IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM
COMMECIAL CASE NO.4 OF 2000
TRUST BANK TANZANIA LTD ----------PLAINTIFF
VERSUS
LE-MARSH ENTERPRISES LTD & 2 OTHERS

JUDGMENT

NSEKELA, J.

In a plaint dated the 2.2.2000, and filed in court on the 18.2.2000, the plaintiff, Trust Bank Tanzania Limited (the Bank) is seeking judgment against the 1sr defendant, Le-Marsh Enterprises Limited, a limited liability company incorporated in Tanzania (the 1st defendant), (2) Joseph Mbui Magari, the 2nd defendant and Lawrence Macharia, the 3rd defendant. The Bank alleged that it had extended credit facilities to the 1st defendant and that the said credit facilities were guaranteed by the 2nd and 3rd defendants in consideration of the credit facilities being extended and which has remained unpaid despite reported demands made upon the 1st defendant and the defendants to repay the same. On the 13.3.2000 the three defendants filed a joint written statement of defence and a counter-claim which sought, inter alia, specific performance of the contract. The Bank on its part filed a reply to the written statement of defence and defence to the counter-claim on the 22.3.2000. On the 20.6.2000, the following issues were framed after consultation with the learned advocates for the parties namely –

(1) Was there an agreement between the plaintiff to extend to the 1st defendant a loan facility up to shs 50,000,000/= and an overdraft/working capital of Shs 100,000,000/=.

(2) If there was such an agreement or agreements what were the terms and conditions thereof;

(3) Were there separate Guarantee and Indemnity Agreements executed between the plaintiff and the 2nd and 3rd defendants.

(4) What were the terms and conditions of the said Guarantee and Indemnity agreements;

(5) Was there a breach of the terms and conditions referred to in issues 2,3 and 4 above? ;

(6) To what reliefs are the parties entitled to.

In addition to this, there was one issue framed as regards the counter-claim –

(7) Are the defendants entitled to specific performance of the agreement between the 1st defendant and the plaintiff referred to issue no.1 above?

On the 14.7.2000 trial of the case commenced PW1 was one Swaraj Kumar Boss, the Bank's Deputy General Manager since June 1997. PW1 testified to the effect that the bank granted a credit facility to the 1st defendant according to a letter of offer, **Exhibit P1.** The 2nd and 3rd defendants guaranteed the said loan as per Exhibit P2 and P3. He added that the bank disbursed slightly over Shs. 45 million but did not disburse the overdraft facility since the 1st defendant did not comply with the conditions in exhibit P1 namely the non-perfection of the securities. He added that the loan attracted an interest rate of 28% per annum from the date of the first disbursement of the loan. There was also a further 7% penalty interest. The loan was repayable in fifteen (15) instalments which remain outstanding including interest thereon. During cross-examination by Mr. Msemwa PW1 stated that the maximum permissible loan according to exhibit P1 was Shs 50 million out of which only shs 45 million was disbursed to the 1st defendant. As regards the overdraft facility of Shs. 100 million, not a single cent was disbursed to the 1st defendant allegedly because the defendants did not comply with the terms and conditions stipulated in exhibit P1 including para 7 as well as other relevant document required for the registration of charges such as annual returns and land rent receipts. It was also the evidence of PW1 that interest charged on the loan is as a matter of practice transferred to the overdraft facility and that the defendants were duly informed of this by way of bank statements sent to them but PW1 could not show any letters sent by the bank to the defendants enclosing bank statements including the calculation of interest.

On the 19.10.2000, Mr. Rwechungura, learned advocate for the bank, made an oral application to amend the plaint. The application was granted under Order VI Rule 17 of the CPC and hearing of the suit was to resume on the 7.11.2000. On this date, Mr.

from representing the defendants. I granted the application and the 3rd defendant, Mr. Macharia then applied for leave to file an amended defence since he claimed the defendants did not have the opportunity to read and digests the amended plaint. The prayer was duly granted and the hearing of the case resumed on the 6.12.2000. This time around Mrs. M.Maajar, learned advocate represented the bank and the defendants were unrepresented but the 2nd and 3rd defendants appeared in person.

PW1 continued with his evidence in chief by stating that he had now prepared a new computation of the loan, the interest thereon and other charges, totallying shs. 98,328,893/58 made up of Shs. 45,230,040/= being the principal amount of the loan; shs 43,030,536/23 being interest on the loan and the balance of Shs 10,078,317/35 being other charges. These calculations of the principal loan; interest thereon and other charges was admitted in evidence and marked exhibit P6A. The statement showed that the bank had now changed its name to Delphi's Bank (Tanzanian Ltd). As evidence of this change in name PW1 tendered in evidence exhibit P7. The bank statement, exhibit P6A was supported by an affidavit sworn by PW1, exhibit P8. PW1 stressed the fact that the calculation of interest was based on the letter of offer exhibit P1 and that the overdraft was not disbursed because the defendants did not perfect the securities despite being reminded from time to time as evidenced by exhibit P9. When cross-examined by Mr.Macharia, PW1 reiterated that the overdraft was to be disbursed once paragraph 7 of exhibit P1 had been complied with.

