High Court, only where, on receiving the petition of appeal and copy of the judgment from which the appeal is being lodged, it peruses it and finds that it is completely without merit and, therefore, that there is no need to allow it to be fixed for the hearing of the appellant. But once the High Court allows the appellant or his advocate to argue the merit of the appeal before it, it has to deliver a judgment in which the reasons for allowing or dismissing the appeal, as the case may be, will be given.

In the present appeal the High Court heard both the appellant and the respondent. That approach implied that the High Court had found that it was not appropriate to dismiss the appeal summarily. It could not in the same breath, purport to dismiss it summarily but should have written a judgment.

Not only did the High Court faulter on the procedure. We also think that this was not at any rate a proper case for summary dismissal. Although the ground of appeal to the High Court were inelegantly drafted, it is discernible at any rate that the appellant was calling upon the High Court to consider critically the evidence which suggested that he had been found with the dangerous drugs. He put to question the reliance by the trial court on x-ray pictures, which were not admitted as Exhibits at the trial. There was also the question of the charge sheet, which did not specify the dangerous drug the appellant allegedly possessed, whether it disclosed an offence.

In the case of *Robert Mgire v. Republic* (1), originating from mainland Tanzania, this court allowed the appeal of the appellant because the High Court wrongly dismissed the appeal summarily instead of re-appraising the evidence. The court had found that there was a reasonable doubt as to the appellant's guilt. In the present appeal we think that it should be heard *de novo* or the High Court to re-appraise the evidence and decide it on merit. In the result, we quash the order of summary dismissal of the appeal and direct that it be re-heard before another judge of the High Court.

NATIONAL BANK OF COMMERCE LTD *v.* UNIVERSAL ELECTRONICS AND HARDWARE LTD AND TWO OTHERS

HIGH COURT OF TANZANIA
(Commercial Division)
AT DAR ES SALAAM

(Kalegeya, J.)

COMMERCIAL CASE NO. 198 OF 2002

Banking – Debtors – Discharging a debtor from liability – Whether the bank's internal mechanism of writing off debts or losses discharges a debtor from liability.

Banking – Securities – Debenture – Whether guarantors discharged upon the debtor failing to excise options provided in a debenture.

Banking – Securities – Guarantee – Whether guarantors discharged upon the debtor failing to excise options provided in a debenture.

Contract – Liability of a surety – Liability is co-extensive with that of the principal debtor – Section 80 of the Law of Contract Act.

Contract – Estoppel – Whether a bank is estopped from claiming from debtors money due to it after using its internal mechanism of debt or loss write-off.

Law – Securities – Debtor of a bank is sued – Effect of the suit on securities given by the debtor.

The defendants were offered and accepted a renewal of an overdraft facility in the sum of TZS. 200 million for a period of twelve months, expiring on 18 December1997. Among the securities included a the second and third defendants provided personal guarantees. Also, the first defendants' landed property was mortgaged. The facility was not serviced and by 27 June 2000 the outstanding liability wasTZS. 123 414 837-25 as principal sum and TZS. 165 013 103.45 as interest. On that date, the Bank's Samora Branch charged off the liability, making the account read "0.0" balance, and

the account was then transferred to the Bank's Head Office which instructed the Bank's lawyers to take debt recovery measures. The lawyers made demands in June 2001 and April 2002. Meanwhile, between 13 November 2000 and 6 November 2001, the defendants paid into the account a total of Shs. 100,609,901-90. By 31 March 2001, the outstanding liability was TZS. 22 804 971-35 as principal and TZS. 288 755 581-64 interest, totaling TZS. 311 560 552-99. defendants argued that the moment the Bank wrote off the debt, their liability was discharged, a claim which the Bank denied.

