IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT ARUSHA

CIVIL CASE NO. 13 OF 2019

NGURDOTO MOUNTAIN LODGE LIMITED.....1ST PLAINTIFF/2ND DEFENDANT

IMPALA HOTEL LIMITED .....2ND PLAINTIFF/1ST DEFENDANT

VERSUS

NATIONAL BANK OF COMMERCIAL LIMITED.....1ST DEFENDANT/PLAINTIFF

DR. ONESMO KYAUKE t/a LOCUS ATTORNEYS.....2ND DEFENDANT

JANETH WILLIAM KIMARO, MICHELE MREMA AND VIV MREMA (As Administratixes of the late MELLEO AUYE MREMA).....3RD DEFENDANT TO C/CLAIM

PELAGIA AUYE MREMA.....4TH DEFENDANT TO C/CLAIM

JOAN AUYE MREMA.....5TH DEFENDANT TO C/CLAIM

JUDGMENT

22/4/2022 & 19/05/2022

GWAE, J

Since 2000s the National Bank of Commerce Limited (hereinafter the 1st defendant (hereinafter to be referred to as "the Bank") and 1st plaintiff, Ngurdoto Mountain Lodge Limited (1st borrower) as well as the 2nd plaintiff, Impala Hotel Limited (2nd borrower) to the main case have been in a

reputable and sound commercial relationship as the lender and borrowers respectively.

In the course of their business, the borrowers' directors namely; Melleo Auye Mrema (deceased) and one Joan Auye Mrema (1st borrower's Directors) and Melleo Auye Mrema and Pelagia Auye Mrema (2nd borrower's directors) played a role of guarantors and the borrowers guaranteed to each other in safeguarding their respective credit facilities from the Bank. It is the version of both the plaintiffs and Bank, 1st defendant in the main case that their relationship did not go smoothly as expected from 2017 to the date of the hearing of these proceedings since the plaintiffs were alleged to have not been repaying credit facilities as per the facility letters.

On the 12th day of April 2019, both borrowers instituted a suit against National Bank of Commerce Limited and one Dr. Onesmo Kyauke t/a Locus Attorneys, an official receiver (2nd defendant to the main case) whereas the Bank filed a cross suit/counter claim through the joint written statement of defence filed by both defendants in the main case on the 6th day of May 2019.

Following the alleged failure to service loans by the borrowers (the plaintiffs to the main suit), the Bank duly appointed the 2nd defendant who subsequently initiated sale processes of the properties offered as securities (mortgaged properties) for the credit facilities which were duly secured by separate securities namely; legal mortgages (four landed properties), fixed and floating debentures owned by the borrowers for unspecified amount, corporate guarantee by borrowers for the extended loans in favour of each other and personal guarantees by the 3rd, 4th and 5th defendant to the counter claim.

In the main case, the borrowers are praying for judgment and decree against the defendants as follows;

1. That, the 1st defendant has prematurely invoked her powers under mortgage deed dated 19th December 2002 and 26th June 2003
2. A declaration that a default notices in respect of the credit facilities granted by the 1st defendant to the plaintiffs and secured by mortgage deeds dated 19th December 2002 and 26th June 2003 are invalid

3. An order stooping the defendants, their officers, or agents from selling or interfering with the plaintiffs' titles in the landed properties with the following particulars
    a) C.T. no. 16105, LRM Farm No. 66/1/5.USA River East Bank, in Arusha Municipality
    b) C.T No. 895-LRM, L.O No. 43803 Plot No. 10 Kijenge area in Arusha Municipality
    c) C.T No. 1001 LRM, L.O No. 43764 Plot No. 11 Kijenge area in Arusha Municipality and
    d) C.T No. 923-LRM, L.O No. 43765 Plot No. 12 Kijenge area in Arusha Municipality
4. General damages
5. Interest from (iv) above at the court's rate of 7 % from the date of judgment to the date of satisfaction thereof

Whereas in the counter claim/cross suit, the Bank (plaintiff to the counter claim) is found claiming that, the 1st and 2nd defendant to the counter claim (borrowers) have defaulted repayments in the sum of USD 549,227.89 and USD 2,342,621.85 respectively. As the Managing Director, the late Melleo Auye Mrema for both plaintiffs to the main case had passed

away in 2017, therefore one Janeth Kimaro, Michele Mrema and Viv Mrema are sued in the capacity of administratixes of the estate of the late Mrema. Also, one Pelagia Auye Mrema and Juan Auye Mrema (4th and 5th defendant) as Directors of the 1st and 2nd defendant respectively to the counter claim are correspondingly sued. Therefore, the plaintiff/Bank to the counter claim prays for judgment and decree against the defendants jointly and severally as follows;

a. An order for payment by the defendants of the outstanding amount aforementioned (USD. 549,227.89 and USD. 2,342,621.85)
b. An order of payment of interest on total outstanding amounts at the rate of 12 % per annum on the credit facilities computed and accruing from 31st March 2019 to the date of judgment
c. An order of payment of interest on the decretal amount mentioned in item (a) above at the rate of 12 % from the date of judgment to the date payment in full.