The defendants did not call any witnesses save themselves, that is, the 2nd and 3rd defendants. DW1 was the 3rd defendant, Lawrence Macharia the Managing Director of the 1st defendant, Le-March Enterprises (Tanzania) Limited. DW1 admitted paragraphs 1,2,3,4 and 5 of the amended plaint and that Shs 45,230,040/= was indeed disbursed in terms of the agreement. He added that in terms of paragraph 7 of exhibit P1 it was the responsibility of the bank to perfect the security documentation required since the bank had been given a Power of attorney according to exhibit D1 dated 30.9.97 and that all the documents required for this purpose had been submitted to the banker including the Valuation Report, exhibit D2. The defendants, he continued did not fail to repay the loan since the working capital had not been disbursed. When cross-examined by Mrs. Maajar, DW1 stated that the repayment of the loan was not

conditional on the release by the Bank of the overdraft. DW2, Joseph Mbui Magari is Chairman of the Board of the 1st defendant and resident in Nairobi, Kenya. He testified that he was one of the guarantors with DW1 of the loan to the 1st defendant. He added that they do not dispute paying interest, but he questioned the 7% p.a. penalty interest.

He went on to testify to the effect that they had expected that the working capital would be released but it was not and questioned as to why the defendants should pay commitment fees when the bank did not release the money and the bank failed to perfect the security documents, and it was the defendants expectation that the bank would disburse shs. 150 million.

Mr. Rwechungura, learned advocate for the Bank submitted that the first four issues framed were not ion contention by the parties. The first issue elated to the existence of a loan facility and an overdraft facility as embodied in exhibit P1. The second issue concerned the terms and conditions of exhibit P1; the third issue was on the existence of the Guarantee and Indemnity Agreements, exhibits P2 and P3 and the fourth issue was in relation to the terms and conditions contained in exhibitsP2 and P3. The 2nd defendant, Mr.Magari was man enough to concede that there was no dispute as regards the first four issues. I am in complete agreement with them and would not waste time discussing these issues. Suffice to mention briefly that from the pleadings and the evidence before court adduced by PW1; DW1 and DW2 –

(i) *There was indeed an agreement between the Bank and the 1st defendant for the former to extend credit facilities to the latter in the form of a loan of up to shs 50,000,000/= and an overdraft/working capital of shs 100,000,000/=.*

(ii) *The terms and conditions of the said agreement was as embodied in exhibit P1 – the letter of offer.*

(iii) *The third issue must equally be answered in the affirmative. The 2nd and 3rd defendants indeed did individually execute the Guarantee and Indemnity Agreements, exhibits P2 and P3 respectively.* ,,

(iv) *The terms and conditions between the Bank and the 2nd and 3rd defendants were as contained in exhibits P2 and P3.*

The main bone of contention lies in the fifth issue, namely –

"Was there breach of the terms and conditions of the agreements referred to in issues 2,3 and 4?"

This is the main issue for enquiry and determination of the court.

The agreements being referred to are exhibits P1; P2 and P3, exhibit P1 being the letter of offer dated 21.8.97; exhibit P2, Guarantee by Joseph Mbui Magari, the 2nd defendant and exhibit P3 Guarantee by the 3rd defendant Lawrence K. Macharia. Mr. Rwechungura, learned advocate for the bank submitted that the 1st defendant was in breach of the loan agreement in two respects.

(a) the loan was to be repaid in twelve (12) monthly instalments commencing December,1997 together with interest in terms of clause 6 of exhibit P1;

(b) failure by the 1st defendant to submit to the bank all the documentation that was required to enable the bank to perfect the security for the loan under clause 5 of exhibit P1. According to the learned advocate, only the personal guarantees of the 2nd and 3rd defendants were issued. A registered legal mortgage on land on which Mnazi sisal Estate is situated and a debenture on plant and machinery was not put in place as required under the agreement.

It was the contention of Mr. Rwechungura that the bank reminded the 1st defendant on several occasions to furnish the bank with the required documents in order to perfect the securities but to no avail. This was in breach of clause 5 of exhibit P1. The learned advocate further submitted that the defendants did not dispute the fact that the loan attracted normal interest at 28% and penalty interest at 7% and that the calculations were not challenged by the defendants.

As regards the counter-claim by the defendants, the learned advocate submitted that in the amended written statement of defence, specific performance is not pleaded as such and should therefore not be considered.

In conclusion, the learned advocate submitted that in terms of clauses 1.02 and 1.03 of exhibits P2 and P3 the 2nd and 3rd defendants undertook to pay all monies due and owing to the bank from the 1st defendant in cause of default to do so by the 1st defendant. The 2nd and 3rd defendants were served with notice of default by the 1st defendant exhibit P6 which was not complied with.

As was stated by PW1 in his evidence and this was not disputed by DW1 and DW2, the loan agreement between the bank and the 1st defendant was contained in exhibit P1. Since exhibit P1 is central to the adjudication of this suit, I take the liberty to quote its main features. It provides as under –

"The Managing Director
Le-Marsh Enterprises Ltd
P.O.Box 51
Mombo,Tanga

Dear Sir,

*Re: **YOUR APPLICATION FOR CREDIT FACILITY***

We refer to your application for credit facilities dated 15/07/1997 and are pleased to inform you that wed are agreeable to offer you the requested credit facilities subject to the following terms and conditions:

1. ***AMOUNT OF FACILITY***

Tshs 150,000,000/= (Tsh. One hundred fifty million only).

2. ***NATURE OF FACILITY***

Secured overdraft – Tsh.100,000,000/=

Secured loan – Tsh. 50,000,000/=

3. ***PURPOSE OF FACILITY***

The overdraft facility is intended to finance your working capital requirements while the loan will be used to make final payment to Tanzania Sisal Authority for the purchase of Mnazi Sisal Estate.