Held: (i) The writing off of the debt was just an internal mechanism intended to clear the bank's books but not to discharge debtors from liability; it was an exercise allowed by the Banks' Guidelines, *vide* GN 39 of 2001, providing debt or loss write offs, but they do not discharge customers' liabilities as such;

(ii) The defendants were never cleared of their liability and there was no estoppel

(iii) In construing a claim the plaint should not be read in isolation. Read as a whole, the plaint was clear and categorical that the overdraft facility was TZS. 200 million and the said shs. 200 million was utilized by the first defendants and that that was the basis of the claim for the outstanding of TZS. 22 804 971 as principal and 332 646 812 as interest as of 28 February 2002;

(iv) By clause 1 of the guarantee document the second and third defendants guaranteed to the Bank to pay all the sums of money owing to the bank by the principal debtor and section 80 of the Law of Contract Act provides that the liability of the surety is co-extensive with that of the principal debtor, unless provided otherwise by second and third defendants have been discharged from the liability by the plaintiff's failure to exercise the options provided in the Debenture Deed;

(v) The action before the court did not concern land as such but concerned a commercial transaction whereby the first defendants received a facility which they did not service and were sued for its recovery; the question of realization of a debenture or mortgage was just ancillary to the action and the court, therefore, had jurisdiction.

Judgment for the Plaintiff

Cases referred to:

(1) *Nurdin Bandali v. Lombank Tanganyika Ltd.* [1963] EA 304

(2) *Bank of Uganda v. Banco Arabe Espanol,* [2002] EA 296

(3) *Shinyanga Regional Trading Co. Ltd and another v. National Bank of Commerce* [1997] T.L.R. 78

(4) *Reid v. National Bank of Commerce,* [1971] EA 525

(5) *Jacob v. Batana and Generals Plantations Trust,* (1924) 1 Xh. 287

Statutory provisions referred to:

(1) Law of Contract Act, sections 80, 167

(2) Law of Evidence Act 1967, section 123

(3) Income Tax Act Number 33 of 1973, section 16

(4) Banking and Financial Institutions Act Number 12 of 1991, sections 15 and 16

(5) Civil Procedure Code, Order XIV, rule 5

Mr Kabakama, for the Plaintiffs

Professor Fimbo, for the Defendants

JUDGEMENT

(Delivered 10 December 2004)

Kalegeya, J.: The plaintiffs' prayer is for judgment and decree against the defendants jointly and severally for:

(i) Payment of the outstanding balance of the sum of TZS. 332 646 812

(ii) Interest of (i) above at the rate of 26% per annum from 1 March 2002 up to the date of judgment

(iii) Interest on the decretal sum at the court's rate from the date of judgment till final settlement and

(iv) An order for sale and or vacant possession of the properties of the first defendant charged under the debenture

(v) Costs of the suits

(iv) Any other relief as the Honorable Court may deem just to grant

The plaintiffs are represented by Mr Kabakama, Advocate, while Professor Fimbo, Advocate, represents the defendants.

The plaintiffs called 2 witnesses-one Zollo (PW1), Credit Officer who also tendered Exhibit P1-8 and Mrindoko (PW2) who works with the plaintiffs, stationed at their head office, credit department and who tendered Exhibits 9 and 10.

The defendants called 2 witnesses one Muro (DW1), the first defendants' Managing Director who tendered Exhibit D1-9 and Lyimo (DW2), the first defendants' Director and Production Manager.

Issues framed during the final pretrial and scheduling conference are as follows:

1. Whether the first defendants owed the plaintiff shs 22,804 971 principal and Shillings 309 841 841 interest as at 28 February 2002 or whether the plaintiffs are estopped from asserting that there was any money owing as at 31 December 2000?

2. Whether the facility extended to first defendants attracted interest of TZS.309 841 841?

3. Whether the debenture dated 9 September 1994 is null and void

4. Whether by suing on the debenture and/or the covenant to pay, the plaintiffs discharged the second and third defendants from their obligation as guarantors under the guarantee dated 28 July 1997

5. Whether this court has jurisdiction to grant Plaintiffs' prayer for "an order of sale and or vacant possession of the properties of the first defendants charged under the debenture" in view of section 167 of Land Act Number 4 of 1999?

In this controversy, key elements are not disputed. The following stand uncontroverted.

Vide Exhibit P1 (a letter of offer) the plaintiffs offered to the first defendants a renewal of an overdraft facility in the sum of TZS. 200 million for a period of 12 months, expiring on 18 December 1997. The offer was duly accepted and the facility was utilized accordingly.

