

IN THE HIGH COURT OF TANZANIA

AT SONGEA

CIVIL CASE NO. 07 OF 2019

VUMILIA SIMON MZENA PLAINTIFF

VERSUS

NBC LIMITED DEFENDANT

JUDGMENT

Date of Last Order: 2/10/2020

Date of Judgment: 27/10/2020

BEFORE: S.C.MOSHI, J

The plaintiff is a customer of the respondent. On 23rd January, 2014 she applied for an overdraft facility of T.shs. 100,000,000/= from the respondent. The facility was varied from time to time. On 20th December 2017 the overdraft facility of T.shs. 120,000,000/= was converted to a term loan following plaintiff's negative business trend and health problems. She stated that she notified the respondent about the above fact as per clause 15 (c) of the Loan agreement. The respondent didn't reply hence this case. The plaintiff with the assistance of her advocate Mr. E.O Mbogoro sued the defendant seeking judgment and decree, as follows:

I. A declaration that the defendant is in breach of clause 15(c) of the loan agreement.

II. An order for specific performance of clause 15(c) of the Loan agreement.

III. Costs of this suit

IV. Any other or further relief(s) as this court might deem fit and just to grant.

The defendant filed a written statement of defence disputing the plaintiff's claims. It was represented by Mr. Mugwe Kitara and Ms. Rashida J. Hussein. Before commencement of hearing the following four issues were framed:-

- 1. Whether the defendant is in breach of the loan agreement*
- 2. Whether the defendant is in breach of clause 15(c) of the agreement.*
- 3. If the answer to issue number 2 is in the affirmative, whether the plaintiff is entitled to specific performance of clause 15 (c) of the loan agreement.*
- 4. To what reliefs are the parties entitled to.*

At the hearing of the suit the plaintiff Vumilia S. Mzena was the sole witness who testified as PW1, she was led by Mr. E. Mbogoro, advocate.

She among other things said that, she is a business woman having a hardware shop. She obtained a loan of 30 million from the respondent through Account No. 023101003030 to run her business in 2008. It was an overdraft, she succeeded to service the same and again, in 2017 she was given an overdraft again of T.shs. 120,000,000/= and T.shs. 240,000,000/=. She used to service 2m per month, later 2.5 per month and later on 3m per month up to 2019 June, when her business deteriorated as builders weren't buying hardware at town center where the plaintiff shop is located, rather to hardware shops built in the outskirts.

She stated further that, she successfully applied for a loan to be converted to term loan following negative business trend and health problems as a lot of time was spent in hospital for check – up and treatment, documents evidencing conversion of a loan and medical chits were admitted as Exhibit. P1 and Exhibit. P2 respectively.

She said that, she informed the respondent concerning the deteriorating status of the business in writing, the notice admitted as exhibit P.3. She notified the respondent basing on the contract, item 15(c) which states that if there's any problem; one should notify the other party. The respondent did not reply, as expected by the plaintiff,

she anticipated that they could have met in view of item 15(c) and agree on way forward instead of threatening to sell the security.

Since there was no response the plaintiff decided to refer the matter to court vide this case. She prayed the court to order the Bank to waive interest, reduce the monthly repayment to one million and order them to meet with her and negotiate.

During cross examination by Ms. Rashida she stated that they signed exhibit P1 1 on 2/1/2018, whereby she was supposed to repay T.shs. 300,000,000/= from 1/8/2018. She was supposed to complete servicing the loan in 5 years. Payment was made from August, 2018 to June, 2019. Thereafter she failed to repay because she was admitted. The respondent threatened her that they would sell the mortgaged house. In June, 2018 she was reminded to repay, she delayed to pay a monthly payment for about 3 days only. She started paying T.shs. 3million on 30/8/2018. She couldn't pay back the 3 million monthly payments due to sickness. The respondent gave her the loan because she showed her business. When she fell sick the business stopped and the shop was closed. She said that, when the respondent was reminding her through telephone, they used to tell her that they would sell the property.

When was she cross examined by Mr. Mugwe, advocate for the respondent stated that Item 15(c) doesn't state that if the business deteriorates or if she feels sick parties will vary the terms. The fact that they would have to negotiate the terms is her interpretation, the agreement showed that if PW1 fail to repay/service in time the security would be sold.

She stated further that Ignorance of law is a defence. She didn't call the Tanzania Revenue Authority (TRA) official to prove that business wasn't doing well. The respondent started to notify the plaintiff of the default before the plaintiff notified it.

Upon re-examination by Mr. Mbogoro, she said that there was a special date for making payment. Even if you delay to pay for a single day you are in default. The notice given to Pw1 was after she delayed to pay for five days. It could be meaningless if item 15(c) did not intend to make the parties meet for settling the issues following parties failure to meet obligation.

That was the end of the evidence of the plaintiff's case.

On the other side the defence called one witness, Chuwa Danies Sekwao NBC debt recovery department officer whose main duty is stated that to make sure that none performing loan debts are recovered. He *inter alia* stated that the plaintiff is their long term client; her loan

was categorized as non performing loan. The plaintiff secured the loan by a house title deed. They prepared a mortgage deed; the title deed and mortgage deed were admitted as exhibit D1 and D2 respectively. They had a contract of guarantee and affidavit (exhibit D3). After that the parties entered into a loan contract in December, 2017 (exhibit P1).

