

TANZANIA / JUDGMENT

EQUITY BANK VS JANETH MWENDA COMM CASE NO

COURT
TANZLIIDECIDED
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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (COMMERCIAL DIVISION) AT DAR-ES-SALAAM COMMERCIAL CASE NO. 23498 OF 2024 BETWEEN EQUITY BANK TANZANIA LIMITED..... PLAINTIFF VERSUS JANETH SOSTEN MWENDA T/A ONGEA NA JANETH COMPANY.....1ST DEFENDANT JUMANNE ABILAH MAOKA.....2ND DEFENDANT DEFAULT JUDGEMENT Date of last order: 03/03/2025 Date of Judgement: 04/04/2025 GONZI, J. The Plaintiff sued the Defendants claiming against them for Judgment and Decree that:

- a. That the Honourable Court be pleased to order the Defendant to pay the Plaintiff TZS. 194,443,521.35/= being sum of loan that stand due and unpaid as of 27th March 2018. 1
- b. That the Honourable Court be pleased to order the Defendant to pay the Plaintiff interest on (a) above at commercial rate of 23% per annum from 27th March 2018 to the date of judgment.
- c. That the Honourable Court be pleased to order the Defendant to pay the Plaintiff Additional interest of 6% on (a) above as agreed in the Banking Facility Letter dated 19th September 2014 from 27th March 2018 to the date of Judgment.
- d. Payment of interest on the decretal sum of (a) and (b) above at the Court's rate of 7% per annum from the date of judgment to the date of payment in full.
- e. That the Honourable Court be pleased to order that the 1st Defendant is in breach of the Credit Facility Agreement as constituted under Credit Facility Agreement dated 19th September 2014 and thus the Plaintiff is entitled to realize the mortgage over the Property on Plot No. ILA/ILL/SSH25/37 Residential Licence No. ILA022984 at Shariff Shamba in Ilala Municipality. 2
- f. That the Honourable Court be pleased to order enforcement of personal guarantee of the 2nd Defendant for recovery of any outstanding amount that may accrue following deficiency of the proceeds of sale of the mortgaged properties over the properties on Plot ILA/ILL/SSH25/37 Residential Licence No. ILA022984 at Shariff Shamba in Ilala Municipality

- g. Costs of this suit.
- h. Any order(s) and relief(s) this Honorable Court may deem fit and just to grant. In terms of the plaint, the Plaintiff claims against the Defendants jointly and severally for payment of the sum of TZS. 194,443,521.35 (Tanzanian Shillings One Hundred and Ninety-Four Million, Four Hundred Forty-Three Thousand Five Hundred Twenty-One and Thirty-Five Cents) being an outstanding amount on account of credit facilities granted to the 1st Defendant and guaranteed by the 2nd Defendant which the Defendants breached by failing to repay the outstanding balance thereof. 3 It was stated that on various occasions and at the request of the 1st Defendant, the Plaintiff extended to the 1st Defendant various Banking Facilities such as follows:
- i. Loan facility dated 10th October 2012 of TZS. 120,000,000 (Tanzanian Shillings One Hundred and Twenty Million) granted to the 1st Defendant for the purpose of working capital to purchase items for media production business at the interest rate of 20% per reducing balance to be repaid in 24 months' equal installments of Tshs. 6,107,497/= ii. Loan facility dated 18th March 2013 of TZS. 130,000,000 (Tanzanian Shillings One Hundred and Thirty Million Only) granted to the 1st Defendant for the purpose of paying off existing facility and additional working capital at the interest rate of 23% per reducing balance to be repaid in 8 equal installments of Tshs. 20,728,017/= iii. Loan facility dated 29th April 2013 of TZS. 166,000,000/= (Tanzanian Shillings One Hundred and Sixty Six Million) granted to the 1st Defendant for the following purpose: Tshs. 112,334,045.25 to liquidate the existing loan granted for the purpose of buying business machines and equipment's including a motor vehicle, Tshs. 36,000,000/= to buy 4 off the outstanding loan with Superior Financial Solution, Tshs. 17,665,955/= to be used as working capital for daily operations of the business. The said facility rate was to be charged at the interest rate of 23% per reducing balance to be repaid in 10 equal installments of Tshs. 22,287,703/= iv. Loan facility dated 19th September 2014 of Tshs. 201,969,700/= (Tanzanian Shillings Two Hundred and One Million Nine Hundred Sixty Nine Seven Hundred Only) granted to the 1st Defendant for the purpose of restructuring of the existing facility at the interest rate of 23% per reducing balance to be repaid in 60 equal installments of Tshs. 5,693,620/= with three months' grace period save for interest. Following execution of the Banking Facility dated 19th September 2014, the 1st Defendant breached the terms of the Agreement for failure to pay interest within three months of the grace period as per the terms thereof. As a result, the Plaintiff issued sixty (60) days' Notice of Default to the Mortgagor Janeth Sostenes Mwenda calling for payment of the sum which then stood outstanding and unpaid to the tune of TZS. 205,405,785.35. Despite the said Demand Notice, the 1st Defendant failed to honor her obligation and, as a result, on 10th August 2015, the landed Property on Plot 5 No. 115, Block 18, Bunju Area Kinondoni Municipality was sold by public auction to the tune of TZS. 25,000,000/= which sum made partial payment of the 1st Defendant's Loan that was in default. As a further security for the said Banking facility, the 2nd Defendant had severally executed in favor of the Plaintiff an irrevocable and unconditional personal guarantee and Indemnity to the effect of guaranteeing full repayment of the said Banking facility. The 1st Defendant utilized

