

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM
COMMERCIAL CASE NO. 87 OF 2019.**

FIRST NATIONAL BANK LTD.....PLAINTIFF

VERSUS

KULAR ENTERPRISES LTD.....1ST DEFENDANT

LAMERCK MARTIN MAEENA.....2ND DEFENDANT

ZAKIYA MAJID ALOYCE.....3RD DEFENDANT

MITUL MAHENDRA SHAH4TH DEFENDANT

BIMAL MAHENDRA SHAH.....5TH DEFENDANT

JUDGMENT.

Date of Last Order: 25/07/2022.

Date of Judgment : 19/09/2022.

MARUMA J.

The Plaintiff is a limited company established under the laws of Tanzania operating in the banking business while the 1st Defendant, Kular Enterprises Limited is a limited liability company established under the laws of the United Republic of Tanzania and

the 4th and 5th Defendants are co-directors of the 1st Defendant's company. The 2nd and 3rd Defendants are natural persons and mortgagors to the 1st Defendant.

The Plaintiff's claim against the Defendants jointly and severally for the payment of TZS. 1,067,381,265.91/= as the outstanding amount plus interest and other charges thereon resulted from the Overdraft Facility Agreements granted to the 1st Defendant through a facility letter dated 8th June, 2017 and 18th May, 2018, an addendum of December, 2017. The Plaintiff prays for judgment and decree against the Defendants for;

- i. An order that the defendants are jointly and severally liable and should immediately pay TZS. 1,067,381,265.91 as per paragraph 6 above.
- ii. Eviction, delivery of vacant possession and an order for sale of landed property registered Plot No. 1100 with Certificate of Title No. 85517, Land Office No.

408211, Midium Density Mikocheni Area, Kinondoni Municipality in the name of Lameck Martin Meena and Plot No. 107 Block 7 Mbweni Mpiji Area in Kinondoni Municipality with Certificate of Title No. 66916 in the name of Zakiya Majid Aloyce.

- iii. If the Plaintiff will not be able to recover the whole amount from roman number ii above. Court to issue an order for recovery of any balance after the sale of the mortgaged property as per roman ii above from any of the properties of the Defendants.
- iv. Interest on the decretal amount at the rate of 7% per annum from the date of judgement till the dale of full and final satisfaction of the decree.
- v. Cost of and incidental to the suit.
- vi. Any other reliefs that this honourable court may deem just and equitable to grant.

The Defendant disputed the Plaintiff's claims and the 3rd Defendant raised a counterclaim in which she claimed for the following;

- i. A declaration that the mortgage deed on Plot No. 107, Block 7 Mbweni Mpiji Area in Kinondoni Municipality with Certificate of Title No. 66916 in the name of the Plaintiff in the Counter Claim purported to have been executed by the Plaintiff in the Counter Claim to have been executed by the plaintiff in the counter claim is unlawful nullity for being fraudulently created by the Defendants to the counter claim
- ii. An order to discharge the mortgage created for Plot No. 107. Block 7 Mbweni Mpiji Area in Kinondoni Municipality with Certificate of Title No. 66916
- iii. A declaration that the 1st, 3rd and 4th Defendants in Counter Claim fraudulently allotted shares to the Plaintiff in the Counter Claim and such shareholder ship is nullity

- iv. A declaration that the 1st, 3rd and 4th Defendants in the Counter Claim fraudulently appointed the Plaintiff to the Counter claim to be a Director of the 1st Defendant in the Counterclaim and that such directorship is nullity
- v. An order that the name of the Plaintiff in the Counter Claim be removed from the list of shareholders and Directors of the 1st Defendant in the Counter Claim
- vi. Payment of general damages and
- vii. Costs of the suit

On the Plaintiff's side, one witness testified on behalf of the Plaintiff who tendered the documentary evidence. On the other hand, DW1 testified for 1st, 4th and 5th Defendants and tendered documentary evidence in support of his testimony. The 2nd Defendant (DW2) called on two witnesses, DW3 (his wife) and DW4 & DW5 (handwriting expert) to testify in his favour. The 3rd Defendant (DW6) testified on her own and the Court called one

expert witness in handwriting in respect of the report prepared specifically for the criminal case where the 3rd Defendant is the claimant.