Throughout the preliminary hearings and trial, advocate Emmanuel Sood represented the 2nd plaintiff in the main case as well as the 1st defendant and 4th defendant to the counter claim whilst Mr. Ngemela, the learned advocate appeared for the 1st plaintiff/2nd defendant as well as the

5th defendant to the counter claim and Mr. Wilbard Massawe (adv) had been appearing for both defendants to the main case and the plaintiff to counter claim. Also, Mr. Miraji Ngereka assisted by Mr. Richard Massawe, both the learned counsel appeared representing 3rd defendants to the counter claim. Immediately before commencement of the trial, the court with consultation with the parties' advocates aforementioned framed the following issues;

1. Whether the default Notices dated 25th September 2018 issued by 1st defendant to the main case was defective and premature.
2. Whether the right to sale mortgaged properties had accrued in favour of the 1st defendant in the main case.
3. Whether the 1st defendant to the counter claim defaulted repayment at the tune of USD 549,227.85 as of 31st March 2019.
4. Whether the 2nd defendant in the counter claim defaulted repayment at the tune of USD 2,342,621.85 as 31st March 2019.

5. Whether the 1st, 2nd, 3rd, 4th and 5th defendant in the counter claim are guarantors for the credit facilities advanced to the borrowers.
6. Whether the default notices dated 25th day of September 2018 were issued to 1st, 2nd, 3rd, 4th and 5th defendant in the counter claim
7. What reliefs the parties are entitled

During trial, the 1st plaintiff and 2nd defendant to the main suit and counter claim respectively summoned her two witnesses namely; Beatrice Dimmatris Dallalis (PW1) and Joan Auye Mrema (PW2). Admittedly, these two witnesses testified that they are not disputing indebtedness with the Bank save uncertainty of the outstanding loans plus accrued interests. Nevertheless, these witnesses seriously contended that, they were not duly served with statutory default notices (Ngurdoto Lodge and its Director-5th defendant) as required by the law adding that their failure to smoothly service the loans advanced to the plaintiffs in the main case were due the following causes;

1. Demise of the plaintiffs' Managing Director one Melleo Auye Mrema in 2017 followed by processes of administration of estate of the deceased.
2. The Government's prohibition of their institutions from using private conference facilities from 2017 to 2019
3. World's outbreak of the Pandemic disease, Corona Virus (COVID-19)

The said witnesses (PW1 & PW2) went on testifying that there were discussions or settlement out of the court that were being carried out before institution of these proceedings and during pendency of the same in the court. Finally, the witnesses for the 1st borrower implored for an order of the court extending time to enable the borrowers and guarantors to amicably pay the outstanding amount and a waiver of the costs of these proceedings.

In her endeavors to prove the suit and defend the counter claim, the 2nd borrower equally summoned her two witnesses who appeared before the court for testimonial purposes, these were; Pelagia Auye Mrema, the director and shareholder (deceased's sister-PW3) and Boniface Kamugisha (PW4). PW3 testified to the effect that, there was no issuance of default

notice and if so, the same was illegal since the restructured loan of 2015 was repayable within seven (7) years commencing from 2015 to 2022. As was testified by the PW2, the repayment schedules were not met as contractually expected immediately after the demise of the late Melleo Auye Mrema. PW3 and PW4 similarly testified to the effect that there were efforts to settle the matter out of the court through the sale proceeds obtained in the public auction whereby the landed properties offered as securities for the credit facilities advanced by the Bank in favour of Naura Spring Hotel were sold. PW3 thus prayed for an order of the court restraining the Bank or his agent from selling the landed properties and an order directing the Bank to pay general damages.

On the other hand, the Bank in her defence and proof of the civil suit and her cross suit respectively, summoned her three witnesses, namely; James Simba working with the Bank as a loan recovery officer and his colleague, Deogratias Kawishe (DW1 & DW2) who essentially testified that the borrowers were advanced credit facilities by the Bank in 2002 and that the same were restructured in the year 2015 after signing of the facility letters adding that the loans given to them were secured by mortgage deeds. DW1 and DW2 further adduced to the effect that, after the

repayment defaults or unsatisfactory repayments by both borrowers especially from 2017 onwards there were demand notices that were issued followed by sixty (60) days statutory notices served to the Directors and administrators of the estate of the late Melleo Mrema and that there were also letters of reply to the Bank's notices requesting for further loans restructuring however the Bank did not accept them due to Regulations or restrictions set out by the Central Bank of Tanzania (BOT).