4. ***PERIOD OF THE FACILITY***
   - *The overdraft facility will be for one year to be reviewed on 31st August, 1998.*
   - *The loan will be for a period of 15 months to be repaid in full by 30th November,1998.*

5. ***SECURITIES***
   (i) The total security will be worth Tsh. 187,500,000/=(Tsh. One hundred eighty seven million five hundred only) to be registered as follows:

(a) 1st legal charge on land on which Mnazi Sisal Estate is situated.

- *Directors value (approximate) USD 325,000 – Tsh.203,000,000/= @ 626)*
- *Amount of charge Tsh.135,000,000/=.*

(b) Debenture on plant and machinery for Tsh. 62,600,000/= (Tsh. Sixty two million six hundred only).

(ii)Personal guarantee of directors for Tsh.150, 000,000/= (Tsh. One hundred fifty million only).

(iii) Company Board Resolution to borrow.

6. ***REPAYMENT ARRANGEMENTS***

- *The facility will be on fluctuating basis repayment on demand.*
- *The loan will be repayable in twelve monthly instalments with a moratorium of 3 months.*

7. ***AVAILABILITY***

- *The facility will be available to you subject to the following terms and conditions:*
- *Tsh. 45,230,040/= (Tsh. Forty five million two hundred thirty thousand and forty only) will be released upon your acceptance of offer letter and upon provisions by you to the bank on undertaking which states that the certificate of title together with all other documents with regards to the property being purchased will be submitted to the bank once purchase has been finalized and the bank shall use these documents to create a charge in its favour to secure credit facility.*

- *The remaining amount of Tsh. 105,000,000/- to be disbursed as follows once charge and debenture has been registered: -*
  (a) Tsh. 100,000,000/= in the form of our overdraft.
  (b) Tsh. 4,769,960/= in the form of a loan in addition to Tsh. 45,230,040/= which will be disbursed to Tanzania Sisal Authority.

8. ***INTEREST***

Interest on both the overdraft and loan facility will be payable at the rate of 28% p.a variable at the banks sole discretion and without notice.

Interest will be calculated on daily basis using a year of 365 days and computed monthly.

Interest will be debited to your account monthly in arrears in accordance with the usual practice of the bank.

Penalty at the rate of 7% p.a. will be charged on any excess over and above the agreed overdraft limit and on any default in payment of loan instalment.

9. <u>ARRANGEMENT FEE:</u>
Arrangement fee of 2% flat on the amount of the total facility of Tsh.150,000,000/= will be payable upon your acceptance of our letter of offer."

It will be recalled that issue no.2 referred to exhibit P1; issues 3 and 4 refer to the Guarantee and Indemnity Agreements exhibits P2 and P3. I shall deal with exhibit P1 separately from exhibits 2 and 3 since the liability or otherwise of the 2nd and 3rd defendants as Guarantors depends on whether or not the 1st defendant was in breach of the terms and conditions as contained in exhibit P1.

This letter of offer, exhibit P1, from the bank to the 1st defendant was duly accepted on the 21.8.97. There is no dispute on this fact. It was accepted by Mr. J.M.Magari, 2nd defendant and Mr.Lawrence K Macharia, 3rd defendant. The credit facility had two components, namely a secured overdraft of Shs. 100 million and a secured loan of Shs 50 million. Again there is no dispute between the parties that shs 45,230,040/= was in fact disbursed as per agreement and this explains why judgment on admission to the extent of this amount was entered against the defendants on the 20.6.2000. The question of interest was left to go on trial. By entering judgment on admission, this meant that the 1st defendant admitted to be in breach of the loan agreement by failing to repay Shs.45,230,040/= in terms of clause 4 of exhibit P1. The loan was to be repaid in full by 30th November, 1998. As regards payment of interest, it is the contention of the bank that interest was payable on the loan according to the agreement for the sake of clarity I quote again clause 8 which provides as follows –

" 8. <u>INTEREST</u>

***Interest on both the overdraft** and the loan facility will be payable at the rate of 28% p.a variable at the bank's sole discretion and without notice.*

Interest will be calculated on a daily basis using a year of 365 days and computed monthly.

Interest will be debited to your account monthly in arrears in accordance with the usual practice of the bank.

Penalty at the rate of 7% p.a. will be charged on any excess over and above the agreed overdraft limit and ***on any default in payment of loan instalment****"(emphasis supplied)*

It is common ground that a loan of up to shs 45,230,040/= was disbursed according to exhibit PI and in terms of the testimony of both DW1 and DW2. The same remains outstanding despite demands made upon the 1st defendant to repay. The ordinary and plain meaning of clause 8 above is to the effect that both the overdraft and loan facility did attract interest at the rate of 28% p.m. which was variable at the sole discretion of the bank. In addition to this, in case of default by the 1st defendant in the repayment of the loan facility, a penalty interest of 7%. In the submissions, Mr. Magari, the 2nd defendant, did not dispute the 28% p.a. interest rate but disputed the penalty interest of 7% p.a. He advanced the reason that the default of the 1st defendant was caused by the bank which refused to release the working capital despite the fact that the bank had in its possession all the documentation required under the agreement. The 3rd defendant did not have much to add except to say that it was the responsibility of the bank to register the legal mortgage and the debenture. It should be clear by now that the 1st defendant was in need of credit facilities from the bank which spelt out in exhibit P1 the terms and conditions under which it would grant both the overdraft facility and the loan facility. As I have stated before this letter of offer was duly accepted by the 1st defendant. There is no scintilla of evidence on the pleadings or on the evidence by the parties that the defendants were misled into entering this contractual relationship. The defendants have not made any allegations of fraud, mistake or misrepresentation that may possibly enable them to wriggle out of the agreement. The 1st defendant has clearly breached clause 4 under which the loan was to be paid in full by 30th November,1998 read together with clause 6. The consequences to the 1st defendant for breaching the agreement for our purposes are to be found in clause 8 referred to above.

