

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL CASE NO. 182 OF 2018

FM COMMUNICATIONS LIMITED ----- 1ST PLAINTIFF

EMMANUEL MUSEE NKUMBI ----- 2ND PLAINTIFF

VERSUS

BANK OF AFRICA TANZANIA LIMITED ----- DEFENDANT

JUDGEMENT

Date of last Order: 15.07.2020

Date of Judgement: 04.12.2020

EBRAHIM, J.

The Plaintiffs, FM Communications Limited and Emmanuel Musee Nkumbi have instituted this suit claiming that on 27th July, 2015 the duo entered into a Memorandum of Understanding (MOU) where it was agreed that the property of the 2nd Plaintiff registered under Certificate of Title No. 101250, LO No. 253443, Plot No. 61 Wazo Area with estimated value of Tshs. 3,500,000,000 be used as a security for the loan. Following such arrangement, the 1st Plaintiff had on 15th February, 2016 and 1st March 2016 signed a facility letter with the

Defendant for Tshs. 1,200,000,000 in financing the contract with VIETTEL TANZANIA LIMITED (Halotel). In effecting their agreement, on 15th March 2016, the Defendant sent to VIETTEL Tanzania Ltd a Domiciliation Letter instructing Halotel to channel all payment in favour of the 1st Plaintiff into **account number 0523016005** as terms and conditions of extending the agreed credit facility to the 1st Plaintiff. In furtherance to their loan facility, on 1st April 2016, the Defendant paid CRDB Tshs. 210,259,723.98 as full payment of the outstanding loan by the 2nd Plaintiff for the purpose of releasing original Certificate of Title No. 101250, LO No. 253443, Plot No. 61, Wazo area, Kinondoni, Dar es Salaam. However, in the turn of events on 20th May, 2016, the 1st Plaintiff received a facility cancellation letter from the Defendant demanding immediate payment of TZS 305,000,000/-. The Plaintiffs claim that the cancellation was wrongful and prematurely done which caused the Plaintiffs to suffer loss and damages.

On being served with the plaint, the Defendant vigorously denied the claims levelled by the Plaintiffs. The Defendant admitted to the extent that she issued a facility letter on 15th February 2016. She contended however that the domiciliation letter could not be performed as it conflicts with the memorandum of understanding signed between

the Plaintiffs. The Defendant contended further that the Plaintiffs entered into an agreement with Viettel Tanzania Limited before issuance of the facility letter; and that the purpose of the loan was partly to liquidate the director's loan with CRDB and not any other person, a fact that was not disclosed by the Plaintiffs. She concluded therefore that the agreement provided for the conditions for the 1st Plaintiff to fulfil before scaling down the facility of which the 1st Plaintiff failed to do so. She prayed for the dismissal of the suit with costs.

In this case the Plaintiffs were represented by advocate Heri Kayunga. The Defendant had representation of three advocates beginning with advocate Karoli Tarimo assisted by advocate Mwang'enza Mapembe and on the last bit she was represented by advocate Peter Swai.

On 23rd June 2020 this court ordered parties to file their final submissions which I shall refer to them in the course of traversing substantive issues.

The following were issues for determination by the court;

1. Whether there was breach of the terms and conditions of the facility letter.

2. Whether the cancelation of the loan is a breach of the facility agreement by the Defendant.
3. If the answer on issue no. 2 above is on the affirmative, whether the Plaintiffs have suffered damages.
4. Whether the Defendants are entitled to compensation.
5. Whether the continued holding of the mortgaged properties is justified.
6. To what reliefs are parties entitled to.

In determining this case, I shall address the first and the second issues together.

The main issue in this case emanates from the undisputed fact that the Defendant cancelled the loan facility extended to the Plaintiffs.