Briefly, the evidence from the witnesses testified in Court in support and against the dispute are as follows.

Mr. Anthony Bwahama (PW1) a credit Manager at First National Bank Tanzania Limited, the Plaintiff. He testified that on 8th June, 2017, the Plaintiff, granted an overdraft facility of TZS 450,000,000/= to the 1st Defendant as financing working capital upon the request made by the 1st Defendant. To support this evidence, he tendered exhibit P1 (the overdraft agreement dated 8th June 2017 with reference number FNBT/HC/692/06/17 together with general terms and conditions applicable to the facility and its addendum dated 18th December, 2017). He further testified that on 18th May, 2018 upon request by the 1st Defendant, the Plaintiff, reviewed the previous overdraft facility and makes a

total granted overdraft facility to be TZS 850,000,000/= as financing working capital which was well accepted by the 1st Defendant on 21st May ,2018 exhibit P2 (the Overdraft Facility Agreement dated 18th May,2018 with Reference number FNBT/HC/739/05/18 together with general terms and conditions applicable to the facility). PW1 further testified that said facilities were guaranteed by exhibit P3 Collectively (the personal guarantee of Mr. Lameck Martin Meena dated 9th June 2017 and the extension guarantee dated 29th May 2018). The personal guarantee of Bimal Mahendra Shah dated 9th June 2017 and its extension dated 29th May 2018 (exhibit P4 collectively), exhibit P5 collectively (The guarantee of Zakiya Majid Aloyce dated 30th May 2018 and the personal guarantee of Mitul Mahendra Shah dated 9th June 2018 and its extension dated 29th May 2018 (exhibit P6 collectively). Other securities for the facilities were Debenture by 1st Defendant dated 21.05.2018 (Exhibit P7), Mortgage Deed for Certificate of Title No. 85517 in the name of Lameck Martin Meena

dated 9th June,2017 together with Certificate of Title No. 85517 Plot No. 1100 and Deed of variation for Mortgage Deed over Certificate of Title No. 85519 dated 28th May, 2018 (Exhibit P8 collectively). Mortgage Deed for Certificate of Title No. 66916 in the name of Zakiya Majid Aloyce dated 28th May,2018 together with Certificate of Title No. 66916 (exhibit P9 collectively), Spouse Consent to create Mortgage of a right of occupancy of Lilian Peter Meena dated 28th May 2018 and of Joseph Alyoce Gozaki dated 28th May 2018 (Exhibit P10 collectively).The Overdraft Facility agreements were for a period of 12 months at Bank at a prime rate of 20% to accrue on the debt balance (s) and which might vary, compounded monthly.

PW1 went on to testify that for unknown reasons and without any justification, the Defendants had neglected and/or refused to service the loan accounts to the satisfaction of the Plaintiff and in compliance with overdraft facility agreement as a

result of which, the outstanding facility including interest and other charges thereon stood at TZS. 1,064,139,606.71/= as of 18th July 2019 the amount which stand unpaid to date. He added that it was upon the above failure, the Plaintiff issued several demand notice and statutory notices to the Defendants as evident by exhibits 11A – 11F17.

Cross examined by Mr. Emmanuel, advocate for the 1st Defendant, PW1 adduced the evidence that the one prepared these exhibits was loan department and lawyer of the Bank and other lawyers engaged by the bank to do perfection of the documents. He said the 1st Defendant has one facility with renewal of overdraft twice as it is for 12 months. PW1 also admitted that the document to signify renewal is bank facility letter as the mother document which specify every detail of the facility. He said it ends the date when the new contract is signed. PW1 also testified that the second facility was not an independent as the

previous loan of TZS. 400 million was not full paid thus why increased to TZS. 850 million. However, when he was questioned further, he admitted that they gave the 2nd facility as the 1st one was performed well. PW1 also testified that at some point they agreed renew but the Defendant was not qualify as he promised to pay from the case he qualified for TZS.300 million but he never fulfill the promise.

