

**IN THE COURT OF APPEAL OF TANZANIA  
AT MWANZA**

**(CORAM: JUMA, C.J., WAMBALI, J.A. And MAIGE, J.A.)**

**CIVIL APPEAL NO. 202 OF 2022**

**FB GENERAL CONTRACTORS.....1<sup>ST</sup> APPELLANT**

**FELIX RWEBANGIRA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**BANK OF BARODA TANZANIA LIMITED..... RESPONDENT**

**(Appeal from the Judgment and Decree of the High Court of Tanzania,  
Commercial Division at Mwanza)**

**(Magoiga, J.)**

**Dated the 27<sup>th</sup> day of August, 2021**

**in**

**Commercial Case No. 13 of 2019**

.....

**JUDGMENT OF THE COURT**

17<sup>th</sup> & 24<sup>th</sup> February, 2025

**WAMBALI, J.A.:**

The respondent, Bank of Baroda Tanzania Limited instituted a suit, Commercial Case No. 13 of 2019 under summary procedure, pursuant to Order XXXV of the Civil Procedure Code, Cap 33 at the High Court of Tanzania, Commercial Division at Mwanza. The suit was preferred against the appellants, FB General Contractors and Felix Rwebangira and two others namely, Anatory Mufundi Blandes and Bonanza Gareya, who are not parties to this appeal. It is not out of place to point out at the outset that, the suit against Anatory Mufundi Blandes, who was the third defendant was dropped before the trial commenced while it proceeded ex-parte

against Bonanza Gareya, the fourth defendant because he did not enter appearance though he was duly served through substituted service by publication in Mwananchi newspaper.

It is in the record of appeal that the appellants successfully applied for leave to defend the suit and subsequently lodged a joint written statement of defence to contest the claim of the respondent.

The facts leading to the dispute between the parties that required determination of the High Court, Commercial Division are apparent in the record of appeal. The respondent, upon request by the first appellant, on 27<sup>th</sup> February, 2015 via a credit facility letter (exhibit P1), advanced an overdraft facility of TZS. 75,000,000.00 for running its business. It was agreed that the credit facility was for a period of 12 months to be renewed annually. It was also a term of the agreement that the credit facility would attract an interest of 19% per annum and upon default an additional penal interest rate of 2% had to be charged over and above the normal rate of interest on the entire amount of loan. The credit facility was secured by: the legal mortgage (exhibit P2) in favour of the respondent over Plot No. 75, Nyakato Satellite Area in Mwanza registered under CT No. 2388 in the name of the second appellant who executed it on 6<sup>th</sup> March, 2015 and was consented by his wife one Revina Felix Rwebangira (exhibit P3); a first ranking chattel mortgage (exhibit P4) in favour of the respondent over the

appellants' and two others' (defendants) fixed and floating assets registered to secure TZS. 93,750,000.00 and personal guarantees (exhibit P5) of the second appellant and two others.

It was contended by the respondent that as the first appellant failed to repay the overdraft as agreed, she requested through a letter dated 29<sup>th</sup> June, 2018 (exhibit P6) that the overdue amount plus interest of TZS. 5,600,000.00 on account of the overdraft be converted into a term loan, which was agreed by the respondent. Nonetheless, the first appellant breached the terms and conditions of the credit facilities agreements. Thus, notice of default (exhibit P7) and demand notices (exhibit P8a, b and c) were issued to the first appellant and guarantors on 12<sup>th</sup> June, 2019 by the respondent. Moreover, it was not contested at the trial that on 3<sup>rd</sup> September, 2019, the first appellant wrote a letter (exhibit P9) to the respondent in which she admitted liability and requested rescheduling of payment of the outstanding loan of TZS. 83,760,890.54.

In this regard, the respondent maintained that as of 31<sup>st</sup> August, 2018, the outstanding debt on overdraft account was TZS. 77,702,477.53 that comprised TZS. 75,000,000.00 being the principal amount and TZS. 2,702,477.53 being accrued interest and bank charges. Moreover, it was averred that as of 31<sup>st</sup> December, 2018 the outstanding debt on the term loan account was TZS. 6,058,413.01 comprised of TZS. 5,600,000.00 being

principal amount and TZS. 458,413.01 being accrued interest and bank charges.

To this end, at the High Court, the respondent claimed payment of TZS. 83,760,890.57 that included the principal amount, accrued interest and bank charges.