However, when DW1 cross examined by the 1st borrower's counsel, Mr. Ngemela, if the administrators of the estate of the late Mrema were served with requisite default notices, his answer was uncertain. DW1 admittedly testified that though the loans were repayable within 84 months as adduced by PW1, PW2 and PW3 yet the Bank has a contractual right to take necessary measures immediately after loan repayment default.

The Bank via its witness, Andrew Mwamboja (DW3) further gave its evidence with effect that the outstanding loans plus their accrued interest in respect of the 1st and 2nd plaintiff to the main case as of 31st March 2019 were USD.549,731.11 and USD. 2,342,248.85. Finally, the Bank's witness prayed for an order of the court directing attachment and sale of the securities so that the Bank can recover people's monies. Despite the oral

evidence adduced by the Bank's witnesses, there were also a number of nine (9) exhibits that were tendered (DE1-DE9) in support of its evidence, these were;

1. Facility letter for term loan dated 12th June 2015, borrower being Ngurdoto Mountain Lodge and guarantors being Impala Hotel Limited, her Managing one Director Melleo Auye Mrema and Joan Auye Mrema, the ones who signed therein
2. Facility letter date 12th June 2015 for the term loan in favour of Impala Hotel Ltd, guarantors being Ngurdoto Mountain Lodge Ltd, Melleo Auye Mrema and Pelagia Auye Mrema
3. Mortgage of a Right of Occupancy, C.T. 895 LRM, L.0 Pot No.10 located at Kijenge-Arusha between Impala Hotel Ltd and the Bank via mortgage deed dated 26th June 2003
4. Security (Mortgage of R/O CT. 16105 located at USA-East Bank of the USA for the loan advanced by the Bank to Ngurdoto Mountain Lodge as per mortgage deed dated 19th December 2002.
5. Default Notice dated 25th September 2018 addressed to the Directors, Impala Hotel Limited (not showing when it was

received), outstanding amount due as of 27th September 2018 being 574, 844.19

6. 14 days demand notice dated 5th September 2018 addressed to the three (3) adminitratixes of the estate of the late Melleo Auye Mrema, Guarantor pursuant to Guarantee Agreement dated 27th April 2001 namely; Janeth William Kimaro, Michele Mrema and VIV (now 3rd defendant to the counter claim) stating the outstanding loan to be USD. 573.647.61 as of 31st August 2018 advanced to Impala Hotel Limited, the notice is duly signed by the said administratixes on the 14th Sept. 2018, demand notices issued to the 3rd defendant and borrowers' directors
7. Two letters of reply by a director-Ngurdoto Mountain Lodge dated 17th September 2018 (5th defendant to the counter claim) and that of the said administratixes of the estate of the late Melleo Mrema bearing the same date and addressed to the Bank seeking restructuring of the loan

8. Default Notices of sixty days dated 25th September 2018 to the 1st plaintiff's Directors (Ngurdoto) showing extent of default being USD. 2, 297,770.77 as of 27th September 2018.
9. Bank statements in relation to Ngurdoto Mountain Lodge and Impala Hotels (borrowers) from 1/6/2016 to 18/4/2019)

After close of the Bank's case, One Janeth d/o Kimaro (DW4) also appeared defending the borrowers as well as herself sued in the capacity of administratix of the estate of the deceased person by giving a brief sworn testimony to the effect that, the administrators of the estate of the late Melleo Mrema were not served with statutory default notices and that as administrators of the deceased's estate, have not accomplished their administration duties. DW4's testimony marked the close of the parties' case.

The advocates who duly represented the parties immediately of the closure of their cases on the 29th September 2021 sought and obtained leave of the court to file their written closing written submissions which I will not reproduce the same, suffices to heartedly thank them for their fruitful contribution towards making of this judgment. However, I am going

to adequately deliberate the same while determining each framed issue as herein under;

> As to the 1st issue**, whether the default Notices dated 25th September 2018 issued by 1st defendant to the main case was defective and premature**

It is requirement of the law that, whenever the mortgagee wishes to exercise her statutory rights of either sale or possession or lease of the mortgaged property upon default by the mortgagor to issue a default notice. The mortgagee may also exercise his contractual rights without seeking an order of the court. However, such rights are exercisable upon adherence to certain procedures as provided under provisions of section 127 of the Land Act, Cap 113, Revised Edition, 2019 (Land Act) which read and I quote;

> "127 (1) Where there is a default in the payment of any interest or any other payment or any part thereof or in the fulfillment of any condition secured by any mortgage or in the performance or observation of any covenant, express or implied, in any mortgage, the mortgagee shall serve on the mortgagor a notice in writing of such default.