Cross examined by the advocate for the 3rd Defendant on whether they did conduct due diligence, his reply was yes and it was done from the opening of account on details company legal established from BRELA. He further replied that, the evaluation report of the 3rd Defendant property was done, however they did not bring to Court because they brought what was relevant. He also admitted that the report was not shared to the Defendants. He responded not to be aware of the forgery. He testified to identify the 3rd Defendant as a director and shareholder through

a BRELA search, however he did not see the relevance of those documents to the present case and said also no need to bring board resolution.

On the Defendant's side, DW1, Mitul Mahendra Shah, the Director of the Kular Enterprises Limited and the 4th Defendant testified also for 1st and 5th Defendants. He adduced the evidence that, being the client of the Plaintiff Bank for many years and in the year 2017 approached the Plaintiff for funding following various supply contracts of various goods in large volumes which required funding. The Bank accepted the Defendant's business proposals and on 8th June, 2017 to issue a TZS. 450,000,000/= overdraft facility. However, the bank condition required securities in the form of landed property and personal guarantees of the Directors. Since the 1st Defendant company had no landed property on its own, the company approached the 2nd Defendant who dully agreed to secure the loan for the period of 12 months

with an undertaking that the loan will be repaid fully within the said 12 months and discharge the property. He added that the 1st Defendant duly serviced and discharged the 1st facility. Given the business needs of the 1st Defendant in 2018 applied for another new and independent facility for the sum total of TZS 2.4 Billion but the Plaintiff approved only TZS 850,000,000/= with a requirement of new and independent security in the form of landed property. This is when DW1 approached the 3rd Defendant who was introduced to him by her husband one Aloyce Gozaga, who on specific condition agreed to provide her property with Title No. 66916 Plot No. 107 Block 7 Mbweni Mpiji through the agreements entered and signed between the 1st Defendant and 3rd Defendant dated 22nd day of March, 2018 and 28th May, 2020 to lend the title for the purpose of mortgage to the Plaintiff bank collectively (exhibit D2). DW1 further testified that upon receiving the title deed from the 3rd Defendant and introduced her to the plaintiff for perfection of the mortgage and it was since then he

had never heard of the Plaintiff. He testified further that later on he was informed that the facility in the form of overdraft was approved to the tune of TZS. 850,000,000/= and issued with facility letter dated 18th May 2018 which was partially signed by head of Legal and not sealed with the Bank seal. DW1 testified that he has not seen any other bank document related to this facility thereafter. DW1 testified to see the mortgage documents, the guarantee documents of the 2nd and 3rd Defendants for the first time in Court and never be involved in their preparation of such documents. He added that the Plaintiff bank never came back to ask him for any further documents apart from those prepared for the 1st Defendant and himself and directly signed by him as Director of the 1st Defendant. DW1 testified that he has not involved in any steps in regards to the due diligence, acceptance or rejection of the same, its valuation, the creation of the mortgages or guarantees of the 2nd and 3rd defendants in relation

to the subsequent overdraft facility as applied by the 1st Defendant company.