Among the securities, included was a debenture created on the first defendants' assets as per debenture deed (Exhibit P2) and which was duly registered as a charge Exhibit P3 (Certificate of Registration). Also, the second and third defendants provided personal guarantees as per Exhibit P4 (a guarantee deed dated 28 July 1997) which they both signed. Also, as per Exhibit D2 (mortgage Deed), the first defendants, landed property on Plot Number 108, Industrial area, Mbezi (Dsm) with certificate of occupancy number 29968 (Exhibit D1) was mortgaged. It transpired however that the facility was not serviced as required such that by 27 June 2000 (as per Exhibit P5, first defendants' statement of Account for the period of 1 January 1998 to 31 December 2000) the outstanding liability was TZS. 123 414 873-25 as principal sum while the interest was TZS. 165 013 103-45.

On the said date (27 June 2000), the Bank's Samora Branch charged off the liability by issuance of three vouchers, tendered collectively as Exhibit P6, making the account (Exhibit P5) to read "0.0" balance.

In a bid to recover the debt, the plaintiffs instructed IMMA, Advocates, who made a demand on 19 June 2001 by the letter as acknowledged by the first defendants' letter (Exhibit P10) dated 3 August 2001 and subsequently, by further demand notices, Exhibit P7 and P8, both dated 12 April 2002.

Between 13 November 2000 and 6 November 2001, as per the Bank statement, (Exhibit P9), the first defendant paid onto the account a total of TZS.100 609 901-90 (TZS. 2 000 000 on 13 November 2000 +2 063 072-00 on 28 May 2001 +82 646 829-90 on 7 August 2001 +3 900 000-00 on 7 March 2001 +10 000 000-00 on 6 November 2001). The said Exhibit P9 indicates that by 31 December 2001 the outstanding liability was TZS. 22 804 971-35 as a principal sum andTZS.288 755 587-64 as interest, all totaling toTZS.311 560 552-99.

Now, for the contested part. As already indicated, the center of contention is very fine indeed.

The defendants urge that the moment the Bank wrote off the debt, their liability got discharged. DW1 insisted that Bank officials told him that the liability had been discharged and referred to representations allegedly made to him by one Byeshulilo. On this, part of his testimony runs as under:

> Removal from the balance sheet means removal from liabilities. Shortly before removal there was an asset. This is TZS. 288 427 976-70. This was a property to the Company. Before removal it should be on assets side of NBC. This is earmarked to be receivable. Accounts receivable are any monies that are given to creditors and then looking forward to receiving them notwithstanding uncertainty. Once it is removed from the balance sheet it becomes no asset.
>
> To my knowledge one gets tax relief once you declare it to be a loss. This is an International Standard...
>
> This is a letter dated 7 August 2000. It is a demand notice. The figure is TZS. 288 427 977 being the principal sum together with accrued interest. It is signed by one Joseph M. Byeshulilo.
>
> *On receipt of the letter, I immediately contacted Joseph who gave me details that the debt had been written off. This was in his office, NBC head office. That's when I first knew that NBC had decided to write off the debt. This was a relief on our operations. We knew that NBC had decided to assist businesses instead of killing them. We would be able to operate fully without liabilities hence with a better balance sheet.* [emphasis supplied]

That was during examination in Chief. In cross examination, DW1 went on:

> I received a demand notice on 9 August 2000 from NBC. We had a liability to the Bank at the time (witness shown Exhibit P6). We had already discussed the possibilities of debt compression or reduction on interest and that's when Joseph told me that the debt had been written off.

DW1 also challenges the rate of interest. On this he had the following to say (after making reference to paragraph 5 of the plaint):

> This shows that the principal sum was TZS. 22 804 971 while the interest was 309 841 841. *What I can say is that the rate of interest is absurd.* Overdrafts attract fluctuating interest and at one stage interest was 35% *The interest here far exceeds the principal contrary to any business practice.* [emphasis supplied]

And, Professor Fimbo, in his final submission, very strenuously expanded the arguments by insisting that the Plaintiffs having written off the debt, they are estopped from lodging the present claims. The Prof. making reference to the Banking and Financial Institutions Act (Number12 of 1991), sections 15 and 16, urged that the banks or financial institutions have to make provisions for bad, doubtful debts and losses which is a public duty and after which they would get tax reliefs in terms of section 16 of the Income Tax Act (Number 33 of 1973) and that therefore under the estoppel principle of law enunciated under section123 of the Law of Evidence Act 1967, no claim, as the current one, can be lodged. He also made reference to *Nurdin Bandali v. Lombank Tanganyika Ltd.* (1) *Bank of Uganda v. Banco Arabe Espanol* (2).