(2) The notice required by subsection (1) shall adequately inform the recipient of the following matters:

(a) the nature and extent of the default

(b) that the mortgagee may proceed to exercise his remedies against the mortgaged land; and

(c) actions that must be taken by the debtor to cure the default; and

(d) that, after the expiry of sixty days following receipt of the notice by 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** (emphasis supplied)"

Basing on the quoted provisions of the law, among other conditional precedents for entitling the lender/bank or mortgagee to sell or enter into possession or lease the mortgaged properties is a default of repayment of the loan or any part thereof or failure to meet any condition stipulated in the mortgage deed.

According to the default notices (DE5 and DE8) issued as required by the law, the said sixty (60) days' notices indicated the extent of the outstanding loans due as per section 127 (2) (a) of the Act (Supra) contrary to the evidence adduced by the borrowers. More so, the

borrowers were also duly notified of the consequences of their failure to rectify or remedy the outstanding loans after lapse of sixty days pursuant to the provisions of the law quoted above.

Correspondingly, the contentions by the borrowers' representatives that, the said default notices were pre-maturely issued since the Bank was to issue reminder notices first before issuing the default notice taking into account of their long business relationship are baseless since the same is neither backed by the parties' facility letters nor the same is provided by the law. Perhaps the assertions may be equitably considered correct as opposed to the facilities letters (See loans agreements at clause 10 of DE3 & DE4) which is binding upon the parties and the law under section 127 (2) (d) of the Act (Supra) requires repayment of the entire outstanding amount upon default by the borrowers/mortgagors.

According to the mortgage deeds (DE3 & DE4), the loan borrowers are deemed to have defaulted repayment of the loan and its accrued interest even by failure to pay a single agreed instalment within the agreed period. Therefore, the principal sum becomes repayable or matured not at the expiry of the parties' facility letters/agreements but immediately upon failure to repay the credit facility and its accrued interest by the borrower

even by a failure to repay a single agreed instalment within thirty (30) days' period as contractually stipulated under clause 10 in each mortgage deed which reads;

> "10. The principal sum and accrued interest hereby secured shall become due immediately payable, if any of the following occurs namely:
>
> (a) A distress or execution either by the court order or execution or otherwise is levied upon any part of the property or assets of the borrower.....
>
> (b) Ac receiver is appointed by the court or by any other person
>
> (c) NA
>
> **(d) The borrower without the consent of the mortgagee ceases to carry business financed by the credit facility**
>
> (e) **The borrower fails to pay or defaults the agreed instalments when they fall due**. For the Purpose of this condition, **default shall be proved when an instalment is due and has not been repaid within thirty (30)** days or in case of an overdraft, the borrower has failed to operate the account satisfactorily or has failed to repay the outstanding balance upon expiry of the overdraft facility (bolded supplied)".

Considering provision of section 127 (2) (d) of the Land Act (supra) and paragraph 10 quoted above in both mortgage deeds securing the credit facilities, the borrowers' directors and guarantors were bound to ensure that each instalment is accordingly repaid and in the event of default, the Bank was contractually entitled to exercise its rights to ensure that its money and accrued interests are recovered by stepping into shoes of the securities for the loans.

Examining the evidence adduced by the Bank and the borrowers' witnesses, I am fully satisfied that, the Bank has managed to prove its counter claim in the balance of probabilities that, the default notices issued on the 25th day of September 2018 were neither defective nor premature ones (See section 110 of the Law of Evidence Act, Cap 6, Revised Edition, 2019 &). Having demonstrated as herein above, the first issue is therefore answered not in affirmative.

Now to the court's determination of the 2nd issue, **whether the right of sale of the mortgaged properties had accrued in favour of the 1st defendant in the main case.**

According to the plaintiffs/borrowers through their witnesses, the right to sale the mortgaged properties had not accrued (See para.6 of their joint written statement of defence to the counter claim and the borrowers' contention that there were circumstances which contributed to their failure to repay unlike in the previous years that is prior to the year 2017. The circumstances that were said to have hindered smooth service of the loans are; **firstly**, the death of the Managing Director, the late Melleo Mrema in 2017 followed by processes of administration of estate of the deceased, **secondly,** the Government's prohibition of their institutions from using private conference facilities from 2017 to 2019 and **thirdly,** world's outbreak of Corona Virus (COVID-19). On the other hand, the Bank via her witnesses (DW1-DW3) told the court that, the borrowers failed to repay the outstanding loans plus accrued interests pursuant to the facility letters (DE1 &DE2).