Mr. Rwechungura in seeking leave to amend the plaint, stated that the purpose was to clarify the question of payment interest and to this end exhibit P6A was prepared which he claimed is a summary position of the account as at 31.1.2000 of Le Marsh Enterprises Limited (the defendant). The summary shows that the total overdue amount

Mr. Rwechungura in seeking leave to amend the plaint, stated that the purpose was to clarify the question of payment interest and to this end exhibit P6A was prepared which he claimed is a summary position of the account as at 31.1.2000 of Le Marsh Enterprises Limited (the defendant). The summary shows that the total overdue amount is Shs 98,338,893/58 comprising of overdue principal loan amount of Shs 45,230,040/=; total interest on loan of shs. 43,030,535/23 and lastly an amount of Shs 10,078,317.35 being other charges, fees and withdrawals plus interest. Detailed calculations are as contained and explained in sheet 01; 02 and 03 of exhibit P6A. PW1 also tendered in evidence exhibit P8, being **"Affidavit in Proof of Entries in a Bankers Book and in Verification of such Entries"** made under sections 78 and 79 of the Evidence Act, 1967. I take the liberty to reproduce the said affidavit which reads –

> *" I, Dr.Swaraj Kumar Bose, being a Principal Officer of the plaintiff, do hereby take oath and solemnly state as follows: -*
>
> 1. *That there have been shown to me copies of the computer printouts forming part of the plaint in this suit and collectively marked as "Annexture C" to the said plaint.*
>
> 2. *That the computer printouts referred to in the foregoing paragraph represent certain entries in the computer ledger books of the plaintiff now known by its new name, The Delphi's Bank (Tanzania) Limited. A copy of the relevant Certificate of Change of Name is annexed hereto and marked as "Annexture –1."*
>
> 3. *That the entries referred to in Annexture C to the plaint reflect computations of normal interest, penalty interest, bank charges and legal fees on the loan extended by the plaintiff to the 1st defendant in this suit.*
>
> 4. *That the plaintiff maintains all its banker's books on the basis of a computer system as opposed to actual paper books, which computer system is under the exclusive control of the plaintiff, and the entries in Annexture C were made in the usual and ordinary course of business.*
>
> 5. *That the plaintiff computer ledger system is controlled and managed by a computer Supervisor, one Haider Twahir Mwinyimvua, who has retrieved and printed the entries in Annexture C.*
>
> 6. *That I have examined the copies of Annexture C with the entries in the computer ledger book of the 1st defendant and verified that the entries in Annexture C are correct.*

The purpose of this affidavit was to show that exhibit P6A was a bankers book in terms of Sections 78 and 79 of the Evidence Act,1967. I shall revert to this issue later on. Mr. Magari, the 2nd defendant in his submissions did not dispute the contents of exhibit P6A but challenged the 28% rate of interest and the 7% penalty interest rate.

The Bank's claim against the defendants from the pleadings and from the evidence of PW1 is based on the statement of account exhibit P6A. The loan facility was made through a letter of offer exhibit P1 which was duly accepted by the defendants. One of the terms and conditions of this loan facility was that it would attract interest at 28% per annum with the Bank reserving its right to charge variable interest rates. There is also a 7% per annum penalty interest rate for late repayments of the loan and interest thereon. The plaint was filed on the 18.2.2000 and the written statement of defence on the 13.3.2000. This is not all. The Bank filed an amended plaint on the 25.10.2000 and the defendants were granted leave to file an amended joint written statement of defence which they did and filed on the 14.11.2000. The defendants did not respond to exhibit P6A which was the summary of the outstanding loan and the calculations of interest thereon. There is no evidence on the record challenging the accuracy of exhibit P6A apart from the bare assertions of DW1 that the interest calculations are disputed. It is my considered view that the effect of the defendants failure to respond to the calculations of interest as contained in exhibit P6A is that what is stated therein stands uncontroverted, and must in the absence of anything to the contrary be accepted as representing the correct factual position. In addition to this, there is clause 01 of the respective Guarantee and Indemnity Agreement (exhibits P2 and P3). I quote the last sentence which reads as follows –

> *" ...Any Statement of Account of the Customer signed as correct by any duly authorized official of the Bank shall be conclusive evidence against the Guarantor of the indebtedness of the Customer to the Bank."*

There is in evidence exhibit P8, an affidavit sworn by Dr. Swaraj Kumar Bose (PW1) who is a principal officer of the Bank. Paragraph 3 and 7 of the said affidavit provides as follows –

> *" 3. That the entries referred to in Annexture C to the plaint reflect the computations of normal interest, penalty interest, bank charges and legal fees on the loan extended by the Plaintiff to the 1st defendant in this suit.*

> *7. That all what I have stated above is true to the best of my knowledge and information, based on the records of the Plaintiff."*

Annexture C to the plaint is exhibit P6A. Exhibit P8 has not been challenged by a counter-affidavit or otherwise to the contrary. In the circumstances, the Guarantors – the 2nd and 3rd defendants- must accept the contents of exhibit P6A as *" conclusive evidence against the Guarantor of the indebtedness of the Customer to the Bank."* The Customer in question is of course the 1st defendant.