On the other hand, through a joint written statement of defence, the first and second appellants contested the respondent's claim and averments in the plaint. Relying on the bank statements, it was averred that the first appellant had repayed the loan as she was depositing the money in the respective accounts and it was thus the duty of the respondent to deduct the amount due.

At the trial, parties relied on the witness statements of PW1 and DW1 respectively and exhibits which were tendered. The witnesses were also duly cross examined.

Having considered the parties evidence on the record, the trial judge initially noted that the following matters were not in dispute between the parties. **One**, the existence of the credit facilities between the respondent and the first appellant as per exhibit P1. **Two**, that the loan was guaranteed by the second appellant's landed property stated above and his personal guarantee. **Three**, that the second appellant and Bonanza Gareya (third defendant) guaranteed the loan through the first ranking

chattel mortgage in favour of the respondent over the first appellant's fixed and floating assets for TZS. 93,730,000.00. And, **four**, that the second appellant and Bonanza Gareya executed personal guarantees for the first appellant in favour of the respondent at TZS. 93,750,000.00. With regard to whether the appellant defaulted in reservicing the loan, the trial judge answered the issue in the affirmative. Particularly, he stated:

*"The plaintiff alleged that since 2018 defendant was in default and up to date, he has failed to repay the loan. In rebuttal, the defendants have argued that they are not indebted to the plaintiff. I have carefully revisited and considered the pleadings, the testimonies of PW1, DW1 together with exhibits P11a, P11b and P10b - P10c. There is no doubt defendant defaulted in servicing the loan. I am entitled to hold so because the outstanding amount as per 31<sup>st</sup> August, 2018 the overdraft is TZS. 77,702,477.53 and the term loan is TZS. 6,058,413.01. More so, the loan was to be repaid for one year but up to date the defendant never repaid the loan. Moreover, exhibits P6 and P9 are loud and clear that the defendant defaulted in servicing the loan and her requesting for conversion of the overdraft to term loan and rescheduling of payment on 3<sup>rd</sup> September 2021 so as to remedy the situation is other admission of default. The arguments that loan was fully paid by*

*the defendants is devoid of any useful merits and is rejected”.*

In the end, having dealt with other issues and determined them against the appellants, he entered judgment in favour of the respondent. Subsequently, he ordered the appellants and Bonanza Gareya jointly to pay the respondent the claimed amount of TZS. 83,760,890.75 together with the interests and costs specified in the plaint.

The trial court’s judgment and decree did not satisfy the appellants, hence this appeal. The dissatisfaction of the appellants is vividly expressed by two grounds of appeal comprised in the memorandum of appeal thus:

- "1. That the trial court erred in law not to evaluate evidence on record regarding the amount deposited by Appellants to the Respondents’ Bank which completed payment on overdraft and charges.*
- 2. That the trial court erred in law for admitting the exhibits wrongly”.*

The appeal is contested by the respondent.

At the hearing, Mr. Innocent Kisigiro, learned advocate represented the appellants. Submitting in support of the first ground of appeal, Mr. Kisigiro strongly argued that the trial judge did not properly evaluate the evidence on the record which indicated that the first appellant had

completed payment of the loan through the deposits she made regularly in the respective account. He stated that in her testimony during cross-examination, Felix Rwebangira, the second appellant, who testified as DW1 stated categorically, relying on the bank statements which were admitted as exhibit P11a – b, that though an amount of TZS. 688,274,315.00 was withdrawn by the first appellant, a total of TZS. 610,511,837.50 was initially paid followed by TZS. 81,000,000.00 which in essence settled the amount of the overdraft, that is, TZS. 75,000,000.00 claimed by the respondent. Mr. Kisigiro emphasized that in 2016 after DW1 deposited TZS. 81,000,000.00, he knew that the respondent had deducted the overdraft credit of TZS. 75,000,000.00 as it was usually done.

In the circumstances, Mr. Kisigiro submitted that, had the trial judge considered the evidence of DW1 and the bank statements (exhibit P11a - b) and subjected the evidence of PW1 and other exhibits on the record to proper scrutiny, he would not have come to the conclusion that the appellants had failed to reservice the overdraft and the term loan. He therefore urged us to overturn the finding of the trial court and enter judgment in favour of the appellants.