In a bid to prove that the Defendant was in breach of the contract, **PW1, one Fadhili Maghembe**, the Managing Director of FM Communications Ltd told the court that in 2014, FM Communications secured various projects with Viettel (T) Ltd trading as Halotel. The projects included among other things construction of Telecommunication towers, to provide security to those towers, supply of fuel and maintenance. FM Communications (1st Plaintiff) therefore

joined with the 2nd Plaintiff as a mortgagor so as to raise big capital. It was thus agreed between the 1st and the 2nd Plaintiffs that FM Communications shall settle the loan that the 2nd Plaintiff had with CRDB. He tendered memorandum of understanding of 27.07.2015 between the 1st and the 2nd Plaintiffs as Exhibit "PE2". On September, 2015 the 1st Plaintiff signed a contract with Viettel (T) Limited - Exhibit "PE3". In February 2016, the 1st Plaintiff signed a facility Exhibit "PE4" with the Defendant for the amount of TZS 1.2 billion for operation or servicing the project of VIETTEL stated in "PE3". PW1 testified under oath that the property to be used as security for the signed facilities was attached at CRDB **as the 2nd Plaintiff had another loan with CRDB.** He said they informed the Defendant who issued a takeover letter to CRDB – Exhibit "PE5". He stated that in March, 2016 CRDB Bank responded that the 2nd Plaintiff owe Bank Tshs. 210 million Exhibit "PE6" of which the Defendant paid the same Exhibit "PE7"- Statement of Account No. 05230160005 at BOA and the title deed in the name of the 2nd Plaintiff was released to the Defendant. Then the mortgage with CT No. 101250 was issued and registered - Exhibit "PE8". In the facility letter one of the pre-disbursement condition put by the Defendant was the provision of domiciliation letter which was to be

signed by VIETTEL (T) Ltd. He stated further that their payments from Viettel were channelled through their account with the Defendant – Exhibit “PE9”. However, the Defendant did not disburse the remaining balance. Thus, both parties conducted a meeting on 18/05/2016 – Exhibit “PE10” and after the meeting the Defendant disbursed Tshs. 161,000,000/=. However, on 19/05/2016, the disbursement of Tshs. 161,000,000/= from the Defendant was reversed without reason and it was followed by a facility cancellation by a letter of 20/05/2019, stated PW1 – Exhibit “PE12”. He testified further that according to Exhibit “PE12”, the reason for cancellation was that the 2nd Plaintiff was dishonest. He testified that after the cancellation, the 1st Plaintiff could not attend 256 out of 374 sites. They only attended 118 sites which caused loss of revenue. He tendered Tax invoices which were admitted as Exhibits “PE14 and PE15”. PW1 tendered Business Plan to show the projected income which was received as Exhibit “PE16” and a notice of termination of contract from Viettel was admitted as Exhibit “PE17”. He thus prayed for specific and general damages on the basis that they lost revenue, their reputation was damaged and they lost revenue from indefinite project. He said however that despite the cancellation of facility by the Defendant, FM Communication Ltd

managed to secure more than 2.1 billion from Halotel. He tendered CRDB Bank Statements for FM Communications for the period between 29.12.2016 to 22.01.2017 and 01/01/2016 – 30/07/2019 - Exhibit "PE18"; and for the period between 01/01/2016 - 30/07/2019 in USD - Exhibit "PE19".

Responding to cross examination questions, PW1 admitted that the Memorandum of Understanding which was signed by FM Communications Ltd and Dr. Emmanuel Nkumbi was for repayment of the loan from CRDB. He admitted also **that the loan at CRDB was for Basihaya Campsite Ltd** whose Managing Director is Dr. Emmanuel Nkumbi and that Basihaya Company and Dr. Emmanuel Nkumbi are two different legal entities.