the said Facilities which were to be repaid in full within 60 months as per the agreed terms and conditions of the facility letter dated 19th September 2014. However, contrary to the same, the Defendants jointly and severally failed to repay the said Banking Facility such that as of 27th March 2018, an outstanding sum of Tshs. 194,443,521.35 (Tanzanian Shillings One Hundred and Ninety-Four Million, Four Hundred Forty-three Thousand Five Hundred Twenty-One Shillings and Thirty-Five Cents) was, and still is, due and owing to the Plaintiff on account of the said Banking Facility. Upon the institution of this suit, the Court ordered the Defendants to be served with summons to file their Written Statements of Defence within twenty-one days from the date of service. Following failure of the normal means of service to the Defendants as the Defendants refused to accept service, the Defendants were duly served through substituted service by way of publication through Mwananchi Newspaper of 15/12/2024. However, the Defendants still did not file their Written Statements of Defence. Hence, the case proceeded without the defendants' involvement. When the suit was called for mention on 17/02/2025 the learned Advocates for the plaintiff, Ms. Ludigalda Mavika and Ninaclara Wambura, prayed to be allowed to proceed with the hearing of the case by filing an application for default Judgment under the provisions of Rule 22(1) of the Commercial Court Rules. In the Circumstances the prayer was granted. The plaintiff filed an Application for Default Judgment vide Form No.1 accompanied by an affidavit in proof of the claim sworn by one, JUMA JABIR SULEIMAN, a Principal Officer of the plaintiff's Company. The Plaintiff attached Exhibits EBTL-1(a), (b), (c), (d), and (e) being copies of the Facility letters dated 10th October 2012; 18th March 2013; 29th April 2013; 19th September 2014 and Residential Licence No. ILA022984. Exhibit EBTL-2 is a copy of Statement of Current Account Number: 3001211120361 from 23rd September 2014 to 27th March 2018 in the name of the 1st Defendant. Exhibit EBTL- 3 is a copy of the Guarantee Agreement dated 22nd 7 September 2014. Exhibit EBTL -4 is a copy of the Loan Statement Number: 3001511204363 from 23rd September 2014 to 27th March 2018 in the name of the 1st Defendant. The suit was proved by way of an affidavit of proof in line with Rule 22(1) of the Commercial Court Rules. One of the cardinal principles of law relating to affidavits is that an affidavit is a substitute for oral evidence. This was elucidated in the case of Uganda v. Commissioner of Prisons, Ex parte Matovu (1966) E.A.514 at page 520. In law where the Defendant does not file a counter affidavit to dispute the contents of an Affidavit, he is deemed to have admitted the statements contained in the Affidavit of the adverse party. This was held in Fatuma Ally Mohamed vs Mohamed Salehe [2020] TZHC Land 2320 (TANZLII) at page 2 and I quote "The position of the law on failure to file a counter affidavit it is settled. The Respondent is deemed to have not contested on the factuality of the affidavit." It is cardinal that where the Plaintiff files Form No.1 and an affidavit in proof of the Claim under Rule 22 of the Commercial Court Rules, the Defendant does not file a counter affidavit thereto since the Defendant has defaulted to file a defence. Therefore, the assertions by the Plaintiff in the Affidavit in proof of the Claim are deemed to be the truth. The suit at hand is premised on allegations of breach of two agreements namely the credit facility contract and the contract of guarantee by the 1st and 2nd Defendants, respectively, failing to pay the outstanding balance to the Plaintiff notwithstanding the demand notices. For the claims of breach of the

