereby the Plaintiff loaned the 1st Defendant a term loan facility of United States Dollars Eight Million Five Hundred (USD 8,500,000) with interest at the rate of 8% per annum. The loan was payable within a maximum period of 96 from the first day of drawdown (i.e. day of borrowing). The loan was secured by; i

1. First legal and continuous mortgage over property located on Plot No 354 along United Nations Road, Upanga Area, Ilala Municipality Dar Es Salaam City vide Certificate of Title No. 186163/54 registered under the name of Diana Complex Limited valued Property Consultancy and Services Ltd, having an open market value of T.shs 3,131,000,000/= as per valuation report dated October, 2014.
2. First and continuous mortgage over located on Plot No. 353 along United Nations Road, Upanga Area, Ilala Municipality Dar Es Salaam City, Vide CT No 186163/58 registered under the name of Diana Complex Ltd, valued by Property Consultancy Services Ltd, having an open market value of TZS 3,195, 000,000/= as per valuation report dated October, 2014;
3. First legal and continuous mortgage over Apartments No. 6, 7,8 and 9 and Recreational Area located on Plot No, 117 Mwandu lane, Kingsway Area, Kinondini Municipality, Dar es Salaam Citu vide CT No. 186030/19 registered under the name of Kingsway Apartments Ltd, valued by Property Consultancy & Services Ltd having an open market value of TZS 4,228,000,000/=

as per valuation report dated October 2014. The 1st Defendant stated in its Written Statement of Defence that although in terms of the loan agreement the Plaintiff was to avail to it the sum of USD 8.5 Million as part of finance of the costs of the project, the Plaintiff 2 never released all the funds that were contracted in terms of the Term Loan Facility and thus impaired the project completion as planned. Furthermore, on the basis of the loan agreement the 1st Defendant claims to have made some payments to a contractor Tanchi Brothers Construction Company Limited amounting to USD Seven Million Two Hundred Fifty Eight Thousand Seven Hundred Nineteen Seventy Eighty Cents. The Plaintiff issued Statutory Default Notice to the Defendants requiring them to pay the arrears but in vain, hence this suit seeking to recover the owing sums of USD 8,453,067.80 together with interest and costs. In their defence the 1st, 2nd, and 3rd Defendants denied the Plaintiff's claims. The first Defendant denied defaulting in servicing the loan disputing the amount claimed and contending that in terms of the agreement loan repayment was to be made from the rental income and that it was expected that in the event of delays in project completion share holders' revenue from real estate business would be used to mitigate such delay. He prayed for dismissal of the suit with costs. The fourth Defendant filed a separate Written Statement of Defence. He admitted to have guaranteed the loan but contended that the loan was secured by the third Defendant and according to the information he had, to the great extent the loan was repaid. Witnesses for both parties filed witness statements and they were cross examined. 3 Both parties were directed to file written submissions and they duly complied with the timelines set by court. The following issues were framed for determination: -

1. Whether the Plaintiff availed the term loan facility to the 1st Defendant and if yes, what was the amount and the terms of that loan facility;
2. What amount (if any) is outstanding and due to the Plaintiff;
3. What (if any) are the liabilities of the Defendants in the term loan facility;
4. To what reliefs are the parties entitled. The issues will be dealt with in the order they were set out. Whether the Plaintiff availed the term loan facility to the 1st Defendant and if yes, what was the amount availed and what were the terms of the facility. The evidence of PW1 Betty Jonas Rupia confirmed by DW1 Mehboob Kassamali Poptani, the third Defendant is to the effect that by a Credit Facility letter dated 18th February, 2016, the 1st Defendant was granted loan facility of USD 8,500,000.00. The loan was repayable within 96 months from the date of first drawdown inclusive of moratorium period of 36 months and interest was to be serviced monthly from the first month of drawdown. 4 The 1st Defendant secured the loan by mortgaging properties comprised in Plots No 353 and 354 along United Nations Road, Upanga Area in Ilala Municipality Dar Es Salaam City. Other collateral is on apartment Nos. 6, 7, 8 and 9 and recreational area located on Plot No. 117 Mwandu Lane, Kingsway Area Kinondoni Municipality, in Dar Es Salaam City owned by the 2nd Defendant. When the 1st Defendant defaulted on the loan, the Plaintiff issued a demand letter requiring payment of the entire sum due (Exhibit P6) . By then, the loan due USD 8,199,000.00. PW1 Betty Rupia