Section 36 of the Evidence Act, 1967 is in the following terms –

> *" 36. Entries in books of account regularly kept in the course of business, are relevant whenever they refer to a matter into which the court has to inquire,* ***but such statement shall not alone be sufficient evidence to charge to any person with liability"****(emphasis supplied).*

This section is in pari material with section 34 of the Indian Evidence Act, 1872 which was construed in the case of **Chandradhar Goswani and Others v Gauhati Bank Ltd** AIR 1967 1058. His Lordship, Wanchoo, J had this to say at page 1060 –

> *"It is clear from a bare perusal of the section that no person can be charged with liability merely on the basis of entries in books of account, even where such books of account are kept in the regular course of business. There has to be further evidence to prove payment of money which may appear in the books of account in order that a person may be charged with liability thereunder,* ***except where the person to be charged accepts the correctness of the books of account and does not challenge them"****(emphasis supplied)*

The essential requirement under section 36 of the Evidence Act is that the entries should not stand alone, there must be some other independent evidence to support it. The defendants have agreed that Shs. 45,230,040/= was indeed paid. It is in the evidence of PW1, DW1 and DW2 apart from exhibit P6A which is a statement of account of the Bank. What remained to be sorted out was the accuracy of the calculations. The defendants have not led any evidence to in peach the accuracy of exhibit P6A. PW1 Deputy Managing Director of the Bank testified that he prepared a new computation showing the principal amount of shs 45,230,040/= which, as stated before, has already been admitted; Shs 43,030,536/23 being interest on the loan and Shs 10,078,317/35 being other charges. The outstanding liability of the 1st defendant stands at Shs 98,338,893/58 inclusive of shs 53,108,853/58 being interest and other charges. It is

therefore my considered opinion that exhibit P6A is admissible under section 36 of the Evidence Act, 1967. This world have been enough to dispose of the issue, but PW1 sought additionally to prove the contents of exhibit P6A by swearing an affidavit, exhibit P8 under sections 78 and 79 of the Evidence Act, 1967. I quote these sections hereunder commencing from section 77 –

> *" 77. Subject to this Act, a copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of such entry and of the matters, transactions and accounts therein recorded;*
>
> *78 (1). A copy of an entry in a banker's book shall not be received in evidence under this Act unless it be first proved that the book was at the time of the making of the entry one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control o the bank;*
>
> *(2) Such proof may be given by a partner or officer of the bank and may be given orally or by an affidavit sworn before any Commissioner for oaths or person authorized to take affidavits;*
>
> *79 (1). A copy of an entry in a banker's book shall not be received in evidence under this Act unless it be further proved that the copy has been examined with the original entry and is correct.*
>
> *(2) Such proof shall be given by some person who has examined the copy with the original entry, and may be given orally or by an affidavit sworn before any commissioner for oaths or person authorized to take affidavits."*

Undoubtedly, exhibit P8 was sworn with, these provisions of the law in mind. In my Ruling dated the 30.8.2000 on whether or not a computer-print-out is a banker's book, I stated thus –

> *" The courts have to take due cognizance of the technological revolution that has engulfed the world. Generally speaking as of now, record keeping in our banks is to a large extent" **old fashioned"** but changes are taking place. The law can ill afford to shut its eyes to what s happening around the world in the banking fraternity. It is in this spirit that I am prepared to extend the definition of banker's books to include evidence emanating from computers subject of course to the same safeguards applicable to other bankers books under sections 78 and 79 of the Evidence Act."*

And I quoted with approval the following statement in **Barker v Wilson [1980] 2 AllER 80** at page 82 where Bridge, L.J. stated as follows-

> *"The Bankers' Books Evidence Act 1879 was enacted with the practice of bankers in 1879 in mind. It must be construed in 1980 in relation to the practice of bankers as we now understand it. So construing the definition of* ***'bankers' books'*** *and the phrase an entry in a banker's book, it seems to me that clearly both phrases are apt to include any form of permanent record kept by the bank of transactions relating to the bank's business made by any of the methods which modern technology makes available ...."*

I do not intend to resile from what I said that the definition of banker's books should include Computer print-outs in view of the current technological revolution that is taking place, but it would certainly be much better if the legislature took up the matter a was done in **England in the Civil Evidence Act, 1968 (1968 c 64) and the Seychelles Evidence (Bankers Books) Act, Cap.75.** To have an idea of what I am referring to section 5(1) and (2) of the **Civil Evidence Act, 1968** provides as follows –

> *" 5. <u>Admissibility of statements produced by computers.</u>*
>
> *(1). In any civil proceedings a statement contained in a document produced by a computer shall, subject to the rules of court, be admissible as evidence of any fact stated therein of which direct Oral evidence would be admissible, if it is shown that the conditions mentioned in subsection (2) below are satisfied in relation to the statement and computer in question.*
>
> *(2) The said conditions are –*
>
> *(a) that the document containing the statement was produced by the computer during a period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period, whether for profit or not, by any body whether corporate or not, or by any individual;*
>
> *(b) that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived;*
>
> *(c) that throughout the material part of that period the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents; and*

(d) that the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities." (See: Halsbury's Statutes of England(3rd edition) page 910,914).

