

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM
COMMERCIAL CASE NO. 20 OF 2003**

THE NATIONAL BANK OF COMMERCE LTD.....PLAINTIFF

VERSUS

**1.MARY NYIGU.....}.....DEFENDANTS
2.CONRAD NYIGU}**

Counsel: Mr. Kabakama for Plaintiff

Mr. Mathia for Defendant

JUDGMENT

BWANA, J.

The Plaintiff in this case is a Bank licenced under the Banking and Financial Institutions Act 1991, to carry on banking business in Tanzania. The first defendant was its client at the plaintiff's Tukuyu Branch. She took an overdraft facility at the said Branch. The second defendant guaranteed the facility. He mortgaged his two properties to facilitate the overdraft arrangement. The two defendants are husband and wife.

The following facts are not disputed. The overdraft facility was for shs.50m/- for a period of one year from July 2001 to July 2002 (Exh.P1). It carried an interest of 21% per annum. In case of default, a 5% penalty was to be paid. The second defendant guaranteed this facility.

It is now claimed by the plaintiffs (and disputed by the defendants) that the latter have defaulted. In addition, it is claimed that the first defendant withdrew money in excess of what had been authorized. It is alleged further that she withdrew up to shs.70m/- while she was authorized to withdraw up to shs.50m/- only. In addition to the shs.70m/-, the plaintiff now claims for the 21% interest and

5% penalty plus the period beyond 31 July 2002. All in all it comes to shs.120,768,253/-.

The defendants deny liability to the tune of shs.120,768,253/- as claimed. The first defendant, who testified as DW1, admits the shs.50m/- debt although she says she had already paid part of it. However there is no evidence of how much she has paid.

According to DW1 she serviced her facility accordingly until she discovered some irregularities in her account. She brought this factor to the attention of the then Branch Manager. The latter kept promising her that he would correct the errors but did nothing to that effect. Further, DW1 claims that she made several (seven) payments by way of cheques. Those cheques were not credited to her account as expected. Instead, they were all credited on the same day, 4 March 2002 – after the said Branch Manager, one John Mpaki – had disappeared and/or suspended from work. These latter allegations are not controverted by the plaintiff. In fact the latter admits that Mr. Mpaki is no longer the Branch Manager, he has been suspended. The first defendant even took the trouble to follow up the issue up to the Dar es Salaam headquarters of the plaintiff. A number of auditors were sent to Tukuyu and according to this DW1 (and uncontroverted by the plaintiff), a number of financial irregularities were found out by the said auditors, including the said cheques which were found in the draws of the office table until then used by Mr. Mpaki.

The main issue of contention is whether the defendants withdrew more money than the amount authorized under the Agreement, Exh P1. The defendant denies that. It is even argued that it was not possible to do so without the consent and authority of the plaintiff through its Branch Manager. I do concur with that argument. Unfortunately John Mpaki or any other witness did not enlighten us on how that could have been possible that the first defendant withdrew money in the excess of what had been authorised. Accordingly I do agree with the defendant's version that she did not withdraw more than sh.50m/- from her overdraft facility. In so finding I am mindful of the contents of the Bank Statement – Exh P6. That statement shows that as at 12 March 2002, the outstanding sum was

shs.120,768,253/20. That is the figure being claimed in this case. However the following facts need to be taken note of. **First** after the discovery of the irregularities on her account she brought it to the attention of the Branch Manager ostensibly to have them corrected. From that time, it is the uncontroverted evidence of DW1, that the said Branch Manager become hostile. It is not clear whether or not further irregularities continued to appear on her account but it seems that was the case as it seems that the statement continued to be operated automatically. **Second** several cheques that had been deposited were not reflected on her account. If that had been so no doubt the higher interest rates including the applicability of the default clause would have shown a different picture. Failure to have the cheques reflected on the appropriate account was the plaintiff's fault. **Third** although the first defendant claims that she has made part payment, there is no proof to substantiate so. She is, however, prepared to pay the balance.

All the above considered, I am of the view that the defendants' liability cannot exceed the sh.50m/- plus the 21% interest per annum and 5% penalty as from the date of default to the date of filing of this case (i.e. from March 2002 to January 2003 the date of filing of this case).

Therefore I enter judgment in favour of the plaintiff against both defendants, and award it the sum of shs.50m/- plus 26% interest per annum (21% + 5%). I further award a 7% per annum interest on the decretal sum from the date hereof till final settlement. In default, then the two mortgaged properties (Farm No.310, Ndembela Village, L. O. No.124616 Rungwe District and Plot No. 106 Block "F: C.T. No.7002 MBYLR)- should be attached and sold.

Given the role played by each party in this matter, each to bear its costs of this suit.

It is accordingly ordered.

Dr. S. J. Bwana

JUDGE

8/9/2004



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