Considering the documentary evidence as earlier explained when determining the 1st issue, the nature and extent of default as of 31st August 2018 are visibly indicated in the demand notices (DE6) and default notices (DE5 &DE8) and the period within which the defaults would be remedied or corrected.

I am however of the opinion that, the contention that the borrowers faced difficulty situations as a result they became unable to regularly and satisfactorily service the credit facilities, would be conveniently considered out of the court by the parties by revisiting their agreements and mutually restructuring the loan agreements taking into account of the undisputable fact that, the borrowers were reputable Bank's customers and not by the way of adjudication despite the fact that, the reasons given are obvious and understandable. In law the alleged frustrations were not anticipated by the parties nor were they part and parcel of the parties' agreements (See **Davis Contractors Ltd vs. Farehum U.D.C** (1956) A. C, 696).

Accordingly, the reasons that hinder smooth repayments as advanced by the plaintiffs, in my view, do not restrain the Bank from recovering its money through attachment and sale of securities as no such clause that is contained in the DE3 and DE4 (No force majeure clause in the facility letters). The Bank is thus entitled to exercise her loan recovery measures and taking into account that courts of law are not mandated to intervene parties' contracts provided that they freely entered into and the same are neither illegal nor immoral. This principle is the principle of Sanctity of

Contract as stated in **Chitty's Law of Contracts**, Volume I, (24 ed), at page 5 which reads:

> "A concomitant of the doctrine of freedom of contract is that of sanctity of contracts; and it is still a cardinal principle of English law because it suits the needs of a commercial community. English law is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud (actual or constructive) or misrepresentation, and no principle of public policy prohibiting enforcement".

This basic principle relating to sanctity of the contract was judicially accentuated by the Court of Appeal of Tanzania sitting at Mwanza in the case of **Simon Kichele Chacha vs. Aveline M. Kiwale,** Civil Appeal No. 160 of 2018 (Unreported) where the Apex Court of the land had the following to say with regard to sanctity of contracts;

> "It is settled law that parties are bound by the agreements they freely entered into and this is the cardinal principle of the law of contract. That is, there should be sanctity of the contract."

See also a decision in **Abualy Alibhai Azizi vs. Bhatia Brothers Ltd** [2000] T.L.R 288 and **East African Breweries Ltd vs. GMM Company Ltd** (2002) TLR 12.

Moreover, the borrowers' assertion that, the facility letters were to expire in 2022 whereas the Bank exercised its mortgage right prior to 2022 is unsubstantiated since the parties are always bound by the terms and conditions of the contract that they freely entered into. Therefore, the borrowers are supposed to adhere to the paragraph 10 of both mortgage deeds (DE3 &DE4) since PW1, PW2 and PW3 had admitted having failed to repay the outstanding loans plus accrued interests. Basing on the reasons given above, the 2nd issue is thus answered in affirmative and in favour of the Bank.

Coming to the 3rd issue, **whether the 1st defendant to the counter claim defaulted repayment of the outstanding amount at the tune of USD 549,731.11 as of 31st March 2019 in the counter claim.**

Examining the parties' oral evidence adduced before this court (PW2, PW3, PW3 & DW3 as well as the documentary evidence (DE9- Bank statements) relating to Impala Hotel's indebtedness to the Bank, the Bank statement is a conclusive proof of the indebtedness as of 31st March 2019. I am therefore satisfied that the Bank has been able to prove its claim against the 1st defendant in the counter claim to the required standard in

civil litigation. Henceforth, it is glaringly proven that, the 1st defendant to the counter claim has defaulted repayment of the outstanding loan plus accrued interests as of 31st day of March 2019 totaling USD. 549,731.11. The 3rd issue is therefore answered in affirmative.

Regarding the 4th issue **on whether the 2nd defendant in the counter claim defaulted repayment at the tune of USD 2,342,621.85 as 31st March 2019.**

This issue should also not detain me as it is plainly clear from the parties' pleadings and testimonies adduced by the parties during trial that, the 2nd defendant to the counter claim did not dispute the Bank's claim in that aspect save the manner the default notice was served or total failure to serve and reasons for failure to repay as agreed. It follows therefore, the 2nd defendant to the counter claim, 2nd borrower has proven to have indisputably defaulted repayment in the tune of USD **2, 342, 621. 85** as of 31st day of March 2019.