However, DW1 testified that, the 2nd overdraft facility was dully repaid and serviced through channeling all 1st defendant's payment from her clients to the plaintiff's bank regardless of presence or absence of other securities from 2nd and 3rd Defendants and by 20th July, 2019 the debt was only TZS. 129,480,819.57/= debit as per bank statements FNB-6 tendered by the Plaintiff. DW1 also testified that the documents extracted from BRELA in regard to the 3rd Defendant are true and are in accordance with what was agreed to with the 3rd Defendant in (exhibit D2). DW1 went further to testify that had the Plaintiffs Bank Officers discharged their duties and stood by the agreement as varied in various meetings held with them as demonstrated in (exhibit D1) the 1st Defendant's business would not have been squeezed and lost businesses with its various clients whose

revenue was wholly being channeled through the Plaintiff and applied to repay the debt. He added that the 1st Defendant discharged and fully repaid the 1st overdraft facility and the security mortgaged was equally discharged as the Plaintiff bank has never involved him in the purported subsequent created documents. He testified that apart from applying for a new facility and introducing the 3rd Defendant to the Plaintiff's bank as prospective security provider and giving the plaintiff's bank the title deed for due diligence purposes he had never been involved in the decision of its suitability, valuation, creation of the mortgage deeds and guarantee documents allegedly to be signed by the 2nd and 3rd Defendants with regards to the TZS 850,000,000/ overdraft facility as the same was independent, standalone facility and was substantially based on the existing business contracts held by the 1st Defendant and a convincing turnover exhibited in the previous facility. DW1 in a counter claim testified that as the 1st Defendant's business was frustrated by the Plaintiff and prayed

for dismissal of the counter claim with costs as at no point in time did the 1st Defendant company or its directors get involved in the creation and perfection of the alleged mortgage deed or guarantees while the BRELA extract remain true and in accordance with the agreements in exhibit D2.

DW2, Lameck Martin Meena, the 2nd Defendant, admitted to be aware of the overdraft facility of TZS. 450,000,000/= which he signed a mortgage deed on 9th June, 2017 with the First National Bank Tanzania Limited the Plaintiff in favour of Kular Enterprises Ltd, the 1st Defendant as first Ranking legal mortgage. He testified that in sometime in September 2020 he became aware of a case before this Honourable Court and found a written statement of defence had been filed for him without his knowledge and instruction to any advocate. Becoming aware of the case he filed his witness statement on 26th February 2021. He went further to testify he was not aware of any subsequent facility of TZS.

850,000,000.00 and or to secure the overdraft purporting to be a deed of variation dated 28th May 2018. He added that those signatures in document "FNB 2" which was used to secure the subsequent mortgage were forged by the Plaintiff Bank or fraudulently procured. To justify that, the 2nd Defendant engaged the services of Risal Security Solutions Ltd of Dar es Salaam on 2nd August, 2021 to analyse his signatures and those of his wife which were used in the second facility. The outcome of that exercise through the report of on 4th December, 2021 revealed that the signatures appearing in "FNB 2" for the purported overdraft facility of TZS. 850,000,000/= were forged.

DW6, Zakiya Majid Aloyce, the 3rd Defendant testified that on early 2018, when she was in need of school fees for her daughter who was studying in China by then. She was informed by her friend Mr. Frank Kessy that he knew someone who could assist her to borrow money provided she had a house to secure for the borrowed money. Later on together with her husband were

taken to the office of the 1st Defendant located at Kisutu and met the 4th Defendant, the Managing Director of the 1st Defendant. DW6 went on to testify that the 4th Defendant informed them that he was intending to take a loan in a near future to the tune of TZS. 400,000,000/= from the bank using my title deed and that from the said amount he would give her 10% so to be able to pay school fees for her daughter. DW6 further testified that after few months, they went again and had a long discussion with the 4th Defendant who assured her to be honest and she should trust him. As a result, DW6 leave her original title deed together with 6 passport size and copies of my identity cards for him to make arrangements of the secured the loan. The 4th Defendant promised to call her back for signing the contract when all bank procedures are completed. Title deed for Plot No. 107, Block 7 Mbweni Mpiji Area in Kinondoni Municipality with Certificate of title No. 66916 as (Exhibit P9). DW6 went further to testify that since then she was never called to sign any bank document and to her