He agreed that part of the loan from the Defendant was to pay the loan of the Director of FM communications, Dr. Nkumbi at CRDB but at in Exhibit "PE2" Clause 4 it **mentions the loan to be paid is of Basihaya Campsite**. Upon being shown **Exhibit "PE4" – the loan agreement**, which was signed by PW1, Dr. Nkumbi and Ambassador Francis Mndolwa; the purpose of the Term loan facility of 800million was partly to liquidate the **director's loan with the CRDB who was Dr. Emmanuel Nkumbi**. He responded also that he told the Bank that

Dr. Emmanuel Nkumbi has a loan with CRDB and part of the loan shall liquidate that loan. He responded also that he does not see any difference between what was agreed in MOU that the loan shall repay the amount of Basihaya loan with CRDB and what was agreed with BOA that the loan shall pay director's loan of Dr. Nkumbi. He said the security for the loan was the house owned by Dr. Emmanuel Nkumbi **as agreed in MOU which there was no official communication that it was made available to the Defendant.** He stated also that the MOU was for the period of three years which started 5 months before the facility agreement with no option for renewal. He responded further that VIETTEL was channelling payment through CRDB FM Communication account whilst in the agreement between BOA and FM Communications it was agreed that the payment from VIETTEL shall be channelled through BOA account. He stated further that they set limitation that only payment for fuel supply, security services and generator maintenance were to go through BOA and the fact that FM Communication had an account with Equity Bank to channel other payments was not disclosed to BOA Bank. He responded further that they held meeting with the Defendant before cancellation on 18/05/2016 where the Defendant discussed the challenges they have

discovered in Plaintiffs' part. Among the business challenges discussed was **the disbursement of Tzs. 231 million sent to clear a loan of a company owned by a director** - Basihaya Campsite. Then the Defendant cancelled facility extended to FM Communication on the reason of dishonest of the guarantor.

Dr. Emmanuel Musee Nkumbi testified as PW2. He told the court that after PW1 has approached him seeking to put his property as collateral, he told him that his properties were at CRDB as he had secured a loan for operating business at Basihaya. PW2 testified further that PW1 told him that the Defendant do not allow a 3rd Party hence required PW2 to be the Director of FM communication so that they can secure a loan. Hence. The MOU was signed in 2015 with the conditions that he be given 10% of the shares; his loan liquidated at CRDB; and FM to pay for valuation cost of the properties. He said he was informed by the 1st Plaintiff in February, 2016 that they managed to secure a loan of 1.2 billion from BOA. Thereafter, the transfer of the collateral to BOA where he then signed mortgage deed and the loan was paid. He testified further that it was July 2016 when he received a default notice of Tshs. 329 million and notices kept coming until December 2018 when he sued the Defendant and FM

Communication for wanting to sell his properties. He then withdrew the case after being informed by the first Plaintiff that he did not get the loan.

Responding to cross examination questions, PW2 said that he was a guarantor on the agreement with the 1st Plaintiff that the loan would pay the loan of Basihaya Campsite. Nevertheless, he has no claim against the Defendant.

He said among the terms with the 1st Plaintiff was that he would be appointed a director of FM Communication of which he was duly appointed and fulfilled the responsibilities of a director for one month. He admitted signing the facility letter that issued to FM Communication. He admitted not being present during the negotiations of the loan and did not participate, but he signed the agreement.

He said in the facility letter, Basihaya Campsite Co. Ltd. not been mentioned. The directors of FM Communication are Ambassador Mndolwa, Dr. Emmanuel Nkumbi and Mr. Fadhili Maghembe. He said further that it was not Dr. Emmanuel Nkumbi who had a loan with CRDB but Basihaya Campsite Co. Ltd though he did not tell the

Defendant nor did he tell the Defendant that his property with the 1st Plaintiff is only for the duration of three years. He said also that Basihaya has been registered as a Company with three (3) shareholders. He admitted not knowing Mr. Fadhili Maghembe before, he only knew Ambassador Mndolwa, hence agreed to be a guarantor out of good faith much as he said he did not know the authenticity of the business. He finally admitted that if the agreement was for payment of director's loan but director had no loan then it is a breach.

