

TANZANIA / JUDGMENT

kai ltd vs crdb bank plc 2012

tzhccomd 64 14 december 2012

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14 December 2012

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IN THE HIGH COURT OF TANZANIA COMMERCIAL DIVISION AT DAR ES SALAAM
COMMERCIAL CASE NO.63 OF 2012 KAI LIMITED..... PLINTIFF
VERSUS CRDB BANK PLC..... DEFENDANT Date o f Hearing: 5th
September, 2012 and l d h October, 2012 Date o f dosing submissions: 05/11/2012 Date o f
Judgment: 14/12/2012 JUDGMENT EXPARTE MAKARAMBA, J.: This is judgment exparte in a suit
the Plaintiff lodged in this Court on the 14th day of June, 2012 against the Defendant for the
following reliefs:

1. Immediate and unconditional release o f C T No.37865;
2. Payment o f Tzs.480,000,000.00 being specific damages as particularized under paragraph 19 o f the plaint;
3. Payment o f interest on the above at the rate o f 24% being the prevailing bank's lending rate from the date o f filing this suit to the date o f judgment; Page 1 of 17
4. Payment o f general damages as pleaded under paragraph 20 o f the plaint;
5. Payment o f aggravated damages as may be assessed by the Honourable Court;
6. Payment o f interest on the decretal sum at the court's rate accruing from the date o f judgment to the date o f payment in full;
7. Payment o f costs o f this suit; and
8. zi/7 / other reliefs this Hon. Court shall deem proper to grant. The Defendant was duly served but they never showed up to defend the suit. This Court upon prayer by the Plaintiff ordered the suit to proceed by way of exparte proof and hence this judgment. Given the nature of this suit, a brief background to it matter is quite apposite. On the 14th day of November, 2008, KAI LIMITED, the Plaintiff, was offered a loan by CRDB BANK PLC, the Defendant, by way of a Facility Letter, amounting to TZS 144,000,000/=. This was upon an Agreement comprised in the terms and conditions stipulated in the Loan Facility Letter dated the 14th day of November, 2008. The loan was for duration of 24 months, payable in 24 equal monthly installments and would attract interest at the rate of 17% per annum

accruing daily on the outstanding balance and charged to the account on monthly basis. The Page 2 of 17 loan facility was to expire on the 30th day of November, 2010. The Loan Facility was to provide for a working capital to finance the business of the Plaintiff of importation and purchasing and selling of agricultural implements, household items, fittings, sewing machines, bicycles, textiles and garments. As security for the said credit facility, and pursuant to Clause 8.1 of the Loan Facility Letter, the Defendant accepted the following fixed assets of the Plaintiff by way of legal mortgage, inter alia:

- (a) 1/11 share of property on Plot No.638/57, Samora/Zanaki Streets Dar es Salaam, comprised in certificate of title number 186016/92 registered in the name of the Plaintiff;
- (b) Property on Plot No.331, Block 42, Kinondoni, Dar es Salaam City comprised in the certificate of title number 37865 registered in the name of the Plaintiff; and
- (c) Property on Plot No.332, Block, Kinondoni, Dar es Salaam City comprised in certificate of title number 38000 registered in the name of the Plaintiff. KAI LIM ITED having executed the legal mortgage surrendered the titles of all assets to CRDB BANK PLC for perfection purposes. KAI LIM ITED continued to comply with the terms and conditions of the facility and had fully repaid the loan facility together with all interests and charges. After numerous verbal and physical follow-ups, CRD B BANK PLC was able Page 3 of 17 to discharge and release only two of the three securities to KAI LIMITED namely; CT. No. 186016/92 and CT No. 38000. CRDB BANK PLC continues to withhold one of the securities, namely, CT. No. 37865 for no reason, which is why KAI LIMITED has lodged the present suit against CRDB BANK PLC claiming for the reliefs as shown in the Plaint on record. On the first day of hearing the following issues were framed and recorded by this Court for the determination of this suit, namely;
 - 1. Whether the Defendant advanced to the Plaintiff a loan in the sum o f TZS. 144, 000,000/=.
 - 2. I f yes, what was the security for the loan.
 - 3. Whether or not the loan was fully repaid.
 - 4. I f yes, whether or not the Plaintiff's property provided as security were discharged and returned to the Plaintiff.
 - 5. What relief(s) are the parties entitled to. Mr. Byamungu, learned Counsel, represented the Plaintiff. At the close of the trial of the suit, Mr. Byamungu prayed to lodge his written closing submissions, which prayer this Court duly granted and with which was duly complied. Page 4 of 17 In making its case, KAI LIMITED called two witnesses, Mr. Michael Kida, the Managing Director of Kai Limited who testified as PW1, and Mr. Peles Fungo, the Managing Director of CRDB Bank PLC who testified as PW2. The first issue for determination is whether the Defendant advanced to the Plaintiff a loan in the sum o f TZS. 144,000,000/=. Both witnesses, PW1 and PW2 respectively in their testimonies in court during the trial, were in agreement as regards the existence of the Loan Facility in the amount of TZS 144,000,000/- which is stated in the Loan Facility Letter which was admitted