On interest, in the alternative, Prof. Fimbo argued that TZS. 22 804 971 as principal sum to attract TZS. 309 841 841 as interest is extortionate and illegal as the rate would be 1,386.66.% per annum.

And yet still, the Professor fronted another argument – that the court has no power to grant prayer (iv) because, first, the Bank could only proceed by appointing a Receiver and Manager as per the provisions of the Debenture deed (Exhibit P2), making reference to *Shinyanga Regional Trading Co. Ltd and another v. National Bank Commerce* (3) (but failed to provide a proper citation), and secondly, because secion167 of the Land Act Number 4 of 1999, grants exclusive jurisdiction on land matters to named courts other than the High Court, Commercial Division.

Finally, the Prof. argued that by suing the second and third defendants as guarantors, secondary securities, before proceeding on the primary

securities of the first defendants as per debenture, the said second and third defendants are deemed to have discharged and made reference to *Reid v. National Bank of Commerce* (4).

On the other hand in his final submissions, Mr Kabakama for the plaintiffs maintained that the existence of liability has not been challenged; that the writing off of the debt was just an internal matter as per Bank of Tanzania Guidelines (Guidelines on Management of Risks, Assets classification of Loans and other Risk Assets, Provisioning for losses and Accrual of interest) in operation since 1991 and finally gazetted on 9 March 2001 under G.N. 38 of 2001 as Management of Risk Assets Regulations, 2001, whose objective is to have "probable losses" kept off the balance sheet to avoid overstatement of income but not to exonerate liability from holders; that defendants could not have been orally notified of no longer being liable as these alleged oral representations would over-ride the terms of written contract, making reference to *Jacob vs Batana and Generals Plantations Trust* (5) and **Cheshire and Fifoot's Law of Contact**, (10 ed) Butterworths, 1981, at page 107 and **Sarkar on Evidence**, Volume 1, (14 ed). at page 1212; that the principle of estoppel is inapplicable as it cannot be used to stop one from asserting his rights, again making reference to **Sarkar on Evidence**, Volume 2, page 1559; that the debenture stands valid and discharged whether or not the execution mode is made through the court; that this division of the High Court is seized with jurisdiction in terms of rule 5 A and 2 of the High Court Registries (Amendment) Rules 1999 (G.N. 141 of 1999 as the relationship between the parties inclusive of executions and enforcement of the debenture, fall under the item (iv) of rule 2 because it is the liability of a commercial or business organization or its officials arising out of its activity and that in terms of clause 2 of Exhibit P2 the entire assets of the Company were encumbered and not confined to land.

Mr Kabakama insisted further that while the plaintiff could appoint a Receiver and Manager without using the court, the latters jurisdiction is not ousted and that it is proper to sue the first defendants together

with second and third defendants as guarantors to avoid "multiplicity of recovery procedures on a single credit transaction" and made reference to Bradgate, R., **Commercial Law**, (2 ed) Butterworths at page 433. Mr Kabakama insisted that the alleged discharge by the second and third defendants is unknown in law because in terms of clause 1 of Exhibit P4 and section 80 of Law of Contract Ordinace, these defendants are either solely or jointly liable with the first defendants hence there is no question of primary or secondary security, distinguishing the *Reid* case in the process. Now for the merits.

During the composition of this judgment I have found it necessary to rephrase the issues as empowered in terms of Order XIV, rule 5 of the Civil Procedure Code, which permit the court at any time before passing a decree to amend, frame or add an issue or strike out any issue that appear to be wrongly framed or introduced. Thus, issue one is broken into the following issues:

1. Whether the plaintiffs' writing off of the debt from the Samora Branch books on 27 June 2000 discharged the defendants from liability hence plaintiffs are estopped from any further claim?

2. If the answer is in the negative, whether the first defendants owed the plaintiffs TZS. 22 804 971 as principal sum and TZS. 309 841 841 as interest as of 28 February 2002?