The last witness for the Plaintiff side (PW3) was Mr. Linus Leons. He said he was involved in preparing a business plan to secure a loan from the Defendant to facilitate the contract they entered with Halotel.

PW3 testified that, in the business plan they projected the profit and expected to gain around Tshs. 11 billion. He said after cancellation of contract, they had a cash flow of around TZS. 2 billion.

Responding to cross examination questions, he admitted that the 1st Plaintiff is not licenced to provide security services much as the document he prepared showed that they were licenced to construct towers and conduct fuel business. He said it was a reliable document

much as the Plaintiff had no licence. He said they prepared a Business plan so that they can induce the Bank to rely on it in giving the loan. He admitted the fact that he said FM Communication is going to conduct fuel business whilst they have no licence is not a true statement and also that the company is licenced to conduct security services while it is not. In re-examination, he said after winning the tender, FM sub-leased and out serviced the security and fuel supply projects.

On their part, the Defendant called to a stand, **Mr. Joseph Bakari (DW1)** who told the court that one of the purpose of the loan facility issued to the Plaintiffs (Exhibit "PE4") was to settle the loan of the one of the Director's at CRDB. He said the Bank halted the facilities after discovering the irregularities on the transactions between the 1st Plaintiff and the Bank. One of the issues was that the 1st Plaintiff did not provide domiciliation letter. Another issue was noted in the MOU signed between the 1st Plaintiff and the 2nd Plaintiff to the effect that the security shall revert to the 2nd Plaintiff before realization of the loan amount. There was also a clause in the MOU showing that they shall open an account with Equity Bank which shall be monitoring daily communications of FM Communication. He said they found that the

1st Plaintiff has diverted the terms as she was supposed to maintain all operations with the Defendant. He said also that the Plaintiffs could not submit the relevant documents pertaining to her business-like licence from EWURA and security licence. He explained further that the problem arose because the purpose of the money advanced was to settle the loan of Dr. Emmanuel Musee Nkumbi but instead the money paid the loan of Basihaya Camping Tanzania Limited. Thus, FM Communications did not disclose the fact that the loan was for another Company and not Dr. Emmanuel Nkumbi. Eventually the loan of Tshs. 300mil was paid up by the 2nd Plaintiff's son hence the mortgage was discharged.

Responding to cross examination questions, DW1 stated that according to the facility letter, the amount was paid to CRDB but not at the conditions set and that according to exhibit PE5, the letter was asking takeover of the outstanding amount in the name of Dr. Emmanuel Nkumbi. As for the account given of Basihaya, he replied that the Defendant had no information concerning Basihaya Company. He responded further that issuance of a loan is more than obtaining security but also fulfilling conditions set by the Central Bank which the Defendant did not fulfil. He explained that according to

Exhibit "PE10" on the way forward, it was for the Bank to consult VIETTEL. When VIETTEL was consulted they said they are not concerned with the business presented to the Defendant. He insisted that the requirement of domiciliation letter was in the offer and not according to the meeting of 18.05.2016. Speaking of exhibit PE7, DW1 said that it is account statement of FM Communications LTD Account No. 05230160005 which has only one page of 2 out of 2 and there is nowhere it is written CRDB. He explained further that the statement has no opening balance and it is written 31.03.2016 Tshs. 219,175,000/- as opening balance. He said the money was paid into FM Communications Account and not CRDB. Thus, exhibit PE7 is not a Bank Statement from Bank of Africa as BOA has special paper to print statement.

In the final submission, Counsel for the Plaintiffs submitted at page 13 of his submission that looking closely at Exhibits P5, P6, and P7, it is clear that the Defendant was well informed that the said amount was going to offset liability of Emmanuel Musee Nkumbi as the Managing Director and guarantor (mortgagor) of Basihaya Campsite Company Limited in a 3rd Party Mortgage. He stated therefore that the cancellation of a loan is a breach of the Facility Agreement by the

Defendant. He referred to **page 213 of the Black's Law Dictionary 9th Edition** which defines breach of contract to mean: -

“Violation of a contractual obligation by failing to perform one's own promise, by repudiating it or by interfering with another party's performance”.

