

TANZANIA / JUDGMENT

JUDGEMENT

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA DAR ES SALAAM SUB-
REGISTRY Civil Case No. 84 OF 2023 CASE REF NO 20230505000495833 UNIQUE AGRO-
INDUSTRIAL LIMITED.....PLAINTIFF VERSUS CRDB BANK
PLC.....1ST DEFENDANT STEAM GENERATION RECOVERIES
LIMITED.....2ND DEFENDANT

JUDGEMENT:

21st Nov 2024 & 19th Feb 2025. KIREKIANO J: The plaintiff carries out the sugar cane harvesting business. The second defendant is a broker licensed to deal with the execution of court orders and loan recoveries. In 2020, the plaintiff and the first defendant entered into an asset financing and working capital loan agreement worth TZS 958,500,000/=. That is to say, TZS 808,500,000/= was for the asset financing of 2 cane loaders, and TZS 150,000,000/= was for working capital. 1 It appears the service of the loans did not go as planned; according to the plaint filed, the plaintiff claims that sometime in 2021, there were unscheduled heavy rains which distorted the whole process of sugar cane haulage and loading; for almost two months, there were no production activities, so all the machines i.e. cane loaders were just idle. The plaintiff claims that the contract faced force majeure. The first defendant was not impressed. The plaintiff claims that the defendants attached the plaintiff's properties that is the cane loaders and sold them at very low prices while knowing that the plaintiff had already made some repayments to the tune of over three hundred Million Tanzania Shillings. It is the plaintiff case that this act caused the loss of two cane loaders worth TZS 838,000,000 and revenue from 24th May to 07th March 2024 was still accruing TZS 534.408,700/. The plaintiff thus seeks court orders for the loss incurred due to the defendants attaching their properties without due course. The plaintiff states that the first defendant was claiming repayment of TZS 1,123,077,459.97 while the plaintiff accounts had a turnover of over 5 billion Tanzania Shillings. Wherefore, the plaintiffs pray for Judgment against the defendants for: 2

- (i) An order that the defendants breached the terms of the loan facility agreement. (ii) Declaration that the 1st defendant illegally altered terms and conditions of the loan facility agreement. (iii) An order that the notice issued to the plaintiff was invalid and in breach of the loan facility agreement. (iv) Payment of TZS 2,970,348,334/= for wrongly attaching the properties of the plaintiff.
- (v) Interest of 7% from the date of attachment to the date of full payment. (vi) That the Honourable court be pleased to grant general damages due to general loss and distress suffered by the plaintiff so far. (vii) Any other or further relief as your I honourable Court may see appropriate to grant. (viii) The costs of the suit. On their part, the defendants disputed the claims. It is the defendant's case that, it was the plaintiff who failed to honour her obligations as agreed in the Facility Letter dated 16th July 2020 and restructured on 7th December 2021 that necessitated the 1st defendant's action to recover the loan. It was also stated that the 1st defendant failed to collect monies for repayment of the loan from the plaintiff's account because whenever the repayment date was due, the plaintiff's account had no sufficient funds for repayment of the loan as per agreed terms. 3 The defendant also states that, as of 27th March 2024, the unpaid loan amount stood at TZS 1,361,866,026.85. Having issued notice to the plaintiff, the 1st defendant invoked the remedies available to her to recover the loan through the services of the 2nd Defendant. The defendant thus prays for dismissal of the plaintiff suit, and the plaintiff to be ordered to pay the outstanding loan amount currently to the tune of TZS 1,123,007,450.97 (sic). In determining the dispute, the following issues were agreed upon to determine this case thus;
1. Whether there was a loan facility agreement between the parties.
 2. Whether there was a breach of the terms and conditions of the loan facility.
 3. Whether the procedure for the disposal of the two crane machines was followed.
 4. To what reliefs the parties are entitled to. To make their case, the plaintiff had the service of Mr. David Ndosi, a learned advocate who paraded one witness. The first and second defendants had the service of Miss Miriam Moses and Miss Haika Mrango, learned advocates who paraded one witness. 4 PW1 Melchiades Rwabuyongo was the plaintiff's General Manager. In his evidence, he said there was loan facility, which was acquired for the purpose of purchasing two cane loaders to be used at Kagera in favour of sugar cane out growers. The facility letter dated 16.7.2020 between CRDB (first defendant) and the plaintiff was admitted as (Exhibit P2). He said that, during harvest season, the company faced unscheduled heavy rainfalls that paralysed the operations. His company notified the first defendant that there might be some delays in making transactions. Again, they were also notified by UWAMMISE (sugarcane out growers) about the hardships encountered by the plaintiff. According to him, the sale of two cane loaders with reference no.T.618 DVC BEL and T.617 DVC BEL was unprocedural because they were sold without valuation and at a very low price of TZS 75,000,000 to an unknown buyer, and no public auction was conducted. He said this was contrary to clause 8.1 of facility letter (Exhibit P2). As such, the attachment was