In view of issue one as rephrased the current issue 2 is superfluous. It is accordingly struck out. The current issues 3 and 5 are maintained but issue four is rephrased

Issues now appear as follows. Apart from the new issue 1 and 2 reflected just above, issue 3 reads:

3. Whether action could be commenced on guarantors only after recovery by way of realization of debenture had failed to discharge the liability and whether suing simultaneously the two guarantors and first defendants on debenture discharged the said second and third defendants' liability.

The current issue 5 becomes issue 4 while a new issue 5 is framed as follows:

5. To what reliefs are parties entitled?

Starting with issue 1, with respect to Prof. Fimbo and DW1, this can only attract a negative answer.

PW1 stated categorically and unchallengedly that the writing off of a debt was just an internal matter. He deposed.

> Procedurally, if facility remains unserviced for a long time in the bank balance sheet, we remove the debt and transfer it to the off-balance sheet. Thus, on 27/6/2000 we charged off the said account. We debited Bank's books and credited the customers
>
> ...Thereafter the debt was transferred to the Bank's head office for intensive recovery follow-up. Thereafter, we in the branch we were being informed of steps being taken. We were then informed that the matter has been handed over to our lawyer

Under the Professor's rigorous cross-examination, PW1 reiterated the position thus,

> We have not written off the debt and we did not so inform the lawyers. We have never informed the customer that the debt had been written off. It was not written off but removed from the balance sheet. I have never told the customer that the debt had been written off.

Apart from the above-unchallenged testimony, if what the defendants allege was correct, as rightly submitted by MrKabakama, it would have sounded odd in that the plaintiffs would have varied the terms of written contract, verbally.

Although DW1 stated that one Byeshulilo (already quoted) and Derek are the ones who told him that the liability has been discharged, his other part of the testimony is incompatible with the allegation.

> I also had discussion with Derek Velliers. This was a person dealing with debt collection in NBC, the new Bank. This was his office at the headquarters. He said that we should give him 50 millions before anything otherwise he would allow dogs. Those were his words. It is immediately after receiving the letter from Joseph.

Now, if indeed he had earlier on been informed that they are no longer liable as the debt had been written off what then had he visited the said office for? Of course, I do appreciate that these are public offices hence can be visited by any person. However, in this situation, DW1 does not tell us what the mission of his visit was. More surprising however, he does not tell us how the discussion went on and whether he challenged Derek, and what the outcome was. A person of DW1's caliber and who was informed and believed that the liability was no longer in existence could not simply stomach Derek's statement. In the circumstances, I am satisfied that he knew then, as he has all long known, that the liability still existed.

The above apart, if indeed he had been notified of the extinction of the liability shortly after 10 August 2000, when he was alleged to have met Byeshulilo which is said to have been immediately after receiving the demand letter of 10 August 2000, common sense can not give the type of allowance fronted; that he (DW1) could have proceeded to author Exhibit P10 dated 3 August 2001 (almost a year later) with the following contents:

RE: OUTSTANDING ACCOUNT WITH NBC LTD

Please refer to your letter dated 19 June 2001 Ref Number IMMA/NBC/UEH regarding the above captured subject.

1. Universal Electronics and Hardwire (T) Limited (Universal) is glad to inform NBC that the government has finally paid Universal TZS.82 646 829-90 (Eight Two Million Six Hundreds Forty Six Thousand Eight Hundred Twenty Nine Cents Ninety Only). This amount was owed to Universal by the Government since1997

   As mentioned in several discussions between NBC and universal, the overdraft facility was used to cover Government obligation in Kisarawe Brick Factory (KIBRICO) owned 70% (Universal) and 30% (Government) on pro-rata basis. Consequently, both the Government and Universal have agreed that the Government makes the payment to NBC directly.

Both the Government represented by (PSRC) and Universal will be grateful if NBC will acknowledge receipt of the enclosed payment of TZS. 82 646 829-90(PSRC Cheque Number 000511 National Micro Finance Bank, Bank House Branch) and relieve Universal's liability to NBC accordingly.

2. Universal is requesting NBC for an appointment to discuss the repayment

Arrangement of the balance due once the above-mentioned cheque has been cleared.

Finally, Universal wishes to thank NBC For their patience and understanding in this issue.