testified uncontroverted to the effect that the Plaintiff's bank availed to the first Defendant a new term loan facility of USD (United States Dollars) 8,500,000.00. This evidence was supported by the testimony of Mehaboob Hassanali Poptan (DW1), who testified in cross-examination that there was a term loan facility agreement entered between the Plaintiff and the 1st Defendant under which the Plaintiff availed to the 1st Defendant USD 7,553,814.00. There is also evidence of Frednand Celestine Kimario (DW2), the first Defendant's accountant who testified to the effect that the Plaintiff availed the term loan facility to the 1st Defendant. According to the term loan facility letter of offer dated 18th February, 2016 (Exhibit PI), the Plaintiff availed to the 1st Defendant a Term Loan Facility of USD 8,500,000.00. In view of the above analyzed evidence, there is sufficient uncontroverted evidence showing that the Plaintiff did avail to the 1st Defendant a term loan facility of USD 8,500,000.00. The first issue is therefore answered in 5 the affirmative. The terms of the said loan term facility agreement can easily be deduced from the agreement (Exhibit PI) and they are as follows:

- i. Loan amount: USD 8,500,000.00 ii. Loan period 60 months after 36 months of moratorium period; iii. Interest rate chargeable 8% per annum
- The Defendant failed to pay the agreed monthly installments thereby defaulting on the loan and by 16th May, 2019 the outstanding due against her was USD 8,199,000.00. This was a clear breach of the contract with the Plaintiff. While the 1st, 2nd and 3rd Defendants argue that the Plaintiff never released all the funds that were contracted in terms of the term loan facility and thus, impaired the project completion plan and thereby breaching the contract as well, this argument cannot be sustained. When he was cross-examined by Mr. Zacharia Daudi, counsel for the Plaintiff, Mehboob Hassanali Poptan DW1 told the court that in terms the New Term Loan Facility the Plaintiff ought to have advanced USD 8,500,000.00 but he gave USD 753, 814.00 only. When he was asked if he has any evidence of the amount disbursed by the Plaintiff she replied that he had none. She also admitted that in terms of clause 12 (b) of the New Term Loan Facility Agreement (Exhibit PI), the Plaintiff has the right to withhold disbursements of the facility. The contract gave the Plaintiff that right without assigning any reason. There is evidence that the loan was not disbursed in full and it has been submitted for the Plaintiff that due to 6 overdue repayments the total amount disbursed was USD 8,086,914.00. The Defendant didn't challenge this evidence and the submissions. In view of that this court finds that the entire amount agreed in the loan facility was not disbursed instead, USD 8,086,914.00 was availed to the 1st Defendant. This was done within the terms and conditions of the agreement (Exhibit PI) The next issue is what amount (if any) is outstanding. From the evidence of PW1 which was echoed by DW1, the total agreed amount was USD 8,500,000.00 but the amount disbursed for reasons stated was USD 8,086,914.00. It is the evidence of DW2 that they made some payments on accrued interest. In paragraph 15 of his witness statement DW2 states that the 1st Defendant has paid to the Plaintiff USD 1,557,357.32 as interest on loan. This is a clear admission by the 1st Defendant that nothing has been paid towards settling the principal amount loaned. As there is unchallenged testimony of PW1 to the effect that by the time of instituting this suit the outstanding amount including interest