Now to the court's determination of the 5th issue which reads, **whether the 1st, 2nd, 3rd, 4th and 5th defendant in the counter claim are guarantors for the credit facilities advanced to the borrowers (1st and 2nd defendant)**

Examining the evidence adduced by the parties during trial of the case particularly documentary evidence that is facility letters (DE1 & DE2), it goes without saying that the 1st and 2nd plaintiff to the main case and 1st and 2nd defendant to the counter claim stood as corporate guarantors to each other. More so, the late Mrema, Managing Director played a role of a guarantor for both borrowers whereas the 4th and 5th defendant acted as guarantor in favour of the 1st and 2nd defendant to the counter claim respectively. This fact is not even disputed in the defendants' joint written statement of defene (WSD) to the counter claim as clearly depicted at paragraph 11 of the said WSD since it is brightly stated that, paragraph 7 of the plaint is without prejudice noted whereas the Bank's plaint at paragraph 7 is to the effect that, the credit facilities were duly secured by landed properties owned by the borrowers who have guaranteed to each other, corporate guarantors and personal guarantors assuring repayment in the event of default to repay the loan by the principal debtors.

My reading of the above quoted paragraph 11 of the defendants' WSD constitutes an admission of Paragraph 7 of the Bank's plaint. I am not unsound of the well-established principle of the law that admitted facts through parties' pleadings do not require further proof as was rightly

stressed by this court at Dar es salaam (**Mwambegele, J** as he then was now JA) in **Yara Tanzania Limited vs. Charles Alloyce t/a Msemwa Junior Agrove Kassim Shodo Mazara,** Commercial Case No. 5 of 2013 (unreported) when approving the decision of Nigerian Supreme Court in **Mojeed Suara Yusuph vs. Madam Idiatu Adegoke** SC. 15/2002 and observed that;

> "It is now a very trite principle of the law that the parties are bound by their pleadings and that evidence lead by any of the parties which does not support the averments in the pleadings or put another way which is at variance with the averments of the pleadings goes to no issue and must be disregarded by the Court".

(See also courts' decisions in **Lim v. Canden Health Authority** [1979] 2 All ER 910 approved by our court in **Bonham v. Hyde Park Hotel Ltd** (1948) TLR 177) and **National Insurance Company vs. Sekulu Construction** (1984) TLR 157 and pursuant to section 60 of Tanzania Evidence Act, Cap 6 Revised Edition, 2019).

Basing on the pleadings in the defendants' joint written statement of defence aforesaid admitting guarantorship, it follows that the defendants to the counter claims are estopped from denying such admitted facts.

I have also taken due regard to the documentary evidence especially terms loan commercial terms (DE1& DE2) accompanied by resolutions of the Board of Directors. The said two documents are duly signed by the guarantors, the borrowers' Directors as well as 3rd, 4th and 5th defendants to the counter claim. Therefore, it goes without saying that all defendants are guarantors to the loans advanced by the Bank to the Borrowers (1st plaintiff and 2nd plaintiff to the main case). Equally, the 5th issue is determined in favour of the Bank.

For the 6th issue, **whether the default notices were issued to 1st, 2nd, 3rd, 4th and 5th defendant in the counter claim.**

It is the requirement of the law that, a principal debtor shall be served with a default notice and that a copy of the same must be copied to a guarantor upon default to repay the outstanding loan by the borrower. The mortgagee (lender) relying on an express provision in the mortgage deed is required to give a default notice and hence he can only sell after the expiry of the time specified in the notice (See section 127 (1) of the Land Act (supra), **NBC vs. Walter T. Czurn**, Civil Appeal No. 31 of 1995 (unreported) and **David Ngigi Ngaari vs. Kenya Commercial Bank Limited** (2015) eKLR).

Given the evidence amply adduced by the Bank and the borrowers' representatives, it is clear that the default notices (DE5 and DE8) were issued to both the 1st plaintiff and 2nd plaintiff in the main suit. Examining the said default notices, I have observed that, the same were duly received by the borrowers' representatives (administrators) especially by the 1st plaintiff to the main case through her director or any other person acting on her behalf as it is clearly shown in DE8 where the same was signed and bearing an official seal exhibiting to have been received on the 9th October 2018 as opposed to the 2nd plaintiff to the main suit where there is only signature, therefore not easier for identification.

It cannot therefore be apprehended that, the 1st plaintiff's director and her guarantor (5th defendant) was served with requisite default notice since there is clear acknowledgment of the receipt of the same through the Company's seal. Furthermore, I am holding the view that, the 2nd borrower was not clearly served by the Bank simply because the Bank has failed to prove who exactly was served with default notice taking into account that the signature appearing on DE5 is questionable in the sense that it does not have Impala Hotel's seal nor does it bear the signature of the 4th

defendant after I have made an inquiry by comparing the signatures appearing in DE5 and her signature appearing in DE2.

