IN THE HIGH COURT OF TANZANIA

DAR- ES -SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CIVIL CASE NO 126 OF 2018

INNOCENT BUBERWA KALEMARA..... PLAINTIFF

VERSUS

STANDARD CHARTERED BANK (T) LTD.....1st DEFENDANT

PETROMARK AFRICA LIMITED.....2nd DEFENDANT

JUDGEMENT

29th April & 14th July 2021

Rwizile, J

The 2nd defendant, a registered oil marketing company based in Dar-es salaam, deals with Petroleum distribution in and outside Tanzania. She has been however in constant banking relationship with the 1st defendant since 2014, before their relationship turned sour in 2017. Facts gathered are to the extent that in February 2017, she applied for credit facility in form of business mortgage. It was for purpose of purchasing a residential house Plot No. 175 Block B, situated at Tegeta, with Title No. 119860 at the price of 600,000,000/=, property of the plaintiff.

The 1st defendant accepted the application and offered the sum of 457,000,000/= subjected to complying with terms of the undertaking.

The plaintiff was instructed by the 1st defendant to transfer the title to the 2nd defendant's name, which he duly complied and submitted the title to the 1st defendant. When all was done with plaintiff, the 1st defendant cancelled the undertaking on ground that the 2nd defendant concealed important information and breached the terms of the facility and so was ineligible for the loan. Since the property had changed hands from the plaintiff to the 2nd defendant, the transfer was to be effected for the plaintiff to get back his house.

The plaintiff therefore, was not happy with the manner in which the 1st defendant handled the matter, due to anguish and trouble caused to him. he has therefore filed this case, claiming against the defendants for the reliefs as hereunder;

I. An order that the first defendant has failed to observe or has breached her undertaking dated 28th April 2017.
II. An order that following such 1st defendant's act herein caused the plaintiff to suffer immediate loss to the tune of 457,000,000/= which the same should be paid to the plaintiff
III. Alternatively, the defendants jointly and severally be ordered to pay the plaintiff the sum of 332,000,000/= being damages arising from cancellation of the 1st defendants undertaking to the plaintiff
IV. General damages to be assessed by the court
V. Payment of commercial interest on the sum mentioned in item (III) at the rate of 20% per annum from the date of filing the suit to the date of judgement

VI. Payment of interest at the rate of 7% per annum on the decretal sum from the date of judgement till full payment

VII. Costs of the suit

VIII. Any other relief as the court may deem fit.

The defendants on their party disputed the claims. The plaintiff who was represented by Mr. E D Buberwa of Upright Attorneys called one witness who is Innocent Buberwa Kalemera (Pw1). On the side of the defendants, the first defendant has been represented by E. N Mwakingwa and Musa Mbaga of FK Attorneys. The 2nd defendant appeared by the representation of her Managing Director one Zaidi Hamis Baraka who is the only witness for the 2nd defendant. While the first defendant called one witness namely Salome lugome (Dw1).

At the closure of the case in both sides, closing submissions were filed as directed. Having gone through the contending submissions and evidence of both sides, I am inclined to determine the three issues raised as follows;

First issue, whether the 1st defendant was justified to withdraw a letter of undertaking after the landed property with CT No. 119860 was already transferred to the 2nd defendant. ***Second issue,*** whether the plaintiff suffered damages. ***Third issue,*** to what reliefs are the parties entitled to

To answer the first issue, *whether the 1st defendant was justified to withdraw a letter of undertaking after the landed property with CT No. 119860 was already transferred to the 2nd defendant.*

The plaintiff's testimony which was also submitted by his advocate that on 28th April 2017, he was notified by the 1st defendant via a letter of undertaking exhibit P1 to transfer his landed property which is a residential house in Plot No. 175 Block B, situated at Tegeta, with Title No. 119860 to the 2nd defendant. He was in return to be paid via his account the agreed price of 457,000,000/=. According to his evidence and submission, he transferred the same to the 2nd defendant and surrendered the certificate of title to the bank on 17th August 2017 as per exhibit P2. Pw1, by profession is a banker who has worked in the industry for over 10 years.