To complete my discussion issue no.5, I am duty-bound to point out that the bank on the 12.2.99 sent a letter to the 1st defendant-exhibit P4 – which provides as follows –

" Le Marsh Enterprises
P.O.Box 51
Mombo – Tanga
Attn: Mr. Bipin vora
Fax 02 – 716625

Dear Sir,
Re: <u>YOUR LOAN & OVERDRAFT ACCOUNTS WITH US</u>

We regret to advise you that despite our repeated request to you have not repaid the advance and there has been no communication at all from your side. We also note that you have failed to service the interest in the account right from the beginning. As on date your account position is given as under –

- *Loan Account (18848 – 0009)*
  Tshs. 55,624,531.65.

- *Overdraft Account (18848 – 0008)*
  TShs. 23,698,061.90

Note:

1. *The above outstanding is inclusive of interest up to 29.01.99.*
2. *The overdraft represents un-serviced interest on loan account and bank charges.*

We hereby call upon you to please pay the above amount plus accrued interest from 30.01.99 till date of full and final payment within 7 days from, the date hereof failing which we shall foreclose the security and adjust our dues."

The 1st defendant responded by writing to the bank exhibits P5 in which the 1st defendant promised **" to totally redeem the loan account and the overdraft account"** within four weeks. This letter was dated the 15.2.99. It was apparently an empty promise, thus prompting the learned advocates for the bank issue a demand notice, exhibit P6, on the 5.8.99 recalling the loan and the enforcement of the securities.

This now takes me to an examination o the identical exhibits P2 and P3 – the Guarantee and Indemnity Agreements. Under clause 5 of exhibit P1 three types of securities were required. A 1st legal charge on land on which Mnazi Sisal Estate is situated; a debenture on plant and machinery and thirdly personal guarantees of the directors. I shall start with the last one. On the 22.8.97 the 2nd and 3rd defendants executed identical Guarantee and Indemnity Agreements with the bank. I reproduce in part clauses 1.01; 1.02 and 1.03 in so far as they are relevant to the issue at hand.

> *" 1.01. In consideration of the Bank making or continuing banking facilities or other accommodation for so long as it may think fit to Le-Marsh Enterprises Ltd of P.O.Box 69731, Nairobi ("the Customer") the Guarantor* ***HEREBY IRREVOCABLY AND UNCONDITIONALLY GUARANTEE*** *the due and punctual payment to the Bank all moneys and discharge all obligations and liabilities whether actual or contingent now or hereafter due or owing or incurred to the Bank by the customer in whatever currency denominated whether on any current or other account of otherwise in any manner whatsoever (whether alone or jointly and in whatever style, name or form and whether as principal or surety when the same are due) including all liabilities in connection with.....guarantees, indemnities.....* ***Any Statement of Account of the Customer signed as correct by any duly authorized official of the Bank shall be conclusive evidence against the Guarantor of the indebtedness of the Customer to the Bank.***
>
> *1.02 The total amount recoverable under this Guarantee shall be limited to the principal sum of Shs 150,000,000/=* ***with interest and commission thereon and all costs, charges and expenses referred to herein.***
>
> *1.03.* ***The Guarantor hereby agrees to pay (to the extent that such interest is not paid by the Customer) from the date of demand until full payment of all moneys, obligations and liabilities hereby guaranteed*** *(as well after as before any demand or judgment or the death, bankruptcy, insanity, liquidation and administration or other incapacity of the customer)* ***at 28% per cent annum over the Base Rate o the Bank from time to time or at such higher rate as may from time to time be payable by the customer*****.....*** *upon such days and upon such terms as the Bank may from time to time determine and such interest shall be compounded in the event of not being punctually paid with quarterly rests in accordance with the usual practice of the Bank without prejudice to the right of the Bank to require payment of such interest when due." (emphasis supplied)*

I have no doubt in my mind at all that the terms and conditions of exhibits P2 and P3 on the basis of which the Bank has instituted this suit against the 2nd and 3rd defendants constituted contracts of guarantee. Both DW1 and DW2 have not disputed this. Sections 78, 79 and 80 of the Law of Contract Ordinance, Cap. 433 provide as follows –

> *" 78. A' contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety'; the person in respect of whose default the guarantee is given is called the ' principal debtor,' and the person to whom the guarantee is given is called the 'creditor'. A guarantee may either be oral or written.*
>
> *79. Anything done, or any promise made, for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee.*
>
> *80. The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.*

Section 78 referred to above gives rise to a contract of guarantee wherein three parties are involved. Under this section, a party who promises to discharge the liability of a third party in case of his default and gives guarantee is called the **"surety".** In the instant case both the 2nd and 3rd defendants were the **"sureties" (guarantors);** the person in respect of whose default the guarantee is given is called the ' **principal debtor'**; in this case the 1st defendant and lastly the person to whom the guarantee is given is called the **'creditor'** - the Bank herein. As stated before I am of the settled view that exhibits P2 and P3 meet the requirements of sections 78 and 79 above. They were both tripartite agreements in the manner explained above.