Responding, Mr. Libent Rwazo, learned advocate who represented the respondent contested the submissions of the appellants' counsel and supported the findings and conclusion of the trial judge. He asserted that

in his witness statement and during cross-examination and re-examination, Victoria Kavishe, the respondent's Branch Manager at Mwanza who testified as PW1, left no doubt that up to 31<sup>st</sup> August, 2018 the outstanding amount of the overdraft and term loan plus interest was TZS. 83,760,890.54. He added that, PW1 demonstrated that on 31<sup>st</sup> October, 2016 the amount due was TZS. 82,855,218.67 and that on 11<sup>th</sup> November, 2016, the first appellant deposited TZS. 81,046,494.60 and thus the balance was TZS. 1,808,724.07. However, he stated, on 14<sup>th</sup> November, 2016, she withdrew TZS. 60,000,000.00 and therefore the overdraft was raised. He emphasized that up to 30<sup>th</sup> August, 2018 the debt was TZS. 77,702,477.53 excluding the interest as she continued to withdraw the money through the overdraft facility as conceded by DW1 when he was asked a question for clarification by the trial court. He added that, the assertion is further backed by the bank statements, exhibits P10a - c and P11a - b.

Mr. Rwazo explained further that the appellants also admitted of being indebted to the respondent on the claimed amount as demonstrated by the letter requesting reconverting the overdraft into a term loan and rescheduling the debt (exhibits P6 and P9) dated 29<sup>th</sup> June, 2018 and 3<sup>rd</sup> September, 2019, respectively. Thus, with such overwhelming evidence on the record, he submitted, the appellants cannot justifiably contest the

finding and conclusion of the trial judge that they had not reservised the overdraft credit facility, the term loan and associated interests. Ultimately, he implored the Court to reject the first ground of appeal.

We have carefully scrutinized the pleadings and the evidence on the record against the parties' submissions. We are in agreement with the counsel for the respondent that at the trial, the appellants did not sufficiently show on balance of probability that they had completed repayment of the advanced overdraft credit facility, the term loan and associated interests. We hold this view for the following reasons. **One**, though the appellants lodged a joint written statement of defence to contest the claim and attached the bank statements as "FBI", they generally denied the claim without further and better particulars. Indeed, the general denial and insistence that the claimed amount was paid, resurfaced in the witness statement lodged by DW1 without sufficient explanation. This was irrespective of the appellant's reliance on the bank statements that were tendered by PW1 and admitted as exhibit P11a - c and adopted by DW1 as part of the defence case. For clarity, the relevant part of DW1 testimony on completion of payment of the loan is found on paragraph 9 of the witness statement thus:

*"9. That the plaintiff granted a loan to the 1<sup>st</sup> defendant, rather I dispute the amount claimed by*

*the plaintiff because the 1<sup>st</sup> defendant has (sic) servicing the loan and to my knowledge all the amount of loan was completed by the 1<sup>st</sup> defendant and made deposits and the plaintiff is the one who was supposed to deduct from the 1<sup>st</sup> defendant Bank Account. A copy of the bank statement is attached as FB "1" to the 1<sup>st</sup> and 2<sup>nd</sup> defendants' written statement of defence".*

Admittedly, that is the only paragraph in the witness statement of DW1 that denounced the claim of the respondent generally without further explanation to what is specifically contained in the attached bank statements on how the claimed amount with regard to the overdraft and term loan accounts was settled by the appellants. Besides, as intimated above, when the trial court ordered that the witness statement of DW1 be adopted as part of the proceedings, DW1 was shown the bank statements which had been tendered by PW1 and admitted as exhibit P11a - b and prayed that the same be made part of the defence case without further explanation. More importantly, during cross-examination, relying on the bank statements DW1, conceded that he had withdrawn TZS. 688,274,315.00 and paid TZS. 610,511,837.50. On the other hand, though DW1 stated that the amount of TZS. 81,000,000.00 was paid in 2016 to settle the balance and that it was the duty of the respondent to deduct the

overdraft credit facility of TZS. 75,000,000.00, he did not explain how the same was settled.

Indeed, when a question for clarification by the trial judge was asked, DW1 stated that though they paid TZS. 81,000,000.00 and the balance was TZS. 1,000,000.00, he admitted that they continued to enjoy the overdraft and withdrew money. The statement is thus consistent with the testimony of PW1 who testified that after TZS. 81,000,000.00 was paid on 11<sup>th</sup> November, 2016, TZS. 60,000,000.00 was withdrawn and thus the overdraft rose up as submitted by Mr. Rwazo. This piece of evidence was not contradicted by DW1 not only in his witness statement but also during cross-examination and re-examination. We further note that the substance of the witness statement of PW1 and the admitted exhibits were not contradicted by the appellants.