credit facility agreement to succeed, inter alia, the Court must make a finding as to whether there was a valid credit facility agreement between the Plaintiff and the 1st Defendant? If that issue is answered in affirmative, whether there was breach of the said agreement by the 1st Defendant? Further the court has to consider whether the statutory notice of default was issued? And where a breach of the credit facility agreement is established, the court is required to inquire as to whether there are damages suffered by the innocent party and the extent thereof. As for the breach of contract of guarantee between the Plaintiff and the 2nd Defendant, the Plaintiff must prove that there existed a valid contract of guarantee with the 2nd Defendant in respect of the credit facility agreement between the Plaintiff and the 1st Defendant herein. Once a valid contract of guarantee is proved to exist, then the Plaintiff is required to prove that the guaranteed person (1st defendant) has defaulted her obligations towards the Plaintiff hence entitling the Plaintiff to proceed against the Guarantor for the liabilities of the borrower guaranteed by the Guarantor. Looking at the affidavit in proof of the Claim, undoubtedly as per Exhibits EBTL-1(a), (b), (c), (d), (e) and EBTL- 3, the Plaintiff has evidenced the existence of a valid credit facility agreement between the Plaintiff and the 1st Defendant and the Guarantee Agreement by the 2nd Defendant as a third party guaranteeing the 1st Defendant's liability in full towards the Plaintiff. Exhibit EBTL-4 is a copy of the Loan Statement Number: 3001511204363 from 23rd September 2014 to 27th March 2018 in the name of the 1st Defendant evidencing failure by the 1st Defendant to repay the said Banking Facility such that as of 27th March 2018 an outstanding sum of TZS. 194,443,521.35 (Tanzanian Shillings One Hundred and Ninety-Four Million, Four Hundred Forty-Three Thousand Five Hundred Twenty-One Shillings and Thirty-Five Cents) was, and still is, due and owing to the Plaintiff on account of the said Banking Facility. This substantiates a breach of the credit facility contract by the 1st Defendant which the Plaintiff has claimed that it has caused him losses in terms of non-payment of the agreed interests and the 10 principal sum. The efforts by the Plaintiff to recover the outstanding sums, constitute inconveniences which warrant imposition of general damages too. Upon the breach of the credit facility between the Plaintiff and the 1st Defendant which agreement the 2nd Defendant guaranteed, it became incumbent upon the 2nd Defendant to make good the liabilities of the 1st defendant towards the Plaintiff. A contract of guarantee is defined under section 78 of the Law of Contract Act Cap 345 thus: "78. A "contract of guarantee" is a contract to perform the promise or discharge the liability, of a third person in case of his default and the person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor"; and guarantee may be either oral or written." In order to have a valid contract of guarantee, there must have been a third party whose liability the Guarantor undertakes to indemnify the creditor. This was held by this court in the case of *Simba Pipe Industries limited v Najja Hardware & Another* [2024] TZHCComD 103. 11 In the set-up of the present case, the 2nd Defendant is the surety who guaranteed to perform the promise or discharge the liability of the 1st Defendant who is the principal debtor in case of her default to perform her obligations under the credit facility agreement towards the Plaintiff who is the creditor. As the contingent risk that was