Despite unclear service of the default notice to the 2nd plaintiff to the main case as explained herein above yet it is clear through demand notices dated 5th September 2018 (DE6) issued by the Bank to the personal representatives of the deceased (3rd defendant) and 2nd plaintiff's director (4th defendant) were served with demand notices. It therefore follows that, the Impala Hotel Limited (1st defendant to the counter claim) was made aware of the loan repayment default though no proof of service of default notice and this is by virtue of PW3's testimony who testified that when she (PW3) was made aware of the default notice, she went to the Bank which requested her to concentrate on the means of repayment.

Nevertheless, it has not been established by the Bank if the 3rd defendant was duly served through his administratixes (Janeth, Michelle and Viv Mrema) of his estate though the Bank is observed to have been aware of the demise of the late Mrema vide its demand notices (DE6) dated 5th September 2018 which was addressed to the said administratixes whilst the purported statutory default notice (DE5) to the 2nd plaintiff's directors was vividly issued on the 25th September 2018, That means the

Bank was aware of the said departure of the borrowers' Managing Director who was also guarantor for borrowers, DE6 reads;

> "By this letter, National Bank of Commerce Limited makes a formal demand upon you as administratix of the Estate of the late Melleo Auye Mrema, Guarantor pursuant to Guarantee Agreement dated 27th April 2001 and made between Melleo Auye Mrema and NBC Limited (lender) to secure credit facilities....."

Considering the said demand letters (DE6) whose parts are quoted herein, it goes without saying that, the Bank was therefore duty bound to serve the administratixes of the estate of the late Mrema with the requisite default notice in the same manner it served them with demand notice in respect of the 2nd plaintiff. In the same disposition, the Bank was to serve representatives of the late Mrema in respect of the 1st plaintiff, Ngurdoto Mountain since it was also made aware of the deceased's demise through its demand notices and the reply (DE7) of the administratixes which was received by the Bank on the 18th September 2018.

In the final analysis, this court is of the considered opinion that the representatives of the estate late Mrema who was not only Borrowers' Managing Director but also the guarantor for both credit facilities advanced

by the Bank. It follows therefore, service of statutory default notices to the said administratixes in respect of both borrowers was mandatorily required under the law. However, as was the case when the Bank issued the demand notices to the 1st borrower, the said administratixes jointly made a reply thereto (DE7), I am therefore of the view that while the Bank had a primary obligation to serve the administratixes of the estate of the late Mrema with default notices for both outstanding amount equally the administrators had the duty to ascertain status of the estate of the deceased including collection of all due debts in favour of the deceased person and make payments of all debts owed by the deceased. In the case of **Sekunda Mbwambo vs. Rose Ramadhani** (2004) TLR 439 it was held;

> "The objective of appointing an administrator of the estate is the need to have a faithful person who will, with reasonable diligence, collect all properties of the deceased. He will do so with the sole aim of distributing the same to all those who were dependents of the deceased during his life time. The administrator, in addition, has the duty of collecting all the debts due to the deceased and pays all the debts owed by the deceased. If the deceased left children behind, it is the responsibility of the administrator to ensure that they are properly taken care of and well brought up

using the properties left behind by their deceased parent....."

(See section 100 of the Probate and Administration of Estate Act, Cap 352, Revised Edition, 2019 and a decision in the case of **Mabongolo Luma and Khadija Abubakary Mwinyi vs. Peter A. Mlanga**, Civil Appeal No. 45 of 2019 (unreported-CAT).

Basing on the above reasons and in the light of the above judicial precedents, the assertion by the 3rd defendant that they were not granted letters of administration prior to 23rd July 2019 is unfounded since they introduced themselves to be administratixes through their joint reply letter dated 17th September 2018 to the Bank's demand letter (DE6). More so, they owe duty to know the status of the estate of the late Mrema. The 6th issue is therefore partly determined in affirmative.

Lastly, determination on **what reliefs the parties are entitled**

From the very outset and as per the court's determination of the 3rd and 4th issues herein, the Bank, plaintiff to the counter claim is therefore entitled to the payment of the outstanding sums owed by the 1st defendant

(2nd borrower) and 2nd defendant (1st borrower) t0 the tune of **USD 549, 731.11** and **USD 2,342,621.85** as of 31st March 2019 respectively.

For the 3rd,4th and 5th defendant to the counter claim who have been found to be guarantors for the loans advanced to the borrowers are liable to repay the proven outstanding loans plus accrued interests that is to say in the event the borrowers who are principal debtors will fail to meet through their said properties mortgaged in securing the credit facilities, which in my view is not the case since the securities offered by the borrowers and withheld by the bank are satisfactory. Responsibility of guarantor of the loan was correctly stressed in **Issack Mwamasika and two others v. EDBP & GD Construction Co. Ltd**, Civil Appeal No. 139 of 2017 (unreported) where the Court of Appeal authoritatively held that;

> "……The Personal guarantees which they signed and executed not only committed them to pay the loan debts of the 3rd respondent or face the seizure of their personal assets, but it also provided the appellant with legal justification to withhold the security documents related to the loans".

