

IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CIVIL CASE No. 161 OF 2017

PRISTINE PROPERTIES LIMITED.....1st PLAINTIFF

MUSLIM SHIVJI KARIM.....2nd PLAINTIFF

GULAM MOHAMEDALI PUNJANI.....3rd PLAINTIFF

SABRI ALLY SAAAD.....4th PLAINTIFF

Versus

ECOBANK TANZANIA LTD.....DEFENDANT

JUDGEMENT

5th November- 19th December, 2019

J. A. DE- MELLO J;

The Plaintiff is seeking for **Specific Performance** compelling the Defendant to abide by its **contractual obligations** under the loan agreement dated **13th October, 2015**, let alone other commitment subsequently by converting the loan into **United State Dollars** and the drawdown made between the **December, 2015** and **December 2016**, to enable the **1st Plaintiff** pay the loan, and **General Damages**. Briefly, the cause of action arose out of a loan agreement amounting to United State Dollar Three millions (**USD \$ 3,000,000**) approximately to **TShs.**

6,600,000,000/ = billion entered between the **1st Plaintiff** through the **2nd** and, **3rd Plaintiff** in which the Defendant had agreed to offer the above mentioned loan to the **1st Plaintiff in USD \$**. However, when it came to the performance of the terms of the contract the Defendant refused to release the said loan in **USD \$ Dollars** leading the Plaintiff to pay the drawdown at high interest rate. Similarly, was with the remaining balance loan despite the compliance by the Plaintiffs to all conditions preferred by the defendant as to security towards the loan.

Following failure to file the **Written Statement of Defense Out of Time**, the same was expunged from the record and, hence the matter proceeded Ex Parte.

Counsel Ashuru appeared for both the Plaintiffs and the following issues were framed as hereunder;

- 1. Whether the Defendant breached the Loan Agreement of 13th October, 2015?**
- 2. Whether the Plaintiffs are entitled to General Damages?**
- 3. What are the Reliefs the Parties are entitled?**

Only one witness summoned to prove the claim, none other than. **PWI, Gulamm Punja**, who introduced himself as one of the shareholders and also the Director of the **1st Plaintiff**, testified how the Defendant breached the contract between the two on **13th October, 2015**, abruptly ending the loan negatively impacting on the Plaintiffs' projects negatively, based on as the offer of a loan amounting **United State Dollars 3,000,000**,

(USD \$ Three million). Exhibit P1 the offer document, was tendered, admitted and, marked as. However, while in the process of executing the loan agreement, the Defendant informed the **1st Plaintiff** that he is constrained by not having limited **USD \$ currency** requesting the **1st Plaintiff** to temporarily accept two disbursement of **USD \$ 2,100,000 (equivalent to Tanzanian shillings) and USD \$ 900,000** for **Letter Of Credit** to be converted to **USD \$ currency** as soon the Defendant receives finances, disregarding the truth that the **1st Plaintiff's** sales and income were in **USD \$ currency**. E-mail correspondence to that effect was tendered and admitted in Court as **exhibit P2**. In so doing, **PW1** testified further that the disbursement in Tanzanian Shillings caused the **1st Plaintiff** to **pay 19% interest rate** instead of **8% in USD** that had earlier been agreed. Following pressure from supplier and service provider, the Plaintiff hesitantly agreed to drawdown the loan of **USD 2.1 millions in TShs**, believing it to be a temporary measure that will soon acquire its original **USD currency form**. While complying to all this and, hoping for resuming to their earlier agreement, notwithstanding payment of interest. Surprisingly, together with his co-co plaintiffs came to learn that the whole amount of **USD \$ 2.1 millions** and, the outstanding **USD \$ 900,000 Letter of Credit** were to be issued on **November, 2016** instead on **September, 2016**, again breach towards this delay, and, which affected their projects badly. On **17th January, 2016** the Defendant turned another deaf ear by not committing to promise to release the remaining loan balance and in full by nothing more nothing less than USD. To buttress this argument, he tendered another e-mail communication between the

Plaintiffs and the Defendants on the same which was collectively admitted as **exhibit P4**.

In the final written submissions **Counsel Bushiru**, added that, the Defendant unreasonably, unjustifiably and contrary to their initial representation and /or promises refused the **1st Plaintiff's** request to restructure the loan so that it can be settled in **USD \$**, much as the Plaintiff was willing to settle the areas.

I have gone through the submissions and which calls me to dispose the two issues framed, and, in absence of the Defendants by the plaintiff

The **1st issue** is **whether the defendant breached the Loan Agreement of 13th October, 2015**.

I have gone through the Court records, the evidence adduced by this only one Plaintiff's witness and satisfied that the **Loan agreement of 13th October, 2015** referred by the Plaintiff and, which I find to be central and the root cause to this dispute is nowhere to be found as it was even not tendered, for admission as evidence. It is the principle of law in Civil matters that, the onus of proof is one who alleges must prove. Since the Plaintiffs relied on the Loan Agreement dated **13th October 2015**, and one claiming that the defendant has breached that same, contract, it was its duty to prove the existence of that Loan Agreement detailing the terms and which had allegedly been violated. This duty to the plaintiffs is imposed by section **110 (1)** of the **Law of Evidence Act Cap. 6 R.E** imposes that duty which states that:

“Whoever desires any Court to give Judgment as any legal right or liability dependent on the existence of facts which he asserts must prove that fact exist”

In the absence of the said loan agreement, this Court finds nothing to that end, not even breach by the Defendant as alleged by the Plaintiff. The same goes for the **2nd issue** as to **whether the plaintiffs are entitled to General Damages**, which in accordance to the Credit Letter Facility of **30th June, 2015**, admitted as **exhibit P1**. Parties to this suit agreed to disbursement of the loan in Tanzanian Shillings but at the value equivalent to **United States Dollars**, the reason more why the plaintiffs were requesting the Defendant to restructure the Loan Agreement, including the drawdown. **Paragraph 18 & 20** of the Plaintiff communicates louder to this effect. Through the email communication thus **exhibit P4**, and satisfied myself that, there was no firm commitment on the Defendant's side to the effect of changing the terms of the above credit facility of **30th June, 2015**, other than offering a blank promise that it will be considered. This then draws our attention, **section 101(1) of The Law of Evidence Act, Cap. 6 R.E 2002** provides the same as here under

“101(1) when the terms of contract, grants ,or any other disposition of property has been reduced to the form of document and in all cases in which any matter is required by the law to be reduced to the form of the document, no evidence shall be given in proof of the terms of such contract grants ,or any other disposition of property or of given matter except the document itself or secondary evidence of its contents in cases in which

secondary evidence is admissible under the provision under this act."

In the absence of the above, there was no legal duty on the Defendant's part to disburse the Credit Letter facility of **30th June, 2015** in **USD**, to the extent of agreeing with the Plaintiff's as alleged. No suffering, loss or otherwise has however been occasioned by the Defendant and if at all, then its on the Plaintiffs own fault.

With regards to the **3rd issue**, as to Relief(s) in the **absence of breach**, and with no general damages suffered, no relief is justifiable.

With that note, I find this suit has no merit and, is dismissed in its entirety, with no orders as to costs, owing to the misconception by the Plaintiff.



J. A. DE-MELLO

JUDGE

19/12/2019