surprise, she was informed that the loan had already been granted to the 1st Defendant by the First National Bank. She testified that she started making follow-up and the 4th Defendant urged her to be calm and he could sort out the matter by replacing my title deed with another title deed, the commitment which he has never been fulfilled. She referred a letter dated 12th May, 2020 (Exhibit D6). DW6 further testified that she had never signed the Mortgage dated 21st May 2018 and not issued and signed the unlimited personal guarantee dated 30th May 2018 or executed first ranking legal mortgage over her residential property situated on Plot No. 107, Block 7 Mbweni Mpiji Area in Kinondoni Municipality with Certificate of Title No. 66916 in favour of the Plaintiff for the banking facility advanced to the 1st Defendant. She also testified not to see and even to sign resolutions mentioned in the facility letter dated 18th May, 2018. She had also, never submitted spouse consent for her husband to the Plaintiff as Bank facility letter dated 18th May, 2018 referred (Exhibit P2). DW6 testified

that the Plaintiff, the 1st Defendant, 4th Defendant and 5th Defendant colluded and forged her signature to all documents which were not signed by her such a personal guarantee dated 30th May 2018 the forged document which shower her and a director of 1st Defendant (exhibit D-7).

DW6 also testified that when the Commercial Case No. 87 of 2019 was instituted the 1st, 4th and 5th Defendants received the plaint and summons for filing the written statement of defence. On 4th September, 2010, the 1st, 4th and 5th Defendants prepared and forged their signatures and filed the joint written statement of defense, notice of preliminary objection and prosecute the matter for more than six months without her knowledge till 10th of September 2020. The said joint written statement of defence was struck out by the Hon. Fikirin J (as she then was) for being fraudulently filed.

DW5, Richard Sana Luhende an expert as independent registered document examiner and finger prints impression

appointed in the Government Notice No. 136 of 9th September, 1983 and the Managing Director of Risal Security Solutions came testified for 3rd Defendant and his wife. He testified to be engaged by the 3rd Defendants on 26th January, 2021 to examined and compared the questioned signatures involved various documents concerning the specimens of the two. The findings of the analysis conducted proved that there were forged signatures on the documents in dispute.

The Court also called an expert witness (CW1) Hamisi Nkaha DTCPL in handwriting expert who was engaged by the senior investigator Kanda Maalum to investigate forgery of documents in respect of the 3rd Defendant concerning the dispute in this case. The findings were that the said documents bear handwriting of two different persons some signed in the normal cause of business and not in the normal cause.

To determine the dispute, the Court coming up with four issues to wit;

1. Whether there are loan agreements between the plaintiff and 1st defendant?
2. Whether the said loans were guaranteed by the 2nd, 3rd, 4th and 5th defendants?
3. Whether the 3rd defendant is the shareholder and director of the 1st defendant?
4. Whether there is a breach of the loan agreements?
5. To what reliefs the parties are entitle to?

Starting with the 1st issues whether there were loan agreements between the Plaintiff and 1st Defendant. Having the testimonials of the PW1, DW1, DW2, and DW6 proved that on June 8th, 2017 there were agreements for an overdraft facility of TZS, 450,000,000/= issued in favour of the 1st Defendant. PW1

testified at paragraphs 2 and 3 of the plaint, as well as paragraph 7 of the plaint. DW1 also admitted being granted an overdraft facility of TZS. 450,000,000/= on 8th June, 2017 under paragraph 5 of his witness statement. The testimonials of PW1 and DW1 also established that there was a 2nd Overdraft Facility advanced to the 1st Defendant on 21st May ,2018 (exhibit P2) as reflected at paragraph 3 in PW1's witness statement. This is also supported by the evidence of DW1 in his witness statement at paragraph 9 that the 1st Defendant in 2018 applied for another new and independent facility for a sum total of TZS 2.4 Billion, but the Plaintiff approved only TZS 850,000,000/=. During the cross examination, DW1 admitted that the 2nd overdraft facility was to the tune of TZS. 850,000,000/=. They were issued with the said facility on 18th May 2018. However, DW2 and DW6 disputed the existence of the agreement of the 2nd overdraft facility of TZS 850,000,000/= advanced to the 1st Defendant by the Plaintiff as it is reflected in paragraphs 3 and 4 in the witness statement of

DW2. PW1 also replied that they did not require the 2nd Defendant or his spouse's presence as they dealt with the documents only. He also admitted that the 2nd overdraft facility was there but there was no guarantee if it was unlimited.