Yours truly,

UNIVERSAL ELECTRONICS AND HARDWARE LTD

E.E.MURO

MANAGING DIRECTOR

"Encls" PSRC Cheque Number 000511 National Micro Finance Bank,

- Bank Branch Branch.
- Letter from IMMA Advocate-Ref. Number

IMMMA/NBC/UEH

c.c. The Executive chairman

PSRC

Dar es Salaam

Attn: MrTemba

Mr W.L. Nyachia

The Treasurer Registrar

Ministry of Finance

Dar es salaam.

Mr Derek De Villiers

NBC Limited

Dar es Salaam.

Further to above, if they knew that the debt no longer existed as early as august 2000 why then go servicing the same such that between 13 November 2000 and 6 November 2001 they paid a total of TZS.100 609 901.90, and why, in terms of clause 2, on the last page of Exhibit10 (quoted), pray to have discussion held on repayment? The totality of the above is incompatible with what the defendants are trying to impress.

On the whole, on facts alone, I am satisfied that no one ever represented to defendants that they are no longer liable stating from 27 June 2000. I am satisfied further that the writing off of the debt was just an internal mechanism intended to clear their books to discharge debtors from liability. And, legally, this was allowable by the Bank's Guidelines, which is rightly explained by Mr Kabakama, were finally gazetted vide G.N. Number 38 of 2001. Under these guidelines, while providing for debt or loss write offs, they don't discharge customers' liabilities as such as they are categorical that there may be partial future recoveries. defendants were never cleared of the liability.

With this finding, breath should not be wasted discussion the patently inapplicable principle of estoppel.

We turn to issue 2. Also, on the evidence available this should be answered positively. PW1 and PW2 tendered ExhibitS P5 and P9, statement of Accounts which indicate the extent of the defendants' liability and which the latter never legally challenged. I should hurriedly add that the denials leveled here and there in Prof. Fimbo's final submission is of no effect as a final submission is not evidence.

Exhibit P5 is a statement for the period between 1 January 1998 and 31 December 2000, indicating withdrawals, commissions and interests. It indicates the status when the internal write-off was effected.

The defendants do not challenge the computation. They in fact adopt it because they rely on "0.0" balance indicated thereon.

Exhibit P9 is a summary statement of an account, which PW2 described thus,

> This is a statement of Account of 1st defendant for the period of 13 November 2000 -29 February 2004. This is for account number 126513000042, maintained at the head office, originating from Samora Branch, collection Unit.

This Exhibit shows how the liability progressed since 13 November 2000. As of 28 February 2002 it is indicated that the owing principal sum was TZS. 22 804 971-35 while interest was 301 986 882-58.

Again the defendants did not front any challenging evidence apart from DW1's branding of the interest amount as "absurd" and which charge I will shortly demonstrate as unjustified.

Now, in terms of the law, the onus swung to the defendants to tilt it and erect otherwise. However, both DW1 and DW2 close their respective testimonies without tilting the balance. The brief cry by DW1, supported by Prof. Fimbo in his submission that the interest charged is illegal don't advance their case as much as they simply fly over in the face of the evidence offered by the plaintiffs. With respect, Professor and DW1 seem to misconceive facts. I fail to see where they gather the assertion that the interest indicated is computed on 22 million as principal.

The plaint is very categorical that the overdraft facility was TZS. 200 million. It is trite law that in construing the claim the plaint should not be segmented but read as whole. Thus paragraph 5 of the plaint should not be read in isolation. Read as a whole, the plaint leaves no one in doubt that shs 200 million was utilized by first defendants and that this is the basis of the claim for the outstanding of TZS. 22 804 971 as principal andTZS. 332 646 812 as interest (*sic*) as of 28 February 2002. The picture of deductions is verified by Exhibit P.9 which shows that on the 13/11/2000 the principal sum was TZS. 121 413 873-25 while the interest wasTZS. 189 873

224-39 and that after the five deposits made by first defendants (and already referred to) between 13 November 2000 and 6 November 2001, including the shs 82 646 829-90 referred to in Exhibit P10, the liability had gone down as per figures reflected for 28 February 2002. And , P1 clearly shows that the interest rate chargeable was 28% p.a. while a penalty "interest of 5% p.a. above the normal rate" was to "be charged in all excesses created without prior arrangements and on expired limit". The Defendants' complaint on interest therefore is without support.