and marked as Exhibit P 1. As Mr. Byamungu, rightly submitted in his closing submissions, the first issue is straight forward and that it should be answered in the affirmative. The testimony of PW1 and PW2, and the Loan Facility Letter, Exhibit P 1 prove that CRDB BANK PLC advanced to KAI LIMITED a loan in the sum of TZS. 144,000,000/=. It is for the reasons explained above that the first issue whether the Defendant advanced to the Plaintiff a loan in the sum o f TZS. 144,000,000/= is to be answered in the affirmative. I now turn to consider the second issue, which isz if the Defendant advanced to the Plaintiff a loan in the sum o f TZS 144,000,000/-, what was the security for the loan? In his testimony PW1 told this Court that, the securities for the loan have been listed under item 8.1 of the Loan Facility Letter, Exhibit P 1 which list includes the following securities:

- (i) A legal mortgage over one eleventh (1/11) shares ownership o f landed property Shop No. 2 Ground Floor, Wing "A " used Page 5 of 17 fo r commercial purposes owned b y KAI Agency International Ltd located on Plot No. 638/57, Samora/Zanaki Streets, Dar es Salaam City, CT. No. 186016/92, LO.No.23247, first charge; (ii) A Legal mortgage over landed property used fo r residential purpose, owned b y KAI Agency International Ltd, located on Plot. No. 331, Block "42", Kinondoni, Dar es Salaam City, CT. No.37865, LO. No. 107527, first charge; (iii) A Legal Mortgage over landed property used fo r residential purpose owned by KAI Ltd, Located on Plot No.332, Block No.42, Kinondoni, Dar es Salaam, C.T. No. 38000, LO. No. 112748, firs t charged; (iv) A debenture over company's assets, firs t charge, and
- (v) The Directors personal guarantee signed b y Heriel Naftari Kida and Foibe Heriel NaftaL I have carefully examined Clause 8.1 in Exhibit P 1. I am satisfied that as per the terms and conditions of the Loan Facility Letter, Exhibit P 1, the above named securities in the list were the securities for the loan advanced to KAI L IM ITE D , the Plaintiff by CRDB BANK PLC, the Defendant. The second issue is therefore to be answered in the affirmative. Page 6 of 17 Let me now turn to consider the third issue which is whether or not the loan was fully repaid. The repayment of the loan as Mr. Byamungu rightly submitted was confirmed by PW2, the Bank Officer. PW1 told this Court that, the Loan Facility was repaid in full. In his testimony, PW1 stated further that, the Bank Statement which was tendered in this Court for Identification purposes only shows that, as on the 26th day of November, 2010, the Plaintiff had paid the outstanding balance in full as the balance in the Bank Statement shows to be zero. In his testimony, PW2 who is a bank officer from CRDB BANK PLC confidently confirms that the Plaintiff has fully repaid the loan. This being the case therefore, the third issue is to be answered in the affirmative, that the loan has been fully repaid.. If the loan has been fully repaid, the fourth issue is whether or not the Plaintiff's property provided as security were discharged and returned to the Plaintiff. In his testimony PW1 told this Court that, the Plaintiff through a letter dated 6th December, 2010, which was admitted in this Court and marked as Exhibit P4, requested the Defendant to return all the titles the Plaintiff had surrendered to the Defendant as security for the loan. PW1 testified further that at his pleasure, the Managing Director of the Defendant signed the discharge forms marked as Exhibit P6, and subsequently returned to the Plaintiff only C.T. No. 186016/92 and C.T. No. 38000 but continued to withhold CT.No.37865 without any explanation. In his testimony