Upon analysing the above evidence, there is no dispute that there were two agreements signed between the Plaintiff and the Defendant in respect to the 1st overdraft facility of TZS. 450,000,000/= executed on 8th June, 2017 and the 2nd overdraft facility of TZS. 850,000,000/= executed on 18th May 2018 as evidenced above by the testimonials of PW1, DW1 and DW2 in respect of the 1st overdraft facility and the evidence of PW1 and DW1 in respect of the 2nd overdraft facility. Also, though DW1 in his witness statement tried to deny the existence of the 2nd overdraft facility, during cross examination by Mr. Innocent, advocate for the Plaintiff, he admitted that the facility was directed to the 1st Defendant, 4th and 5th Defendants but they did not

receive enough as they requested a facility of TZS. 2.4 billion but were given TZS 850 million. As a result, the evidence presented above is sufficient to establish that there were loan agreements in respect to overdraft facilities May 2018 and 8th June 2017. Hence, the 1st issue is answered affirmatively.

Coming to the second issue, whether the loans were guaranteed by the 2nd, 3rd, 4th and 5th Defendants. While answering this issue, the focus will also be on the counter claim by the 3rd Defendant. Going by the evidence of PW1, DW1 and DW2 there is no dispute that the 1st overdraft facility was secured by a deed mortgage of the property of DW2. PW1 further testified that said facilities were guaranteed by the personal guarantee of Mr. Lameck Martin Meena dated 9th June 2017 and the extension guarantee dated 29th May 2018 (exhibit P3 collectively). The DW1 and DW2 admitted that they did mortgage and signed the document in respect of the 1st facility agreement, which was

successfully discharged after the end of the 12 months. The only dispute is on the guarantee of the 2nd facility by DW1, DW2 and DW6.

According to the evidence of PW1, the two loan agreements were secured by land properties and a personal guarantee to include the personal guarantee of Mr. Lameck Martin Meena dated 9th June 2017 and the extension guarantee dated 29th May 2018 (exhibit P3 Collectively). The personal guarantee of Bimal Mahendra Shah dated 9th June 2017 and its extension dated 29th May 2018 (exhibit P4 collectively), exhibit P5 collectively (The guarantee of Zakiya Majid Aloyce dated 30th May 2018 and the personal guarantee of Mitul Mahendra Shah dated 9th June 2018 and its extension dated 29th May 2018 (exhibit P6 collectively). Other securities for the facilities were Debenture by 1st Defendant dated 21.05.2018 (Exhibit P7), Mortgage Deed for Certificate of Title No. 85517 in the name of Lameck Martin Meena dated 9th

June,2017 together with Certificate of Title No. 85517 Plot No. 1100 and Deed of variation for Mortgage Deed over Certificate of Title No. 85519 dated 28th May, 2018 (Exhibit P8 collectively). Mortgage Deed for Certificate of Title No. 66916 in the name of Zakiya Majid Aloyce dated 28th May,2018 together with Certificate of Title No. 66916 (exhibit P9 collectively), Spouse Consent to create Mortgage of a right of occupancy of Lilian Peter Meena dated 28th May 2018 and of Joseph Alyoce Gozaki dated 28th May 2018 (Exhibit P10 collectively).