He concluded on the point that in so far as Exhibits “PE4 and PE10” are concerned, the Defendant violated her contractual obligations by failing to disburse the loan facility as expressly covenanted by the parties.

On their part, the Defendant's Counsel argued that the terms of the facility letter are very clear and unambiguous on the following facts that clause 2 of the facility letter provides the purposes of the loan to be advanced by the defendant through exhibit (PE4) that part of the loan will be used to liquidate the director's loan with CRDB. He stated therefore that, from the evidence produced in court by the Plaintiffs themselves, the loan advanced by the virtual of the facility letter was utilized to clear the debt of Basihaya Campsite Company Ltd. Hence, the terms of the facility letter were breached and the Plaintiffs cannot escape liability through the evidence produced in court. He stated further that the evidence of DW1 faulting the 1st Plaintiff for failure to

provide domiciliation letter as another term as agreed in Exhibit "PE4" was not controverted. Counsel for the Defendant stated also that after signing the facility letter, the Defendant discovered that there was existing a separate agreement exhibit PE2, between the 1st Plaintiff and the 2nd Defendant which its contents are directly in conflict and or inconsistency with the terms of the facility letter and the 1st Plaintiff did not disclose the same to the Defendant.

Submitting to the issue as to whether the cancelation of the loan facility was a breach of contract by the Defendant, Counsel for the Defendant argued that the fact that the Plaintiffs did not disclose the fact that it was Basihaya Campsite Company Ltd that had the loan with CRDB during negotiations and signing of the facility letter; the Plaintiffs committed fraudulent misrepresentation which led to the signing of the loan agreement. He referred to the provision of **section 17(1) of the Law of Contract Act, Cap 345 RE 2019** which defined the terms Fraud to mean acts committed with intent to deceive another party to enter into a contract by the suggestion, as to a fact, which is not true by one who does not believe to be true. He further cited the provisions of **section 18 of Cap 345 RE 2019** on what amounts to misrepresentation and stated that it is the fact that, the Defendant

was moved to liquidate the loan which was supposed to be of the director of the 1st Plaintiff and consented to the signing of the loan agreement while it was not true. Thus, in terms of **section 19 of the Law of Contract**, the agreement is voidable at the option of the party whose consent was so caused.

Having recapitulated the evidence and submissions pertaining to the 1st and 2nd issue, the undisputed facts are that the Plaintiffs signed with the Defendant a facility agreement for the provision of the term loan of Tshs 800 million. It is also not disputed that under clause 2 of exhibit PE4 **“Part of the Term Loan Facility shall be used to liquidate the directors loan with CRDB...”** Both PW1 and PW2 admitted before the court that when they negotiated with the Defendant, they did not disclose that in-fact the loan at CRDB was of the company named Basihaya Campsite Limited and not the 2nd Plaintiff. The 2nd Plaintiff was a director of the Company and his property was used as collateral only.

PW2 told the court that he was not present at negotiations and he did not even know the PW1. All he knew was that PW1 wanted to use his property as collateral and he tabled his conditions which were

agreed upon by PW1. He stated also that he did not know the authenticity or the purpose of the business.

Clearly, this goes contrary to the elements of utmost good faith between parties in entering into a contract. One could ask as to how could a party enter into an agreement and sign for such a big business involving a magnitude amount without being fully involved in the same. Surely, the agreement was clouded with elements of intent to defraud and misrepresent to make the other party consent to the business.

More so under the **Events of Default – in Clause 2 of Exhibit “PE4”** provides that: -

“Any representation, warranty or statement by F.M. COMMUNICATIONS LIMITED in this letter or in any document delivered under it is not complied with or is or proves to have been incorrect in any respect when made or, if it had been made on any later date by reference to the circumstances then existing, would have been incorrect in any respect on that later date; ...”