however, PW2 told this Court that, the Loan Facility was disbursed basing on only two Certificates of Titles, namely, C.T. No.186016/92 and C.T. No. 38000. PW2 stated further that, Page 7 of 17 CT.No.37865 was not presented to the Bank by the Plaintiff and therefore the Bank cannot release something which was not presented to it by the customer. In his closing submissions, Mr. Byamungu argued that the Loan Facility Letter constitutes an agreement in which a lender (the Defendant) sets out the terms and conditions to a borrower, which provides that the agreement or certain parts of the agreement will only come into force if and when certain conditions are met. Under this loan, Mr. Byamungu further argues, one of the condition precedent for the disbursement of the loan was upon the perfection of the enumerated securities in Clause 8.1 of the Facility Letter, without which the loan would not have been available. Mr. Byamungu submitted further that, PW2 having confirmed that the loan was sanctioned upon the terms and conditions of the Loan Facility Letter and that no any modification was made under the Loan Facility Letter, it is therefore against his own testimony and documentary evidence available, Exhibit P 1, to claim that CT. No. 37865 was not one of the securities taken by the Defendant. In his testimony PW2 told this Court further that, they have been searching for the title in dispute, CT. No. 37865, at their office without any success. However, according to PW1 their efforts do not end there, they are still searching for it, if it could be found they shall notify the Plaintiff for collection. However PW1 thinks that, since the document was searched at their office and could not be found, the same was not presented to the Bank by the Plaintiff, Mr. Byamungu further submitted. Page 8 of 17 On the evidence on record, it is without much dispute that, it was one of the terms and conditions of the loan as stipulated in Clause 8.1 of the Loan Facility Letter, Exhibit P 1 that the Plaintiff had to furnish securities including, Certificates with titles C.T. No. 186016/92; C.T. No. 38000; and CT. 37865. It is also not in much dispute that C.T. No. 186016/92 and C.T. No. 38000 were presented to the Bank by the Plaintiff and then they were returned back to the Plaintiff by the Defendant Bank after the Plaintiff had fully repaid the loan. In the present suit, the main controversy surrounds Certificate of Title number CT. 37865, which the Defendant claims that the Plaintiff did not present it to the Defendant but the Plaintiff contends that it did present it to the Defendant Bank along with the other titles which the Defendant has returned to the Plaintiff. In his testimony, PW2 told this Court that the loan was disbursed basing on only two certificates of titles namely, C.T. No.186016/92 and C.T. No. 38000. I have carefully gone through the Loan Facility Letter dated 18th November, 2008, Exhibit Pl. Clause 8.1 therein forms part of the terms and conditions of the Loan Facility Letter. The loan which the Defendant granted to the Plaintiff was to be advanced upon the Plaintiff depositing with Defendant's Bank, among other things, C.T. No. 186016/92, C.T. No. 38000 and CT. 37865 as security for the loan. PW2 confirmed to this Court that there was no any modification made to Exhibit P 1 and that the loan was granted to the Plaintiff according to the terms and condition of the Loan Facility Letter. PW2 told this Court further that, even the two certificates, C.T. No. 186016/92 and C.T. No. 38000 which were Page 9 of 17 handed over by the Defendant to the Plaintiff, they had been presented to the Defendant's bank and then they were released to the Defendant without any record to show the nature of this transaction. If this is the case then it means that, there is no any evidence