done without informing the stakeholders in the tripartite. Thus, the situation caused loss of business and revenues with other companies, who were in the tripartite agreement and were not notified. As such, he said the notice of sale by auction of 5 the 2 cane loaders was invalid since the agreement between the parties was still subsisting, expiring December 2024. He said that according to the bank statement (Exhibit P3), the plaintiff was capable of making transactions of TZS 1,586,107,284.33 thus the first defendant ought to have deducted the same from syncing account. When cross-examined by Miss Miriam Moses, he said a facility letter was signed on 22.7.2020. According to him, the first defendant, CRDB, paid the supplier directly. According to Exhibit P2, the loan was in 2021. This is because, according to clause 2:1 of the facility letter, Exhibit P2 mentions a repayment period of thirty-six months from the date of the first drawdown according to clause 2:1 (a) said it would count from the first draw which he said was 8.1.2021. He conceded that loan payments were rescheduled several times, but this was mainly caused by rain. Regarding the community of out-growers, the said UWAMISE, he was not sure if there was a tripartite agreement signed with them. On the part of the defendant, DW1, Mr Octavian Oiso Kirambata, senior Loan Recovery Officer. He said on 16th July 2020, the Plaintiff and the Bank entered into a Loan Facility Agreement (Exhibit P2) with a 6 tenure of 36 months from the date of the first drawdown, with a tenor of 36 months from the first drawdown. He said the Plaintiff failed to meet her obligations as per the initial Loan Facility Agreement, which culminated in the restructuring of the said loan facility by the First Deed of Variation dated 4th August 2021 (Facility Agreement) in respect to the Second Deed of Variation dated 7th December 2021. (Exhibit D2). The restructuring extended credit period, for the Term loan facility (Asset Financing) of TZS 985,529,968.51 with a tenor of 36 Months payable in equal semi-annual monthly instalments. This was secured with the personal guarantee of two plaintiff directors, Fidelis Christian Bashasha and Florian Bashasha, on 13th December 2021. (Exhibit D3). He said, the first Defendant failed to collect monies for repayment of the loan from the Plaintiff's account (sinking account) as, whenever the repayment date felt due, the Plaintiff's account had no sufficient funds for collection, as evidenced by the bank statements (Exhibit D4)." Based on this, the plaintiff was served with default notice in respect of two facilities (Exhibit D 5) to the effect that upon expiry of thirty days

- (30) from the date of receipt of the default notices, the 1st defendant would exercise her right to take possession and sell the assets that is, the 7 two cane loaders which secured the loan. This was done after the expiry of the notice to sell was issued to the Plaintiff, which was advertised on 13th May, 2023 in Zanzibar Leo News Paper (Exhibit D6). He said the total outstanding amount stood at TZS 1,361,866,026.85, including Interest and the restructuring fee interest for both Deeds of Variation. When cross-examined by Mr Ndosu, he confirmed that the plaintiff made deposits. When taken through the plaintiff's bank statement Exhibit P3 and asked if the plaintiff ever paid the first defendant, DW1 said payments were made on diverse dates. Still, the payment was not according to the amount required; as such, deductions could not be made effectively because they were subject to a repayment schedule. I will start with the first issue, which is whether there was a loan facility

agreement between the plaintiff and the first defendant. The plaintiff stated in paragraphs 5, 6, and 7 of the plaint that a loan facility agreement was signed in 2020. This contract was tendered by PW1 and admitted as Exhibit P2. The same was to the effect that the plaintiff and the first defendant entered into a loan facility agreement, where the applicant secured TZS 958,500,000 in total. The defendant, on their part, acknowledged that there was this loan facility. Going by the pleading, this also suggests that there was a loan agreement; with that note, this court can gather from the pleading to answer the first issue. In *Luhumbo Investment Limited vs National Bank of Commerce Limited & Others* (Civil Appeal 503 of 2020)