guaranteed by the 2nd Defendant has occurred and the 2nd Defendant as a guarantor has failed to discharge the liability of the 1st Defendant towards the Plaintiff, the 2nd Defendant has breached the guarantee contract. As the guarantee involved the 2nd Defendant put his landed property on Plot No. ILA/ILL/SSH25/37 with Residential Licence No. ILA022984 at Shariff Shamba in Ilala Municipality, Dar es Salaam as security, the Plaintiff is entitled to proceed against that property in attempt to recover his money loaned to the 1st Defendant on the guarantee of the 2nd Defendant. The breach of the guarantee contract has caused losses to the Plaintiff herein in the same way that the breach of the credit facility by the 1st Defendant has. Therefore, having carefully gone through the affidavit of proof of claim and exhibits EBTL 1-4 which were tendered by the Plaintiff in this suit, I am satisfied that Parties entered into valid agreements of credit facility and contracts of guarantee. It is clear that the Defendants have not honored their 12 respective contractual obligations under the two agreements and thus occasioning losses and inconvenience to the Plaintiff. I find that the Plaintiff has proved his claims under this suit against the 1st and 2nd Defendants. I hold that the conditions for granting default judgment are satisfied. For the foregoing reasons, I enter Judgment and Decree in favor of the Plaintiff against the Defendants jointly and severally, as prayed and proceed to make the following orders: (a). It is hereby declared that the 1st and 2nd Defendants are in breach of the Credit Facility Agreement and the contract of guarantee, respectively, as constituted under Credit Facility Agreement dated 19th September 2014. (b). It is hereby ordered that the Plaintiff is entitled to realize the mortgage over the Property on Plot No. ILA/ILL/SSH25/37 with Residential Licence No. ILA022984 at Shariff Shamba in Ilala Municipality, Dar es Salaam. (c). The Defendants, jointly and severally, are hereby ordered to pay the Plaintiff's TZS. 194,443,521.35/= being the sum of loan that stands due and unpaid under the Credit Facility Agreement dated 19th September 2014 as of 27th March 2018. 13 (d). The Defendants, jointly and severally, are hereby ordered to pay the Plaintiff commercial interest on (b) above at the rate of 23% per annum from 27th March, 2018 to the date of judgment. (e). The Defendants, jointly and severally, are hereby ordered to pay the Plaintiff an additional interest of 6% per annum on (c) above as agreed in the Banking Facility Letter dated 19th September, 2014 from 27th March, 2018 to the date of Judgment. (f). The Defendants, jointly and severally, are hereby ordered to pay the Plaintiff interest on the decretal sum on (c), (d) and (e) above at the Court's rate of 7% per annum from the date of judgment to the date of full and final satisfaction thereof. (g). The Plaintiff is hereby authorized to embark upon enforcement of personal guarantees of the 2nd Defendant for recovery of any outstanding amount that may remain due under Banking Facility Letter dated 19th September 2014 in the event of any deficiency in the proceeds of sale of the mortgaged properties on Plot ILA/ILL/SSH25/37 with Residential Licence No. ILA022984 at Shariff Shamba in Ilala Municipality, Dar es Salaam. 14

- g. Costs of this suit shall be borne by the Defendants jointly and severally. It is so ordered. A. H. GONZI JUDGE 04th April, 2025 Judgment is delivered in Court this 4th day of April, 2025 in the presence of Ms. Ludigalda Mavika, Advocate for the Plaintiff and in absence of the Defendants who were duly notified of the date of delivery of the Judgment. A. H. GONZI JUDGE 04th April, 2025 15

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