According to **Sheldon's Practice and Law of Banking** (10th edition) by C.B. rover and R.W.B.Bosley at page 332 –

> *" The essence of a contract of guarantee is that the guarantor is only collaterally answerable; the original debtor is not released from his liability. All that the guarantor promises to do is to pay, either the whole or an agreed part of the debt, if the person who has contracted or will contract the debt fails to do so. It is the principal debtor (i.e the customer of the bank in the kind of guarantee we are concerned with) who is primarily responsible.*

*The existence of an enforceable debt is generally fundamental." **(See also: Nagpur Nagarik Sahakari Bank Ltd and Another v Union of India and Another AIR 1981 AP 153; Moschi v Lep Air Services Ltd and Others {1972} 2 WLR 1175; Grayson & Co. Ltd v A.H.Wardle (Uganda) Ltd and Others [1963] EA 582.)***

It is trite law that the liability of a surety is ancillary and can rest only on a valid obligation on the part of the party whose obligation is guaranteed. The 2nd and 3rd defendants have put forward an argument to the effect that they are not liable to pay under the respective Guarantee and Indemnity Agreements since the Bank did not disburse the working capital/overdraft of Shs 100,000,000/= as contemplated in the letter of offer – exhibit P1. According to them, this was in contravention of clause 3 of the letter of offer. It is certainly an ingenious argument but I am not persuaded by it. It is true that the amount of the facility was Shs 150,000,000/= made up of Shs 100,000,000/= secured overdraft and Shs 50,000,000/= secured loan (See clauses 1 and 2 of exhibit P1), but these clauses should not be read in isolation. The court where possible, must give effect to all the clauses in exhibit P1 and construe them in harmony with one another. Furthermore clause 7 is a specific one which stipulates the conditions on the availability of the loan facility. It is my considered view that this clause is the controlling one on the availability of the loan. At the risk of making my judgment unnecessarily long, I reproduce it again.

" 7. *AVAILABILITY*

- *The facility will be available to you subject to the following terms and conditions:*

- *TSh. 45,230,040/= (T.Sh. forty five million two hundred thirty thousand and forty only) will be released upon your acceptance of offer letter and upon provision by you to the bank an undertaking which states that the certificate of title together with all other documents with regards to the property being purchased will be submitted to the bank once purchase has been finalized and the bank shall use these documents to create a charge in its favour to secure credit facility.*

- ***The remaining amount of Tshs. 105,000,000/= to be disbursed as follows once charge and debenture has been registered: -***

(a) Ths 100,000,000/- in the form of our overdraft.
(b) Tsh. 4,769,960/= in the form of a loan in addition to Tsh.45,230,040/- which will be disbursed to Tanzania Sisal Authority." (emphasis supplied)

It is not disputed that TShs. 45,230,040/= was disbursed according to the agreement. What is min issue now is the disbursement of Shs 100,000,000/= overdraft. The condition precedent for the release of this amount was the registration of the charge and debenture. The Bank contends that not all documents have been submitted to enable it to register the charge and debenture under a power of attorney given to it under clause 5 of the Security Arrangement Agreement exhibit D1. This clause is in the following terms –

" 5.0. <u>POWER OF ATTORNEY</u>

The Borrower hereby irrevocably and unconditionally appoints the Bank and the person deriving title under it to be its attorney in its name and on its behalf and as its act and deed or otherwise:

(i) to process transfer of the Right of Occupancy on land referred under recital "B" once the purchase agreement has been completed.

(ii) to execute and complete any documents which the Bank may require for perfecting creation of security comprising the Right of Occupancy on land referred under Recital "B"and otherwise generally to sign or seal any documents which shall be required to enable the Bank to successfully create a legal mortgage in its favour.

(iii) to do all such acts and things as may be required for the full exercise of the powers hereby conferred."

The 2nd and 3rd defendants submitted that the default to repay the loan was caused by the failure of the Bank to disburse the working capital/overdraft. All the required documents were made available to the Bank to enable it to comply with clause 5 of exhibit D1. Mr. Rwechungura, on the other hand, contended that the defendants had defaulted by not making available to the Bank the required documents that would have facilitated the registration of the securities mentioned in clause 5 of exhibit P1. according to the testimony of PW1, the documents that have not been submitted were the annul land rent receipt and current annual returns from the Registrar of Companies. I have examined the letters in exhibit P9, in particular the letters dated 17.12.97 and 23.1.98 which do not specifically state the kind of documents that were required to be submitted

to the Bank. The letter dated 17.12.97 made reference to an earlier one dated 12.10.97 was not tendered in evidence.

It is not clear from clause 5 (i) and (ii) as to the exact nature of the documents that were contemplated in order for the securities referred to in clause 5(i)(a) and (b) of exhibit P1 to be registered. One would have expected evidence from officials of the Ministry responsible for land matters and the Registrar of Companies. There was none. Under the circumstances, on the rather tenuous evidence before me, I am unable to conclude that the defendants were in breach of their obligations on this point. Nor can I take judicial notice of the type of documents required for the registration of mortgages and debentures under section 59 (1) of the Evidence Act 1967. More importantly however, under clause 7 of exhibit P1, the conditions precedent for the disbursement of Tshs. 45,230,040/= and the overdraft/working capital of Shs 105,000,000/= were different. There is no linkage that the repayment of the loan was contingent upon the disbursement of the working capital/overdraft. The sticking point is the repayment of the advanced loan together with accrued interest and other charges, and not the disbursement of the working capital/overdraft.

Section 80 of the Law of Contract Ordinance stipulates that the liability of the surety is co-extensive with that of the principal debtor – the 1st defendant – unless it is stated otherwise in the contract. This means that the liability of the 2nd and 3rd defendants cannot be in excess of what the 1st defendant would himself be liable. The terms and conditions under which the 2nd and 3rd defendants bound themselves are as embodied in exhibits P2 and P3. They cannot be made liable for more than what they had undertaken.