and other charges was USD 8,453,067.80 this court finds and holds that the outstanding amount at the time of filing this suit was USD 8,453,067.80. The third issue is about liabilities and it asks; what (if any) are the Defendants' liabilities in the term loan facility? In law Where a contract provides for prompt payment of each installment as being of the essence, the effect of the clause is that 'bny failure to pay an installment promptly is breach of contract going to the heart of the contract giving the right to terminate the contract at law.... [See Lombard North Central PLC vs. •7 Butterworth [1987], RB 527. In general, the effect of termination of the contract is discharge the parties from their unperformed obligations under the contract. However, it does not affect liabilities of the parties for the breach of that contract that occurred prior to the contract being terminated. Apart from the fact that the Plaintiff is entitled to terminate the contract. She is also entitled to recover the sums which are due and outstanding. The evidence of PW1 shows that at the time the suit was filed USD 8,453,067.80 was due to the Plaintiff from the Defendant. However, the Defendant states that the loan repayment was to be made from the rental income and that it was expected in the event of delays in project completion share holders' revenue from the real estate business would be used to mitigate such delays. Apparently these expectations were not accommodated in the facility agreement signed by the parties, thus, they do not form part of the terms and conditions of the agreement. This court finds that the Plaintiff is entitled to recover the entire amount due on the loan. The principle established by decided cases is that: - "where there is a clause providing that in event of any breach of contract a term loan would immediately become payable and that interest on the full loan would not only still be payable but payable at once to constitute a penalty as being payment stipulated as in *torrorem* or legal threat of the offending party". This principal was established by Sir John Donaldson in the case of *Oresundsvaret Aktiebalag vs. Marcos Diamantis 8 Lemos (The "Angelic Star")* [1988]! LLoyds Rep. 122 (CA). As regarding liabilities of other Defendants, outstanding sum, as correctly submitted by the plaintiff's counsel, the position of the law has been settled by the Court of Appeal in Civil Appeal No. 92 of 2009 between Exim bank (Tanzania) Limited Versus Dascar Limited and Others where the Court said: "Once a guaranteed debt is due and the principal debtor has failed to pay it, it is the duty of the surety to pay it together with all the attendant consequences arising from the breach. In terms of section 80 and 92 of the Act, once a principal debtor defaults in the payment of the loan, the surety steps into or is placed Into equal footing with that of the principal debtor. So unless the principal debtor sooner discharges the liability, the guarantor is as liable as the principal debtor to the creditor and to the same extent under the terms of the overdraft facility" In Civil Appeal No. 139 of 2017 between CRDB Bank Versus Issack B. Mwamasika and 2 others the court held thus: "The guarantor cannot escape the legal consequences awaiting loan guarantors in case their principal debtors fall to pay their loan or default in their 9 repayment schedules. The persona! guarantee and indemnity which the guarantorsexecuted to enable the third Defendant to secure the loan facility from the Appellant, is in law a binding contractual agreement which left it open to the Appellant to enforce the terms of the guarantee in case the third Respondent (as per principal debtor) fails to liquidate its debt" The argument of the 4th Defendant that the suit is premature and