to prove if it is only two certificates as alleged by PW2 which were presented to the Defendant's bank as the Defendant claims or three certificates as the Plaintiff maintains. In my considered view, it could have been either two or three or even less certificates which were presented to the Bank. In such circumstances and on the evidence on record the Plaintiff is to be given the benefit of doubt having established on a balance of probability that the loan was advanced basing on among other securities the three Certificates of Title, two of which have been returned by the Defendant to the Plaintiff. The testimony of PW2 that they have been searching for the title in dispute, CT. No. 37865 at their office without any success, but in the event they come upon it they will dully notify the Plaintiff to come and collect it contradicts his own testimony that the loan was disbursed basing on only two certificates of titles namely, C.T. No. 186016/92 and C.T. No. 38000. This Court is left wondering why if this is true would the Defendant's Bank keep on searching for something they claim they did not receive. I should only add that it was the duty of Bank to keep good their customer's record and documents presented to the bank for different purposes, failure of which the Bank is to make good any loss of customer's documents entrusted on the Bank for safe custody. It is equally baffling and hard to believe that the Defendant's Bank granted the Plaintiff a loan of such amount without complying with terms and conditions of the Loan Facility Page 10 of 17 Letter, Exhibit Pl. The fact that the Defendant's Bank embarked on a search of the lost Certificate of Title CT. 37865 in their office pointy convincingly to the fact that the said Certificate of Tile number CT. 37865 was presented to Bank as security for the loan the Defendant's Bank advanced to the Plaintiff and which has been fully repaid. In the course of his testimony when PW2 was asked by this Court as to what evidence is there that the said Certificate of Tile No. CT. 37865 was not presented to the Bank, PW2 responded that they have searched for it but without any success and therefore the Bank believes that the said document was not presented to the Bank at all. And as if that was not enough, PW2 even promised this Court to proceed searching for the said Certificate and in case they find it they will notify the Plaintiff accordingly. In such circumstances this Court asks itself as to what further testimony there is to offer other than that of PW2 so as to make any reasonably placed tribunal to conclude that Certificate of Tile No. CT. 37865 was presented by the Plaintiff to the Defendant's Bank as security for the loan? The fact that the loan disbursement was based on the terms and condition set out in Exhibit Pl, and that no any modification was made to the Loan Facility Letter, make this Court finds that the Certificate of Title number CT. 37865 was presented to the Defendant's bank by the Plaintiff and that the said Certificate has not been returned to the Plaintiff. It is for the foregoing reasons that the fourth issue whether the Plaintiff's property provided as security were discharged and returned to the Plaintiffs to be answered in the negative. Page 11 of 17 What reliefs are the parties entitled to is the fifth issue for determination by this Court. In its Plaint the Plaintiff has prayed for among other reliefs for the payment of TZS 480,000,000.00 as specific damages for the loss of business, loss of profit and loss of goodwill. The Plaintiff tendered audited financial statements for the year ended 31st December, 2009, Exhibit P9, in a bid to prove the loss incurred by the Plaintiff's company. In his closing arguments Mr. Byamungu learned Counsel for the Plaintiff referred this Court to the case of NATIONAL BANK OF

COMMERCE VERSUS PERMA SHOE COMPANY [1988] T.L.R. 224 (CA), and the case of NATIONAL BANK OF COMMERCE VERSUS SAID ALLY YAKUT [1989] T.L.R. 119, where it was decided that the bank owes a duty of care to the customer to inform him promptly of such loss or anything likely to affect his interests and the bank was held the bank liable for compensation. I have gone through the audited financial statements, Exhibit P9, which basically disclose the financial statement of the Plaintiff's company before and the year in which the loan was granted. The audited financial statement, Exhibit P9, reveal that, the Plaintiff's company generated much profit in the year in which the loan was granted. However, the Plaintiff is claiming to have incurred losses in the year in which the Overdraft Facility was rejected by the Bank, which is after the 9th of November, 2010, as per Exhibit P2. It is on record that the Defendant rejected application for an Overdraft Facility on the 10th of December, 2010, as per the letter which was admitted and marked as Exhibit P3. The audited financial statement for the year 2010, the year in which the Plaintiff claims that the application Page 12 of 17 for Overdraft Facility was rejected by the Defendant's Bank, was not tendered in this Court as evidence to show the extent in which the Plaintiff suffered loss after the rejection of the application for the overdraft facility. This Court was interested in looking at the audited financial statements of the Plaintiff's company for the year ended 2010 and 2011 respectively so as to be able to make a comparison with the audited financial statements for the years ended 2008 and 2009 so as to get a full picture of the kind of losses incurred and whether they were a result of the rejection by the Defendant's Bank of the application for overdraft facility by the Plaintiff. As such there is no any evidence tendered in this Court to found any proven loss after the rejection by the Defendant's Bank of the application for an overdraft facility by the Plaintiff's Company. It is trite law as was succinctly stated in ZUBERI AUGUSTINO VERSUS ANICET MUGABE [1992] T.L.R. 137 and BAMPRASS STAR SERVICE STATION LTD VERSUS MRS FATUMA [2000] T.L.R. 390 that: "...special damages being "exceptional in their character" and in which may consist o f "off-pocket and loss o f earnings incurred down to the date o f trial" must not only be claimed specifically but also strictly proved." The Plaintiff having failed to prove how the Plaintiff's company incurred loss after the rejection by the Defendant's Bank of the Plaintiff's Company application for Overdraft Facility, the prayer by the Plaintiff for Page 13 of 17 specific damages has not been established, and this Court cannot therefore grant it. The Plaintiff also has made a prayer for general damages. In his closing submissions Mr. Byamungu argues that, general damages are in the discretion of the Court, and referred this Court to the case of CONSOLIDATED HOLDING CO-CORPORATION VERSUS GRACE NEANA [2003] T.L.R. 19 and that of SAID KIBWANA AND GENERAL TYRE EA LTD VERSUS ROSE JUMBER [1993] T.L.R. 175 to support his argument. Mr. Byamungu added that, general damages cannot be quantified but the proposed amount may possibly salvage and recompense Plaintiff's losses. I am also alive to the decision in COOPER MOTOR CORPORATION LTD VERSUS MOSHI/ARUSHA OCCUPATIONAL HEALTH SERVICES [1990] T.L.R. 96 (CA) that general damages need not be specifically pleaded, may be asked for by a mere statement or prayer of claim as the Plaintiff did in this case. I have noted the intention of the Plaintiff to apply for a new loan basing on the Certificates of Title previously offered to the Defendant's