The Plaintiffs in their submission relies heavily on the knowledge of the Defendant when liquidating the loan that they were liquidating the

loan of Basihaya Campsite (T) Ltd das per Exhibit "PE6". Nevertheless, exhibit PE5 is clear that when the Defendant was asking for the account number to liquidate to deposit the outstanding balance, she was asking the outstanding loan of Dr. Emmanuel M. Nkumbi. CRDB availed the Defendant the account number of Basihaya Campsite Company Limited telling the Defendant that Dr. Emmanuel Nkumbi was the Managing Director of Basihaya Campsite Company Limited, and accordingly provided the outstanding balance of Basihaya Campsite Company Ltd. One might argue that the Defendant then had knowledge that he was liquidating the loan of Basihaya and not Dr. Nkumbi. Nevertheless, firstly by the time the Defendant had asked for the outstanding balance, she was already made to believe by the Plaintiffs that she was indeed paying the loan of Dr. Nkumbi who was the Director of Basihaya and at the same time the Director of the 1st Plaintiff. PW2 admitted that he was made a director and performed his duty for a month only so that the 1st Plaintiff could obtain a loan. PW2 also admitted that he did not disclose to the Defendant that the loan was of Basihaya Camp Company Limited whilst the agreement was for the Defendant to liquidate the loan of Dr. Nkumbi. PW1 also

admitted not to have disclosed such a fundamental term of their agreement.

I need not say much from the evidence produced in court that the agreement was clouded with fraudulent misrepresentation of the fundamental term of their agreement irrespective of whether the Defendant came to know that the loan was of Basihaya or not as clearly defined under **sections 17 and 18 of the Law of Contract, Cap 345 RE 2019**. Indeed, this is clear case of concealment of fundamental term so as to induce the other party to consent and sign into an agreement. Verily, that is contrary to the principle of *uberrimae fidei* (utmost good faith). All in all, the doctrine of equity demands that "*those who seeks equity, must do equity*". By their own testimonies both Plaintiffs admitted not to have done what was equitably demanded of them.

Indeed, by discovering that the Plaintiffs had initially misrepresented the facts, the Defendant rightly exercised her right to rescind the agreement. I am also inspired by the writing of **Michael Furmston in his book Cheshire, Fiffoot and Furmston's Law of Contract, Lexis Nexis Buttleworths, 14th Edition at pg 311** as referred by the Counsel for the Defendant that a party who in an unequivocal manner that by reason

of fraud or essential error of material kind was induced to enter into the contract he has resolved to rescind it, if his election is justified by the facts, it terminates the contract and puts parties in status quo ante to the original position before the agreement was entered.

From elaborated principle which I derive inspiration from, and considering the admission of concealment of facts by the Plaintiffs as well as *the lack of utmost good faith, I find that there was a fundamental breach of terms and conditions of the facility letter by the Plaintiffs. Accordingly, the Defendant justly cancelled the loan facility following such breach of the Facility Agreement by the Plaintiffs.*

Having answered the 1st issue in the affirmative and the 2nd issue in the negative, I find that the Plaintiffs have not suffered any damages and are not entitled to any compensation.

As for the 5th issue in line with the decision of the Court of Appeal in the case of **CRDB Bank Limited Vs Isaack B. Mwamasika and Others**, Civil Appeal No. 139 of 2017, the Defendant has general lien over the security in question. Nevertheless, PW2 and DW1 ably informed the court in their testimonies that, PW2 through his own arrangement has

paid the Bank the loan outstanding amount secured by the mortgage deed. Therefore, he has no claim against the Defendant.

Following the above findings of this court, I find that the Plaintiffs case is bereft of any merits and I accordingly dismiss it with costs.

Accordingly ordered.



Dar es Salaam

04.12.2020

A handwritten signature in blue ink, appearing to read "R. A. Ebrahim".

R. A. EBRAHIM

JUDGE