To his dismay, when waiting for payment, he was informed by the bank that the 2nd defendant failed to disclose important information in their deal, the undertaking was cancelled. This happened on 26th September 2017 something like 4 months from the date he was instructed to transfer his property which is a two storey residential house. The communication, it was testified and submitted was done via a letter exhibit P5. It was his evidence that upon transfer of his land property into the name of the 2nd defendant, and upon cancellation of the undertaking, he remained with no home. he had to retransfer the same back to his name. The process according to him caused him a lot of suffering and anxiety to his family. He had to pay the sum of 35,000,000/= as per exhibit P9.

It was his evidence further that, he lost his income upon resigning from his former employment at NMB where he earned a monthly gross salary of about 10,000,000/=. The reason to resign was to do business of the real estate. Cancellation of the undertaking brought down everything since he sold the house for capital which he lost.

The plaintiff as a seasoned banker blames the 1st defendant which is a serious bank, for acting unprofessionally. It was his evidence that if the bank did its duty properly it would have found the information concealed by the 2nd defendant before committing him to the costly transaction which ultimately caused a great loss to his business.

His evidence was supported by the 2nd defendant. Dw2, was of the evidence that by cancellation of the undertaking between him and the 1st defendant was done negligently and without reason. He believed so because, he had taken loans before. As testified by Dw1, that the reason for cancellation due to the case between the 2nd defendant and Exim bank, which was discovered after the transfer between the plaintiff and 2nd defendant had been effected. According her, that was done because that information was concealed by Dw2 and according to the undertaking the bank reserved the right to terminate the transaction for such reason. This evidence according to Dw2 prove how 1st defendant acted unprofessionally. Dw2 show exhibit DA5 that the case was well known to the 1st defendant because it was pending before the CA and had informed them about it before.

He was clear therefore that if the 1st defendant had genuine reasons, they could have consulted him before cancelling the banking facility. He also said that if the bank was serious for the time it held the plaintiff property it would have discovered if there was a problem which it did not.

It can be stated that there is no dispute that there were banking transactions between the 2nd defendant and the first defendant where Dw2 had previously taken loans, as per exhibit DA which is a loan taken in 2016. There is clear

evidence that the 1st defendant did not cancel the banking facility with the 2nd defendant and the letter of undertaking with the plaintiff. that was done after the plaintiff had transferred his title to the 2nd defendant. The defendant had paid at the time the transaction was cancelled the 20% party to the plaintiff since the facility was to be paid by the bank for 80% only. This also led the plaintiff to pay the same back because transfer of his property back to his name could be impossible without doing so.

As testified by Dw1 that exhibit P1 had an exclusion clause that entitled the bank to cancel the transaction any time. But the same, it was submitted for the 1st defendant that payment to the plaintiff was to be directly done to his account upon successful registration of the mortgage on the said landed property to the 1st defendant. It is therefore clear to me that the facility letter between the defendants exhibit DA1 had to be read with the undertaking letter exhibit P1. This means before the payment to the plaintiff was effected as per the undertaking letter, Dw2 had to fulfil terms stated in DA1. Since the terms stated in both letters, the 2nd defendant had the right to make sure that all terms are complied with as stated in both documents.

It would appear therefore, the 1st defendant used the exclusion clause in the letter of undertaking and facility letter to terminate the transaction. The plaintiff submitted this clause was unjustified. He referred this court to the case of **Tanzania Building Construction Company Ltd vs Tanzania Railways Corporation** [1983] TLR 70, where it was held that the exclusionary clause that absorbs a party from fundamental term of the contract would not be enforced. He also cited in that line section 37(1) of Law of Contract Act [Cap 345 R.E 2019] which is categorical that parties

must perform their respective promises to a contract unless none performance is excused by the provisions of the Act. The court was therefore asked to deal with the exclusion clause in a construction that would not cause absurdity as held in the case of **Godbless Lema vs Musa Hamis Mkanga & Others,** Civil Appeal No. 47 of 2012. The 1st defendant on her party was clear that the duty of disclosing that he had a case in court was fundamental to the 2nd defendant. he concealed that information. The due diligence conducted did not find such information. According to the 1st defendant's submission, regulation 17 and 18 of Bank of Tanzania (credit Reference Bureau) Regulations 2012 GN 416 of 2012 was complied with. The information sought from the credit reference database showed the 2nd defendant was credit worthy and that is why the process was done. Therefore, realizing that the same had a case in court was clear that information was deliberately concealed.