Treading on Exhibit P9 however, the amount due as on 28 February 2000 was TZS. 22 804 971-35 as principal and TZS. 309 841 841 as interest as claimed. However, as a party should not be awarded what he has not claimed, the liability under issue two is decreed to be TZS. 22 804 971 on principal. On interest, as the sum claimed is above that established by evidence (Exhibit P9) it is decreed that the interest due was TZS. 301 986 882-58.

We turn to issue 3. With respect to Professor Fimbo, the argument pegged on primary and secondary securities does not apply in this situation. As rightly stated by the Plaintiffs' Counsel section 80 of the Law of Contract Ordinance which provides:

> The liability of the surety is co-extensive with that of the principal debtor, unless provided by the contract

read together with clause I of Exhibit P4 which reads:

> We the undersigned hereby guarantee to you the payment of and undertake on demand in writing made on the undersigned by you or... an authorized agent to pay to you all sums of money which may now be or which hereafter may from time to time become due or owing to you anywhere from or by the Principal either as principal or surety and either solely or jointly with any other person...

do not permit the arguments presented to stand. The terms of the contract stand against what is urged by Prof. Fimbo. Thus, the second and third defendants have not been discharged from the liability by the Plaintiffs' failure to exercise the options provided under Exhibit P2.

On issue four, I should only say that section 167 of the Land Act is not applicable. The said provision provides:

> Section 157(1) The following courts are hereby vested with exclusive jurisdiction, subject to the provisions of this part, to hear and determine all manner of disputes, actions and proceedings concerning land, that is to say:
>
> (a) The Court of Appeal
>
> (b) The Land Division of the High Court established in accordance with law for time being in force for establishing courts divisions:
>
> (c) The District Land and Housing Tribunals:
>
> (d) Ward tribunals;
>
> (e) Village Land Councils

In my considered view, the action before us does not concern land as such. What is before us is an action, concerning a commercial transaction whereby first defendants received a facility which they did not service and they are now being sued for its recovery. The question of realization of a debenture or mortgage is just ancillary to the action and this comes into play once the main action has been decreed in favour of the Plaintiffs. In my view, in enacting section 167, the Legislature had in mind an action which centers on land, pure and simple. Thus, I hold that this court has jurisdiction. And, I should add that in the early stages of this matter the Professor had raised a general preliminary objection that this court had no jurisdiction to no avail.

Finally, we come to reliefs. This follows the consequences of the findings made. Judgment is entered in favour of the Plaintiffs as per prayers' paragraph (i) and (ii) with a qualification that the interest sum to which the Plaintiffs are entitled is TZS.301 986 882-58 as established by evidence, bringing the sum awarded to shs. 324 791 853-93 (TZS. 22 804,971 35 + 301 986 882-58) instead

of TZS. 332 646 812. On prayer (iii), the decretal sum to attract 7% interest from the date of judgment till payment in full. Prayer (iv) to be invoked in the event the decretal sum is not paid. Defendants are also condemned in costs.

NATIONAL BANK OF COMMERCE v. WAKULIMA ENGENEERING COMPANY AND TWO OTHERS

HIGH COURT OF TANZANIA
(Commercial Division)
AT DAR ES SALAAM
(Dr Bwana, J.)

COMMERCIAL CASE No. 114 OF 2002

Banking law – Loan facility – Loan Agreement not stating whether interest to be charged is "simple interest" but the bank charges "compound interest" – Whether the charging of compound interest is lawful.

Banking – Loan facility – Compound interest charged on loan facility – Compound interest defined.

On 10 December 1990 the plaintiff granted to the first defendant a loan facility of TZS. 12 900 000 on such terms and conditions as stated in the Loan Agreement. On 28 May 1992 an additional loan of TZS. 11 000 000 was granted. To secure the loan the first defendant mortgaged its property on Plot Number 135 Block "E" Unga Limited Arusha in favour of the plaintiff. Both the second and third defendants severally and jointly guaranteed the loan by executing a deed of guarantee on 6 June 1992. The defendants defaulted to pay interest on the loan. In their defence the defendants contended that the plaintiff was charging them compound interest instead of simple interest.

Held: (i) Compound interest is interest charged on interest;