was hurriedly filed as the bank didn't offer him the chance as a guarantor to discuss the status of the loan is hereby rejected. There is sufficient evidence to the effect that the 1st Defendant has defaulted in repayment. The 4th Defendant stated in his witness statement that he was notified of the notice of default on the facility on 25th July, 2019. This matter was presented for filing on 16th October, 2019 which is about three months after he became aware of the notice of default. If he had wanted to discuss the status of the loan with the Plaintiff, he had sufficient time to do so. He didn't. Further to that, even after the institution of the matter in court, parties went through mediation process which took place effectively from 6th August 2020 to 18th September, 2020 when it was marked to have failed. In my opinion that was yet another great opportunity for the 4th Defendant to discuss and possibly agree with the Plaintiff on the status of the loan. He didn't seize that opportunity to discuss it, therefore he cannot be heard in complaining that he was not offered chance to discuss the status of the loan. Section 80 of the Law of Contract Act [Cap 345 R.E. 2019], provides clearly that: "the liability of the surety is co-existent with that of the principal debtor, unless it is otherwise provided by the contract" in the case of *Altica Sea Carriers Corporation vs. Ferrostoai Poseidon Bank Reederei GMBH* [1976] 1 Lloyd's Rep. 250 Lord Denning emphasized that: "The aim of the law is to ensure that an innocent party receives his full due and that no rule or equity can compel him to take a loss no matter how minute it may be". The learned Judge stated further that: ".....An innocent party should be adequately compensated. The only compensation for non-payment of a debt is payment of the debt. The innocent party in other words is entitled to that no loss end and is empowered to achieve it by an action for debt. The contract breaker cannot escape his contractual liability or limit his liability by repudiating it and insisting that such repudiation be accepted by the innocent party." ii As already indicated in this judgment the only compensation for non-payment of debt is payment of debt. And this court is bound with the decision of the Court of Appeal in *Mwamasika's case* (supra) that guarantors cannot escape the legal consequences in case their principal debtors fail to repay the loan or default in their repayment schedules. While I agree with the 4th Defendant's submission that in terms of Section 127(1) of the Land Act [Cap 113 R.E. 2019], issuance of a notice of default is mandatory, but absence of such default notice to the guarantor does not discharge him from the duty to repay the loan. Section 127(1)(d) provides that:- "that, after the expiry of sixty days following the receipt of the notice to the mortgagor, the entire amount of the claim will become due and payable and the mortgagee may exercise the right to sell the mortgaged land" It would appear from the above quoted provision of the law that default notice is more crucial where the mortgagee is willing to exercise his right to sell the mortgaged land. This is so because, in my view, sale may be conducted without knowledge and awareness of the mortgagor. This cannot be the position where the mortgagee resorts to exercise his right to sue for the debt because court proceedings take long time and in the process he will definitely be aware of what is going on in respect of his mortgaged property and have an opportunity to discuss it with the lender.

12 The Plaintiff is entitled to recover the outstanding loan from all Defendants jointly and severally. The Plaintiff seeks to recover the sum of USD 8,453,067.80 interest on the sum at the rate of 8% per annum interest at court's rate and costs of the suit. As already pointed out

herein, the Plaintiff is entitled to recover the outstanding sum on the loan which at the time of filing the suit USD 8,453,067.80 and interest at the rate of 8% per annum as agreed in the loan facility. On the interest at court's rate I note from the pleadings, evidence and submissions that the currency involved in this matter is United States of America Dollars. US Dollar is among the strongest currency in the world economy and it is very popular. That being in mind I would award court's interest rate of 2% per annum on the decreed amount chargeable from the date of this judgment to the date of settlement of the decree. As regarding costs, the Plaintiff seeks to recover costs of the suit. Under S. 30 (1) of the Civil Procedure Code the law provides inter alia that: "Subject to such conditions as may be prescribed and to the provisions of any law for the time being in force, the costs of, and incidental to all suits shall be in the discretion of the court and the court shall have full power to determine by whom or out of what property sng to what extent such costs areb to be 13 paid.....any action, cause or matter shall follow the event unless court for good reason orders otherwise". rt finds that the Plaintiff is entitled to costs of eth suit and there is no d cause to deny them. Costs of the suit are accordingly granted to the ntiff. ummary therefore. Judgment and decree is entered for the Plaintiff and mst all Defendants jointly and severally in the following terms:- . The Defendants pay the Plaintiff the sum of USD 8,453,067.80; . Interest is awarded on the said amount at the rate of 8% per annum from the date of filing the suit until payment in full; . Court's interest on the decreed amount at the rate of 2% per annum from the date of this judgment to the date of full payment of the Decreed amount; . Costs of the suit as shall be taxed by the Taxing Master. A. R. Mruma JUDGE 25/8/2021

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