He testified further that a credit facility may change when there's challenge in repayment within first 90 days, the bank may renegotiate with the client. It may change from overdraft to term – loan, depending on the business trend. The plaintiff's loan was converted to term loan to curb the challenges she faced in servicing the loan. She was advanced a T.shs. 120,000,000/= loan and was supposed to pay back T.shs. 3,912,220.27 per month. She did not service as agreed. She was advised through a telephone, visitation and was given notice. Then they started recovery procedure vide the security property. A 60 days' notice was issued in June, 2018. However the sixty days expired, they continued to communicate with the plaintiff. Thereafter the respondent started to auction the mortgaged property as all other ways to recover the loan were futile.

A client may fail to repay the loan due to various reasons such as accidents as fire, theft, clients' health, client's own personal wish and misuse of loan fund. They normally negotiate with the client and

restructure the loan. However when all efforts fail, recovery of the loan is through auction.

He further said that, Item 15(c) of exhibit P.1 provides for the duty to notify in case of other circumstances. The object of this item is to allow the client, in case of challenges to notify the respondent and see possibility of restructuring the loan. This item is not an excuse for not servicing the loan.

He prayed the court to dismiss the case and allow them to proceed with auction of the security.

Upon being cross examined by Mr. Mbogoro, he said that he recalls that the plaintiff has been their customer since 2009, Item 15 (c) does not excuse the client from paying back the loan. Parties may re – negotiate; loan agreement may change from overdraft facility to term loan.

The plaintiff was servicing a lesser amount even after she defaulted and when they were in the recovery process, they do not threaten the clients rather they advise them. In this case, the plaintiff was advised to change the facility loan to term loan. They visited her and educated her on the implication of not paying back the loan, the implication on the security. Auctioneers come in during the auction.

During re-examination he said that it is the client's duty to know the nature of business she is doing, the bank's duty is to satisfy itself if the business is a float, there is no evidence that the plaintiff was sick, and he doesn't think that health problem is a reason for default. Whether the plaintiff is a long term client or otherwise, she is duty bound to repay the loan.

That was it from both parties.

Counsels for the parties were allowed to file final written submissions; they duly filed them as ordered. I have considered the submissions in relation to the evidence which was adduced.

Now reverting back to the issues:-

Starting with the first issue, it is evident that the defendant didn't breach the contract rather it was the plaintiff who breached the contract. This is vividly shown in the evidence given by both parties. The plaintiff's testimony shows that in 2017 to 2018 her business deteriorated and she had health problems hence she did not service the loan as per agreement. This necessitated her to notify the defendant via her letter dated 10th July 2019 which was admitted as exhibit P3. It is not disputed that the notice letter was written after being served with the statutory notice reminding her in servicing loan. Therefore at the time when exhibit P.3 was written the plaintiff was already in default.

In regard to the second issue, that is whether the defendant is in breach of clause 15 (c) of the loan agreement, it is apparent that the defendant is not in breach of the said clause, as indicated above, by the time the plaintiff wrote the letter informing the defendant regarding the problem she was facing on her business, she was already in breach of the loan agreement. Reading through the loan agreement there is no provision which provides for renegotiation in case the borrower is facing problems with his business or otherwise in the repayment of the loan after default.

Clause 15 (c) of the loan agreement which reads thus:-

"Duty to notify each other in the event of circumstances beyond control.

-You must notify us immediately when you become aware of any circumstances that may affect your ability to meet your obligations under this agreement, the security additional security or other documents related to your term loan.

-We agree that in case there are matters beyond our control which may lead to no provision of services we shall notify you through reasonable means of communications, including but not limited to, Tv, radio, newspaper, social , media, electronic media and mail".

My interpretation of the above clause is that a party to the loan agreement who thinks that there are matters beyond her control has to notify the other party before the default and not otherwise. Therefore the plaintiff was duty bound to notify the defendant in 2017-2018 when he faced health problems and her business started to deteriorate. It is my conviction that, informing the defendant in 2019 and after being served with the statutory notice is an afterthought, evidencing that she didn't act in good faith per the terms they agreed when signing the loan agreement.

On the third issue, it is my considered view that the prayer sought by the plaintiff of a specific performance of a loan agreement has been overtaken by event, following the statutory notice of 60 days issued to the plaintiff on 12th June 2018. She wrote a letter which is the basis for her to seek this relief under clause 15(c) of the loan agreement after a year had lapsed since the statutory 60 days notice was issued.

All in all, I find that the plaintiff has failed to prove the case on the required standard, that is on the balance of probabilities.

As the plaintiff failed to prove the claim, she is not entitled to any relief sought and there is no basis for restraining the defendant from enforcing the loan agreement in accordance with the terms of the loan agreement and the terms of the mortgage deed.

In the final analysis the suit is dismissed with costs in its entirety.

Right of appeal explained.




S. C. MOSHI

JUDGE

27/10/2020