**Two**, by a letter dated 3<sup>rd</sup> September, 2019, which was admitted as exhibit P9, the appellants conceded that they were indebted to the respondent and requested for rescheduling of the payment of TZS. 83,760,890.75. Exhibit P9 was admitted in evidence without objection from the appellants. This fact is also supported by the evidence of DW1 during cross-examination by the respondent's counsel. Particularly, the following is revealed:

*"DW1 shown exhibit P9 and asked if he acknowledge to know the letter and says yes is our letter. It was signed by me as Managing Director. I acknowledged the debt of TZS. 83 million. The letter dated 03/09/2019. I received the loan as agreed".*

In this regard, considering the admission of DW1 as shown by the reproduced part of his testimony, the nature of the written statement of defence and his witness statement, the appellants cannot validly contend that as of 31<sup>st</sup> August, 2018, they had settled the outstanding amount by simply contending that it was the duty of respondent to deduct the deposited money. More so, before exhibit P9 was written, the appellants had also admitted to be indebted and requested convention of the overdraft to term loan through a letter dated 29<sup>th</sup> June, 2018 (exhibit P6).

**Three**, there is ample evidence on the record that even after the appellants had paid TZS. 81,046,494.60, and the balance became TZS. 1,808,724.07, they continued to utilize the overdraft credit facility by withdrawing money as stated by Mr. Rwazo. The fact was also confirmed by DW1 when he was asked by the trial judge to clarify on the issue. In response, he stated:

*"When we paid 81 Million the balance (sic) I Million.  
We continue (sic) to enjoy the overdraft and  
withdraw money".*

In totality, based on our deliberation above, we are settled that the complaint of the appellants in the first ground is unfounded as the general denial concerning the claim of the respondent made both in the joint written statement of defence and witness statement of DW1 did not prove on the balance of probability that they had settled the debt. The Court has consistently emphasized that in civil cases, proof is on balance of probability and that a party who asserts the existence of a fact and desires a judgment of a court in his favour must discharge a burden of proving the respective fact. This is also the spirit and context of sections 110 and 111 of the Evidence Act, Cap 6. For emphasis, in **Anthony M. Masanga v. Penina (Mama Mgesi) & Lucia (Mama Anna)** (Civil Appeal No. 118 of 2014) [2015] TZCA 556 (18 March 2015, TANZLII), the Court held:

*"...Let's begin by re-emphazing the evercherished principle of law that generally in civil cases, the burden of proof lies on the party who alleges anything in his favour. We are fortified in our view by the provisions of sections 110 and 111 of the Law of Evidence Act, Cap 6 of the Revised Edition 2002".*

Moreover, in **Paulina Ndawavya v. Teresia Thomas Madaha** (Civil Appeal No. 43 of 2017) [2019] TZCA 453 (11 December 2019, TANZLII), the Court stated:

*"It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence Act, Cap. 6 [R.E. 2002]. It is equally elementary that since the dispute was in civil case, the standard of proof was on a balance of probabilities which simply means that the court will sustain such evidence which is more credible than the other on a particular fact to be proved.*

*...it is again trite that the burden of proof never shifts to the adverse party until the party on whom the onus lies discharges his and that the burden of proof is not diluted an account of the weakness of the opposite party's case".*

Indeed, in **Sarkar's Law of Evidence**, 18<sup>th</sup> Edition by M. C. Sarkar, S. C. Sarkar and P. C. Sarkar, Published by Lexis Nexis at page 1896, the following is stated:

*"...the burden of proving a fact rest on the party who substantially asserts the affirmative of the issue and not upon a party who denies it; for negative is usually incapable of proof. It is ancient rule founded on consideration of good sense and should not be departed from without strong*

*reason... until such burden is discharged, the other party is not required to be called upon to prove his case. The court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until it arrives at such conclusion, he cannot proceed on the basis of weakness of the other party”.*