I now propose to deal briefly with the counter-claim. In the original joint written statement of defence filed on the 13.3.2000 there was also a counter-claim. The learned advocate for the bank with leave of the court, was allowed to amend the plaint and an amended plaint was filed on the 25.10.2000. In similar vein, the defendants were permitted to file their amended defence which was filed on the 14.11.2000. This defence conspicuously did not include the counter-claim. When the issues were framed on the 20.6.2000, there was one based on the defendants counter-claim in the following terms –

" Are the defendants entitled to specific performance of the agreement between the 1st defendant and the plaintiff referred to issue no.1 above? "

Order VIII rule 9(2) of the Civil Procedure Code provides as follows –

" 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. "

As the defendants did not include a counterclaim in their amended defence, it must be deemed to have been abandoned. A counterclaim is in effect a plaint in terms of Order VIII rule 9(2) of the CPC which attracts the operation of Order VII of the CPC. In view of the current state of the pleadings, there is no subsisting counterclaim before me to consider and determine.

Lastly, I come to the question of reliefs, if any, to which the parties are entitled to. In the amended plaint, the reliefs being claimed by the bank against the defendants jointly include –

(i) *Payment of a total Tshs. 53,108,853/58 representing normal interest penal interest and other charges on the loan as on 1ST February, 2000.*

(ii) *Normal interest on the amount in (a) above at the rate of 28% per annum and penalty interest at the rate of 7% per annum with effect 1st February, 2000 up to the date of judgment.*

(iii) *Interest on the decretal amount at the court rate from the date of judgment to the date of full settlement.*

(iv) *Costs.*

I have no quarrel with the relief in paragraph 13 (a) of the plaint since this represents the contractual liability of the 1st defendant in terms of exhibit P1 as hopefully amply demonstrated before in the course of this judgment. It is my considered view that it does not fall under the purview of Order XX rule 21 of the Civil Procedure Code which provides as under –

" (1) The rate of interest on every judgment debt from the date of delivery of the judgment until satisfaction shall be seven per centum per annum or such other rate, not exceeding twelve per centum per annum, as the parties may expressly

agree in writing before or after the delivery of the judgment or as may be adjudged by consent:

(Proviso not applicable)

(2) For the purposes of this rule –
"judgment debt" means –

(a) the principal sum;

(b) any interest adjudged on such principal sum for any period prior to the institution of the suit;

(c) any interest adjudged on such principal sum for the period between the institution and delivery of judgment."

On the facts of this suit, the principal amount is of course Shs. 45,230,040/= which amount was admitted by the defendants. This should now include interest which has accrued in terms of exhibit P1 as discussed earlier on. It becomes part of the principal amount. However the interest in paragraph 13 (b) on the amended plaint has caused me a bit of anxiety. There is no doubt that the bank has been deprived of its money that it advanced to the 1st defendant. And since the 1st defendant has defaulted in honouring its contractual obligation to repay, it is only just and fair that since the bank has been deprived the use of its money, the bank should be compensated for such deprivation by the award of interest. The problem of course is at what rate of interest. Order XX rule 21 (1) and (2) I believe has provided an answer to that. The prescribed rate of interest is between 7% p.a and 12% per annum at the discretion of the court. I therefore order that the interest chargeable under paragraph 13 (b) be 7%p.a to be reckoned from the institution of the suit up to the delivery of judgment. The bank is non-commital as regards the interest payable as from the date of delivery of judgment until final satisfaction of the decretal amount. The terminology used is at *"court rate"*.

In the case of ***Saidi Kibwana and General Tyre EA Ltd v Rose Jumbe [1993] TLR 175,*** the Court of Appeal had occasion to construe section 29 and Order XX rule 21 of the Civil Procedure Code, 1966. The Court, speaking through Mfalila, J.A had this to say at page 188F –

" The rate of interest prescribed under the powers conferred on the Chief Justice by s29 vide GN No.410/64 are the same as those prescribed under 020 r 21 namely between the minimum of 7% and the maximum of 12% per annum from the date of the delivery of judgment until satisfaction. The rate of interest to be awarded for the period prior to the delivery of judgment is set at the discretion of the Court. The rate which it considers reasonable. There are thus two divisions of interest under Tanzanian Law as opposed to three under s 34 of the Indian Civil Procedure Code which ceased to apply in Tanzania in 1966. These two divisions correspond to the period for which interest is awarded. The first period covers the whole of that period up to the delivery of judgment. The second period is the period from the delivery of judgment to final satisfaction. The rate to be awarded for the first period is entirely at the discretion of the Court, whereas the rate to be awarded for the second period is also at the discretion of the Court but within set limits between 7% and 12% per annum."

In the result, the defendants are liable to the bank in the following terms –

(i) *Judgment was entered in favour of the Bank on admission by the defendants in the sum of Shs 45,230,040/= on the 20.6.2000.*

(ii) *The said sum of shs 45,230,040/= will carry interest at 28% p.a normal interest; 7% p.a penalty interest per annum up to 20.6.2000 (decretal amount).*

(iii) *There will also be interest at the rate of 7% per annum on the decretal amount from 20.6.2000 until final satisfaction of the same.*

(iv) *The defendants shall also pay to the bank shs 10,078,317/35 being other charges.*

(v) *The defendants are condemned to pay costs of this suit. It is accordingly ordered.*

H.R.Nsekela,
Judge.
9.2.2001

9/2/2001

Coram – Hon. H.R. Nsekela,J.,

For the Plaintiff – Mr. Rwechungura.

For the Defendants – 1. Mr. Magari.

2. Mr. Macharia.

Judgment read in the presence of Mr. Rwechungura, learned advocate for the plaintiff and the 2nd and 3rd defendants who appeared in person.

H.R. Nsekela,

Judge.

9.2.2001.