DW2 strongly denied engaging in the 2nd overdraft facility, which was supported by DW1's evidence that the 1st Defendant duly serviced and discharged the 1st facility agreement. DW1 also pointed out that the company approached the 2nd Defendant who dully agreed to secure the loan for the period of 12 months with an undertaking that the loan would be repaid fully within the said 12 months and discharge the property. DW1 also, during cross

examination, testified that the extension of the 2nd overdraft facility, the 2nd and 3rd Defendants were not involved in signing of the documents for the 2nd facility, as he had never seen them sign. PW1 also added that during his cross examination he testify that it was not necessary for the mortgagor to appear before them but as they knew them by documents. PW1 also admitted that the mortgage deeds (exhibits P8 collectively) were drawn by external counsel of the Bank under instruction of the Bank. All these testimonials proved that the 2nd Defendant (DW2) had consented to mortgage the 1st overdraft facility and he wasn't engaged in the 2nd facility. Moreover, during the cross examination PW1 failed to respond the question as to why the Plaintiff's bank failed to produce evaluation report in respect to 2nd Defendant's property while knowing it is disputed in his WSD.

Besides the evidence of DW6 at paragraph 5 in her witness statement, as well as in her written statement of Defence at

paragraphs, she had never signed the mortgage dated 21st May 2018 and had not issued and signed the unlimited personal guarantee dated 30th May 2018. She also testified that she did not see or sign the resolutions mentioned in the facility letter dated 18th May, 2018, and that she never submitted spouse consent for her husband to the Plaintiff as required by the bank facility letter (Exhibit P2). Although she admitted to being aware of the 2nd overdraft facility after being approached by the 4th Defendant, she was not engaged in the signing of any document in relation to the loan agreement. She testified that she handled her title to the 1st Defendant for the purpose of the loan in an agreement to be given 10% but never signed any document in relation to the Plaintiffs documents for loan purpose and thus why in her counter affidavit claimed for her titled to be returned supported by a letter dated 12th May 2020 by 1st Defendant promising to return my title. (Exhibit D6). This evidence is supported by the evidence of DW1 that upon receiving the title deed from the 3rd Defendant (DW6),

he introduced her to the plaintiff for perfection of the mortgage and it was since then that he had never heard of the Plaintiff. Her evidence was also supported by the evidence of DW1 that after he handed her over to the Plaintiff, he had not heard anything from the bank side till he was informed about the disbursement. The question that comes to mind is how the borrower could not make any follow up with his guarantor for the requested loan and be silent till the matter comes to court. That is very strange. Also, the fact that it was the Plaintiff's bank that went through the perfection of the documents means that there is no supporting evidence that the 3rd Defendant was involved in any way in the guarantee of the loan agreement. In addition, DW1 testified that even if their business and their personal guarantee were enough to secure the loan agreements without the need of 2nd and 3rd Defendants.

It is a trite law that the one who asserts must prove as provided under section 110 of the Evidence Act, Cap 6 R.E 2019 that:-

"...110 (1) 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.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person..."

Also, a case of **Paulina Samson Ndawavya Versus Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017. At page 14,15 and 16 it was held that,

"... the burden of proving a fact rest on the party who substantially assert the affirmative of the issue and not upon the party who denies it: for the negative is usually incapable of proof."..... The Court has examined as to whether the person upon whom the burden lies has been able to

discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of the weakness of the other party..."

Also, the case cited by the 3rd Defendant of **Nichoderms Bethelehem Mwaduma Vs. Kcb Bank Tanzania Limited & 3 Others, Land Case No. 05 Of 2019** which cited the case of **Abdul Karim Haji vs. Raymond Nchimbi Alois & another**, Civil Application No. 99 of 2004 (Unreported) the Court of Appeal held that:

"... it is an elementary principle that he who alleges is the one responsible to prove his allegations..."