In the case at hand, this being the first appellate court, and having exercised our mandate under rule 36 (1) (a) of the Tanzania Court of Appeal Rules, 2009 (see our decisions in **Jamal A. Tamim v. Felix Mkosamali and Another** (Civil Appeal No. 110 of 2012) [2013] TZCA 342 (3 May 2013) TANZLII and **Domina Kagaruki v. Frida F. Mbarak and Others** (Civil Appeal No. 60 of 2016) [2017] TZCA (19 June 2017, TANZLII) and re-appraised the evidence on the record, we are satisfied that the appellants did not discharge the burden of showing that they had settled the advanced overdraft credit facility, the term loan and the associated interests claimed by the respondent. On the contrary, the respondent proved her claim on balance of probability, and thus the onus was on the appellants. We are therefore in agreement with the finding and conclusion of the trial judge. Ultimately, we dismiss the first ground of appeal.

With regard to the second ground of appeal, we gather that the thrust of the appellants' complaint is that the trial judge wrongly admitted exhibits 10a - c and 11a - b. In his brief submission, Mr. Kisigiro contended that the said exhibits had to be admitted separately because they were bank statements of different accounts to enable the appellants to verify the same and understand their contents and be able to raise issues if any, during cross-examination. He therefore urged us to declare that the said exhibits were wrongly admitted and thus cannot be relied in evidence in determining the dispute between the parties.

In reply, Mr. Rwazo stated that the respective exhibits were properly admitted collectively because they concerned the bank statements together with certificate of authenticity of the term loan and overdraft accounts of the first appellant. He added that the exhibits were properly placed before the trial court and admitted and that the counsel for the appellants did not object to their admission. He thus urged us to reject the complaint on this ground.

The record of appeal clearly indicates that the complained of exhibits concerned the bank statements printed on 24<sup>th</sup> April, 2019 by the respondent that were maintained in the name of the first appellant regarding the term loan and overdraft account numbers, 960040600000142 and 96040400000003 together with a certificate of

authenticity (exhibits P10a - c) respectively and accounts numbers 960040400000147 and 960040400000003 for term loan and overdraft (exhibits P11a - b) respectively. It is noted that the respective statements covered the period from 30<sup>th</sup> June, 2018 to 5<sup>th</sup> August, 2020. We further note from the record of appeal that the appellants' counsel did not object to the admission of the said exhibits as submitted by the learned counsel for the respondent. We hasten to add that since PW1 made it clear that the said exhibits comprised of certificates of authenticity and bank statements and no objections were made to their admission, the appellants cannot be heard to complain at this stage of the appeal. More importantly, the appellants were aware of the existence and content of the said exhibits because they were also attached to the plaint and later listed in PW1's witness statement as documents to be relied in her testimony before they were tendered and admitted in evidence. Besides, during the defence case, DW1 urged the trial court to adopt exhibit P11a - b as part of the defence which he had intended to tender but was tendered by PW1. It is noteworthy that the appellants also attached the said statement as annex FBI to the written statement of defence as per paragraph 3. We therefore respectfully disagree with the appellants' counsel submission regarding the wrongful or improper admission of the respective exhibits.

In the circumstances, we find that the collective admission of the bank statements and certificates of authenticity regarding the overdraft and term loan accounts did not prejudice the appellant to the extent of occasioning miscarriage of justice. It follows that the complaint in this ground is not substantiated. We accordingly dismiss it.

In the final analysis, considering our deliberations above, we have no hesitation to conclude that the appeal is devoid of merit. In the result, we dismiss the appeal with costs to the respondent and confirm the finding and conclusion of the trial court.

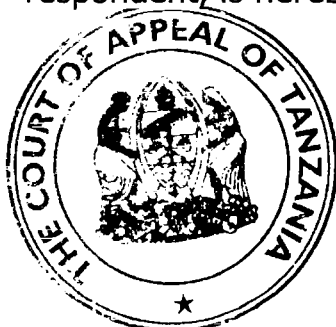
**DATED at MWANZA** this 24<sup>th</sup> day of February, 2025.


I. H. JUMA  
**CHIEF JUSTICE**

F. L. K. WAMBALI  
**JUSTICE OF APPEAL**

I. J. MAIGE  
**JUSTICE OF APPEAL**

The Judgment delivered this 24<sup>th</sup> day of February, 2025 in the presence of Mr. Innocent John Kisigiro, learned counsel for the appellants and holding brief for Mr. Libent Rwazo, learned counsel for the respondent, is hereby certified as a true copy of the original.



  
R. W. CHAUNGU  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**