See also judicial jurisprudence in **CRDB Bank Limited vs. Issack B. Mwamasika and 2 others**, Civil Appeal No. 139 of 2017 (unreported) where the Court of Appeal of Tanzania held among other things that if a

person executes a personal guarantee to supports the principal debtor's application for loan, the guarantor concern puts all of his property at risk if the principal debtor defaults.

More importantly, I am of the view that, since the securities offered by Corporate guarantors (borrowers) guaranteeing each other have value worth more than the proven outstanding sum (not more than Tshs. 7.5 billions), therefore, fetchable proceeds in the securities offered by the borrowers (corporate guarantors) will obviously be higher than debts even by a sale of the single mortgage. Hence, the Bank will step into shoes of the personal guarantors (3rd, 4th and 5th guarantors) after public auction of the properties of the borrowers in case the sale proceeds of the borrowers' mortgaged properties will not satisfy the debts plus other related execution or sales costs.

Having found as herein, a contentious issue that follows and which I requested the parties' advocates to address the court is, which mortgaged properties are to be attached taking into account that each borrower has defaulted repayment and has executed Corporate guarantee in favour of each other (cross guarantee), is it the property of one of the borrowers who is more indebted as argued by the 3rd defendant's advocates or is it

proper to issue an order directing each borrower to be liable with her mortgage in accordance with her indebtedness as argued by the learned counsel for the Bank and 2nd borrower.

Though section 98 of the Law of the Contract, Cap 345 R. E, 2019 has been referred by the counsel for the parties but I think this statutory provision is not applicable in the cross guarantee except in co-sureties or co-guarantors like the 3rd defendant and 4th defendant to the counter claim who stand as guarantors in favour of the 2nd borrower or 3rd defendant and 3rd defendant in favour of the 1st borrower.

Be as it may, since I have found herein to be glaringly clear that both debtors, borrowers have guaranteed to each other and since each principal debtor has defaulted repayment, for the interest of justice, it is therefore proper, in my firm view, to order attachment and sale of the mortgaged property (one of the borrowers' properties) which has less value than another property after valuation has been conducted in respect of the mortgaged properties by an authorized valuer for the purpose of clearing the debts of both borrowers. I am guided by the legal principle that; the Credit Law provides that judgment must generally be obtained against the primary debtor under the principle of contract before enforcing the

guarantee (See Guarantors and co-borrowers (Part 3 Division 2 NCC; s. 90 NCC and The Modern Contract of Guarantee. London: Sweet and Maxwell. 2003, pp. 8 -13.).

I am further of the considered view that since there are irregularities in the purported service of the statutory default notices to the defendants by the Bank as alluded herein above when determining the 6th issue and taking into account of the reasons that led to the failure to repay the loan namely; death of the borrowers' Managing Director followed by processes of administration of the estate of the deceased including mortgaged properties as well as the intended settlement out of the court that has been carried out before institution of these proceedings and while the matter is pending in court. That being the court's findings, the defendants to the counter claim are given forty (40) days within which to pay the proven due sum in favour of the Bank instead of ordering re-service of the default notices and have their mortgaged properties discharged pursuant to section 138 of the Land Act (Supra).

In the upshot, the main suit narrowly succeeds whereas the Bank's counter claim mainly succeeds. Consequently, I make the following orders;

a. The Bank is entitled to the sum of **USD 549,731.11** and **USD 2,342,621.85** being outstanding principal sum plus accrued interest as of 31st day of March 2019 owing from Impala Hotel Limited (2ndborrower) and Ngurdoto Mountain Lodge Limited (1st borrower)

b. That, defendants are given **forty (40) days** within which to pay the ordered outstanding sums as per the order (a) above from the date of this order

c. In case the borrowers and their guarantors fail to settle the debts within forty (40) days set in the order (b) above, loan recovery measures shall accrue including public auction of the mortgaged property with value much less than other but not less than the proven outstanding amount.

d. In the event, the defendants to the cross suit will not comply with the order (b) above the Bank shall be entitled to an interest on the decretal amounts at the court's rate (7 %) from the date of judgment delivery to the date of full payment of the outstanding sums.

e. Considering the nature of the court's findings, I refrain from making an order as to costs.

It is so ordered

DATED at **ARUSHA** this 19th May, 2022

M. R. GWAE
JUDGE
19TH MAY 2022

Court: Right of Appeal fully explained

M. R. GWAE
JUDGE
19TH MAY 2022