In that stand and above analysis, in the absence of evidence from the Plaintiff's side to prove that the 2nd and 3rd Defendants were engaged in the 2nd overdraft facility. The Plaintiff has failed to establish his case against the 2nd and 3rd Defendants. Hence, the counter claim against the Plaintiff on the balance of

probabilities is in favour of the 3rd Defendant, the Plaintiff in the counterclaim. The above finding goes together with the 3rd issue of whether the 3rd Defendant is the shareholder and director of the 1st Defendant as it has been demonstrated above how the 3rd Defendant was not involved in the signing of any documents and the said documents were dealt with by the advocates working on behalf of the Plaintiff. The evidence of DW1 also supported this fact since he was handled 3rd Defendant to the Plaintiff, he did not new anything continued between the Plaintiff and the 3rd Defendant.

Having the evidence above, I don't see any reason to consider the expert witness evidence as the facts established by both sides answer the issue directly.

On the 4th issue, whether there is a breach of the loan agreements. As discussed in issue No. 2 and 3, there is no breach of contract in respect to the 2nd and 3rd Defendants, However,

since the 4th Defendant (DW1) admitted the fact that they took the loan and also that there was a default of only TZS.130 million. There is a breach of contract against the 1st, 4th and 5th Defendant collectively. The mere evidence that the second overdraft facility was TZS. 400 million rather than TZS. 850 million is baseless, and no evidence has been produced by the DW1 to prove as the law requires under Section 100 (1) of the evidence Act, Cap. 6 R.E.2019 as produce hereunder provides that,

"...When the terms of a contract, grant, or any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant, or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act..."

Therefore, since DW1 failed to prove by any documentary evidence that the contract was for TZS. 400 million or the fact that they repaid a loan and the remaining balance was about TZS. 130 million, as he replied when he was cross examined. Based on the position above, the oral evidence has no room over the 2nd facility of TZS.850 million with accrued interests and penalties as claimed by the Plaintiff. This position is also held in the case of **MS. Msolopa Versus Paul Warema & Others** (Land Case No.23 of 2017 [2020] TZHC 2078 (26th February 2020) it was discussed that,

"...Where there is documentary evidence it is valid and that oral evidence cannot superseded..."

Therefore, as required by law the consequence for the breach of contract is provided under Section 73 (1) Part VII of the **Law of Contract Act, Cap. 345 of the Revised Edition, 2019** that,

"...When a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss or damage caused to him by the other party..."

In regard to the last issue, what relief the parties are entitled to taking into account that the Plaintiff has failed to establish a case against the 2nd and 3rd Defendant save for the counterclaim, which has been proved against the Plaintiff who is the Defendant in the counterclaim. However, in regard to the relief of general damages claimed by the 3rd Defendant, nothing has established to prove the claim for general damages. Therefore, since the breach of contract has been proved against the 1st, 4th and 5th Defendants in respect of the 2nd overdraft facility, May 2018. I therefore, proceed to enter judgment in respect of the plaint and counterclaim as follows:

- i. The 1st, 4th and 5th defendants jointly shall be liable to pay TZS 1,067,381,265.91 to the Plaintiff to the plaint.

- ii. The 1st, 4th and 5th defendants shall pay the Plaintiff an interest on (i) above at the rate of 20% as per overdraft facility agreement from 18th August 2019 to the date of judgment.
- iii. The 1st, 4th and 5th defendants shall pay an interest on the decretal amount at the rate of 7% per annum from the date of judgment till the date of full and final satisfaction of the decree.
- iv. The Plaintiff's claim against the 2nd and 3rd Defendants is dismissed.

In regard to Counter Claim:

- v. The mortgage created for Plot No. 107, Block 7 Mbweni Mpiji Area in Kinondoni Municipality with Certificate of Title No. 66916 is ordered to be discharged.
- vi. The 1st, 3rd and 4th Defendants shall be liable to take proper steps to remove the Plaintiff to the counter claim from the

shareholder and directorship ship of the 1st Defendant in the Counter Claim.

vii. Costs to follow the event.

It is so ordered.

Dated at Dar Es Salaam on this **19th day of September, 2022**



Z.A.Maruma.

JUDGE