[2022] TZCA 738 (23 November 2022), the court held that; With profound respect, we are not persuaded by the argument advanced by Prof. Saffari. As correctly argued by the learned counsel for the respondents, it is trite law that parties are bound by their own pleadings. On top of this, there was also evidence from DW1 that the loan agreement was restructured by two deeds of variation dated 4th August 2021 and 7th December 2021. (Exhibit D2). From what may be gathered from the pleadings, the testimonies of the parties and exhibits particularly Exhibit P2, which was relied on by both parties, it is clear that there was a loan agreement between the plaintiff and the first defendant. I have, as such, noted the existence of deeds of variations as exhibited in Exhibit D2. The first issue is accordingly answered in the affirmative. The second issue is whether there was a breach of the terms and conditions of the loan facility. I have also considered the plaintiff's argument that the facility's term had not lapsed; that is, it would end in January 2024. I note that initially, the facility's tenor was 36 months, according to clause 2:2:1 (Exhibit P2). However, the first and second deeds of variation (exhibit D2) amended this to the effect that the final tenor remained at 24 months from the date of the first deed of variation (4th August 2021). This did not mean the plaintiff was not enjoined in making the payment as scheduled. What is clear and common ground is that the service of the loan did not go as planned in the first place, leading to the restructuring of the facility. It was also the plaintiff's case that the company notified the first defendant that there might be some delays in making transactions. Again, UWAMMISE (outgrowers) also notified them about the hardships encountered by the plaintiff. There was no proof tendered of the correspondence made as alleged. Yet after restructuring, there was default as evidenced in the default notice (Exhibit D5). The default notice was issued on 20 Feb 2023, demanded among others things thus, The Company is required to pay forthwith the sum of TZS 309,641,495.49 (Say Tanzanian Shillings Three 10 Hundred Nine Million Six Hundred Forty-One Thousand Four Hundred Ninety-Five Cents Forty-Nine) and any other instalment that shall have fallen due within a period of 30 (thirty) days from the date of receipt of this Notice in order to cure your default. As indicated above, the notice of default was issued on 20.2.2023. This was a loan contract, which, among other basic terms, was payment of the loan by the borrower, in this case, the plaintiff. I have considered PW1 Melchiades' testimony that the first defendant did not serve them with a default notice. According to Exhibit D5 a reminder notice was received by one Fidelis Bashasha on 20.2.2023. This person was one of the plaintiff directors who signed the directors' guarantee. (Exhibit D3)

I see no valid argument here that the plaintiff company was not served with the notice of default. Now, reading from the loan agreement Exhibit P2, the same shows under article 3:1 that the loan was secured by the following in rank. (a) A first-ranking specific debenture over 2 cane sugar loaders to be purchased and registered in the joint name of the Bank and Borrower.

(b) n/a (c) n/a (d) 11

(e) Deed of assignment of Contracts proceeds for harvesting of sugar cane between the Borrower and UWAMMISE AMCOS. It is noted here that the deeds of variation Exhibit D2 did not amend part 3:1 of the loan agreement. I have considered the plaintiff's argument that the defendant's recovery action did not involve the outgrowers. In view of article 3:1, that was a separate security as indicated above. For the sake of argument, even PW1 said he was not sure if the tripartite agreement was signed with the outgrowers. I see no valid argument on this. In the case of Christopher P. Chale Versus Commercial Bank of Africa, Misc. Civil Application No. 635 of 2017, (unreported) where Hon. Mwandambo J. at pg. 08 citing with approval the holding in the Agency Cargo International Vs case. Eurafrican Bank (T) Ltd. HC (DSM) Civil Case No. 44 of 1998 (unreported), it held that: - "The object of security is to provide a source of satisfaction of the debt covered by the respondent to continue being in the banking business must have funds to lend and which as to be repaid, debtors. If a bank does not recover its loans, it will seriously be an obvious candidate for bankruptcy. I have examined the evidence of the failure to service the loan and also the failure to heed the default notice. I have, as such, considered the 12 evidence that the cane loaders were one of the topline securities of the loan. The plaintiff also relied on the bank statement Exhibit P3 to make a case that the plaintiff's account had funds and that the defendant ought to have deducted the same. With this argument, I was not convinced, based on the evidence by DW1, that deductions were subject to schedule, and whenever the repayment date was due, the plaintiff's account had no sufficient funds for repayment of the loan as per agreed terms. It is my considered view that when the existence of a loan is proven, then the safest way to make a case against the lender is proving payment of a loan. In the absence of evidence that the plaintiff settled the loan defaulted in the notice, the lender reserved the right to take measures to recover the loan. In this case, the plaintiff has not managed to prove that there was a breach on the part of the defendant. The second issue is accordingly answered. The third issue is whether the procedure for the disposal of the two crane machines was followed. It is the plaintiff case that the cane loaders with reference no.T.618 DVC BELL and T.617 DVC BELL were sold to an unknown buyer; the sale of the said 2 cane loaders was unprocedural as the said public auction was never conducted and that the sale was done 13 without notice to other companies in tripartite agreement. The defendant disputes any wrongdoing in this. Before I resolve this, it is worth noting that it is the plaintiff's burden to prove what was alleged. In Mary Agnes Mpelumbe vs Shekha Nasser Hamad (Civil Appeal No. 136 of 2021) [2021] TZCA 667 (5 November 2021) but also Barelia Karangirangi vs Asteria Nyalambwa (Civil Appeal No. 237 of 2015) [2019] TZCA 51 (1 April 2019) in the latter case the court held inter alia that; "At this juncture, we think it is pertinent to state the principle

governing proof of case in civil suits. The general rule is that he who alleges must Prove." The court went further to highlight the origin of this rule by stating that: "The rule finds backing from sections 110 and 111 of the Law of Evidence Act, [Cap 6 RE 2019] which among other things state:

110. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. 14
111. The burden of proof in suits lies on that person who would fail if no evidence was given on either side." I have taken in to account the evidence by PW1 that the sale was conducted without notifying the companies which the plaintiff had tripartite agreement. On this aspect, I have deliberated above that the two cane loaders were stand alone security, as such even if connected with other companies in tripartite agreement, the plaintiff failed to prove that there was such tripartite agreement. He said he was not sure. On aspect on whether there was auction conducted, PW1 evidence was that no auction was conducted, on the other side the defendant testified tha there was auction conducted and advertised in news paper (Exhibt D6). On aspect of valuation the plaintiff relied on clause 8:2 of the contract Exhibit P2 item 8:2 of the standard terms the bank had involve the plaintiff in the valuation. The item provides; The properties pledged as security shall from time to time be subjected to valuation at the Borrower's cost to ensure that the value of 15 security adequately covers the total outstanding exposure of the Facility by at least 154 percent. It is on this the plaintiff claims they were not involved in the valuation before sale. The defendant (DW1) case was that the clause meant valuation during the good term of the business, not at the default of the loan. DW1 said that the valuation was done for the purpose of recovery, and this did not involve the borrower because, by nature, they were defaulters already, Mr Ndosi. Counsel for the plaintiff pressed, DW1 to prove on the valuation report which he did not tender. I consider that to ask more from the defendant will be shifting the burden of proof to the defendant. Reading from item 8:2 of the loan facility contract, it appears the clause was drafted to ensure that the loan is secured with valuable security. In event of default as stated by DW1, I see no where intended that purpose of recovery of the loan the borrower had to be involved. With presence of Exhibits D6 on advertisement of the auction, on balance of probability, I resolve this issue in affirmative that the procedure in disposal of the security was followed. The last issue is the relief the parties are entitled to. 16 For good reason, I wish to start by addressing what the defendant prayed on this aspect. The defendant asked that this court order the plaintiff to pay the outstanding loan amount, currently TZS 1,123,007,450.97. This prayer emanated in the written statement of defence. The counsel for the plaintiff, Mr Ndosi, queried the path taken by the defendant. It would appear the defendant's counsel treated the relief as a counterclaim. While I address this, I have in mind the cardinal principle of the law of civil procedure is founded upon prudence that no party is allowed to present a case contrary to the pleadings - see for instance, *Martin Fredrick Rajab v. Ilemela Municipal Council & Another*, Civil Appeal No. 197 of 2019 [2022] TZCA 434 (18 July 2022, TANZLII) As such, it is to be noted that a counterclaim is a claim for relief filed against an opposing party after the original claim is filed. It must be done with the requisite

pleading, and parties exchange their contending positions by pleadings. As such, the same has to be proved after ascertaining the issue (s) in controversy. 17 In *Onaukiro Anandumi Ulimi vs Standard Oil Company Limited & others* (Civil Appeal No. 252 of 2020) [2023] TZCA 18010 (19 December 2023) it was clarified that; A counterclaim is ordinarily pleaded by a defendant against the plaintiff in respect of a cause of action which accrued to the defendant before the presentation of a written statement of defence. The procedure for presenting a counterclaim is stated in Order VIII Rule 9(1) of the CPC CAP 33 [RE 2019]. When that is done, the effect of this is provided under rule 9 (2) thus;

- (2) Where a counterclaim is set up in a written statement of defence, the counterclaim shall be treated as a cross- suit, and the written statement shall have the same effect as a plaint in a cross-suit, and the provisions of Order VII shall apply mutatis mutandis to such written statement as if it were a plaint. With that note on the law and procedure on the counterclaim, no plaint was presented by way of a counterclaim to the plaintiff's case. this court can not award a claim that was not adjudicated. That said, since the plaintiff's claims have not been proved, the reliefs in the plaintiff's plaint can not be granted; thus, this suit is dismissed with costs. 18 Dated at DAR ES SALAAM this 19th day of February 2025. A J KIREKIANO JUDGE 19

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