The 2nd defendant was of the submission that he disclosed all information and that was known to the bank before.

It would appear banking business like any other business needs transparence on party of the bank and its customer. There is evidence that the 2nd defendant had been in contact with the 1st defendant since 2016 and had before obtained the loans without any serious reported problem in paying the same. There is no such a complaint from the Dw1. The duty of 1st defendant in before advancing the loan is to diligently vet its customers. It has to make sure all necessary and important information leading to the loan has been obtained.

In this case, since the 2nd defendant had obtained loans, there was reasonable grounds to believe that the same had been trusted and accepted. Otherwise, it is the duty of the 1st defendant to prove that the same was concealed that information. Section 110 and 111 of the evidence act imposes that duty on the 1st defendant. This court was not provided with evidence to that effect. But still, the letter of undertaking directed to the plaintiff merely informed him that the 2nd defendant had concealed some information. It is not known if at the material time, the same had discovered the case. Further, the same did not before termination of the facility letter consult the 2nd defendant about it. This, in my view brings an impression that they had perhaps other undisclosed reasons and the case stated was not one. This therefore leads me to the first issue in the negative that, the 1st defendant was not at the time justified to terminate the undertaking and therefore the facility letter.

Second issue, whether the plaintiff suffered damages. It is crystal clear that at the time this case was filed in court, the plaintiff had recovered his house. But basing on evidence, he had transferred the same to the 2nd defendant and submitted the title to the 1st defendant on 17th August 2017. It should be recalled that the plaintiff had been informed by the bank four months before he submitted the same to them to do so as under exhibit P1 issued on 28th April 2017. It follows therefore that the plaintiff had since April been in the process of transferring the same to the defendants. The termination was done on 26th September 2017, this was after one month upon submission of the document to the 1st defendant.

It was submitted by the 1st defendant that since the bank cancelled the transaction in its duty and according to the procedure and that there was evidence showing the plaintiff and defendant had been in the business of the same house since January 2017 as per exhibit D6, the plaintiff therefore did not prove there was damages suffered.

Of course, the plaintiff testified that he had worked in the banking industry for over a decade. He terminated his employment at NMB where he earned an amount of at least 10m. he did so after being placing his house in the market and the 2nd defendant at the instance of the 1st defendant assured him to purchase it. It was therefore submitted that he had suffered loss.

In normal circumstances, the plaintiff for the period of at least 4 months also was expecting to sell his house to meet his goals. He could not have sold it that much for no reason. The time he was in the process and upon transferring to the 2nd defendant, he was in normal way of doing business having no such a house. He as well paid for it as shown in exhibit P6 when he was retransferring the same to himself. According to exhibit D5, it was shown that the amount directly paid by the 2nd defendant to the plaintiff is the 20% of the total amount of 500,000,000/= which is 43,000,000/=. The rest of the amount paid by Dw2 were costs of transfer. Therefore, there is no evidence by the plaintiff showing that, how much money he suffered as direct costs except which he has shown in exhibit P6. From the foregoing, I am convinced that the plaintiff suffered damages as the result of cancellation of the undertaking as the stage it had reached. But I agree with the 1st defendant that he did not prove the extent in specific terms as to the amount of money or value lost. He did not prove when he terminated his employment

with NMB, neither did he prove he worked with NMB because the salary/pay slip (P8) tendered is not a conclusive evidence of being employed by the same. he did not show that vividly. I therefore hold that the plaintiff suffered the unsubstantiated damages.

Having dealt with the preceding two issues, it is now opportune to answer the last issue to what reliefs are the parties entitled to. The 2nd defendant submitted that he was paid 23,000,000/= by the plaintiff. He therefore claims from him, the sum of 20,000,000/= as the balance from the 20% paid to him and 35,000,000/= paid to the plaintiff for transfer of the same back to his name. It is unfortunate his prayers are untenable. It clear that the same cannot be attended as the claim featured in the submissions. He ought to have raised a counter-claim perhaps.

But as to the plaintiff, I hold that based on the facts and evidence produced, he is entitled to general damages at the tune of 150,000,000/= and costs of this suit.

Recoverable Signature

X

Signed by: A.K.RWIZILE

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DAR ES SALAAM DISTRICT REGISTRY