bank. The evidence to that fact is the application for an overdraft facility which was admitted as Exhibit P2. The act of the Plaintiff of retaining the Certificate of Title number CT. 37865 has therefore hindered the Plaintiff from applying for a new loan based on that Certificate of Title. Since the other two Certificates of Title have already been returned to the Plaintiff, this Court exercising its discretion and basing on the circumstances of the suit and the nature and relationship of the parties in this suit finds it fit to award the Plaintiff general damages to the tune of TZS. 50,000,000/=. Page 14 of 17 The Plaintiff has also made a prayer for aggravated damages. In his closing submissions Mr. Byamungu submitted that, this Court is being requested to take into account the manner in which the Defendant has acted and the irresponsibility of the highest level shown by the Defendant while attending to the Plaintiff's matter. Mr. Byamungu submitted further that the level of arbitrariness and oppression inflicted upon the Plaintiff by the Defendant is comparable to that which was discussed by the Court of Tanzania in REV. CHRISTOPHER MTIKILA VERSUS ATTORNEY GENERAL [2004] TLR 172. In that case, which I have had the opportunity to go through it was observed that: "...these aggravated damages are truly compensatory, being for the injury to the Plaintiff's proper feelings of dignity and pride. In my considered view, aggravated damages are compensatory in nature being damages for non-pecuniary losses, which are designed to compensate the Plaintiff. They are measured by the suffering of the Plaintiff for intangible elements such as pain, anguish, grief, humiliation, wounded pride, damages for self-confidence or self-esteem, loss of faith in friends or colleagues, and such similar matters that are caused by the conduct of the Defendant. In the present suit, it was not proved as to what extent the Plaintiff as a legal entity has suffered in terms of its dignity, pride or self-esteem, by the conduct of the Defendant. It is for this reason, that this Court cannot grant the prayer for aggravated damages. Page 15 of 17 In the whole and for the reasons explained above, the Plaintiff's suit succeeds to the extent as indicated herein above. The Plaintiff shall be entitled to the following reliefs:

1. The Defendant shall immediately and unconditionally release the Certificate of Title, CT No.37865 to the Plaintiff;
2. The Defendant shall pay general damages to the tune of TZS. 50,000,000/=;
3. The Defendant shall pay interest on the decretal sum at the court's rate of 7% per annum accruing from the date of judgment to the date of payment in full; and
4. The Defendant shall pay costs of this suit. It is so ordered accordingly. R.V. MAKARABA JUDGE 14/12/2012 Page 16 of 17 Judgment delivered this 14th day of December, 2012 in the presence of Mr. Byamungu learned Counsel for the Plaintiff. R.V. MAKARABA JUDGE 14/12/2012 Page 17 of 17

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