**IN THE HIGH COURT OF TANZANIA**
**(DAR ES SALAAM DISTRICT REGISTRY)**
**AT DAR ES SALAAM**

**CIVIL CASE NO. 110 OF 2019**
**FAITH DAY CARE AND PRIMARY SCHOOL----------PLAINTIFF**

**VERSUS**
**INTERNATIONAL COMMERCIAL**
**BANK (TANZANIA) LIMITED----------DEFENDANT**

**JUDGMENT**

Date of Last Order: 30/8/2021
Date of Judgment: 7/9/2021

**MASABO, J.:**

The gravamen in this suit is whether there ever existed an enforceable agreement between the parties. The factual background of the suit is not hard to establish as it was basically undisputed by the parties. It all started in early June 2018 after one Mzungu Sanguya, an employee of defendant, visited the plaintiff and enticed her to open a bank account which would have given her an access to credit facilities extended to business entities by the defendant. Convinced, on 8th June 2018, the plaintiff opened two bank accounts with the defendant, one in local currency and the second one in USD. He subsequently, on the same date submitted a loan application letter through which she requested a loan facility of Tshs 2,500,000,000/= for extension of the school.

Thereafter, protracted negotiations ensured between the defendant and the plaintiff's director one Florian Josephat Katunzi. Meanwhile the plaintiff continued to maintain the two accounts and incurred some costs to satisfy

certain loan requirements prescribed to him by the defendant. Their negotiations continued up to 25th February 2019 when the defendant turned down the deal for reasons that, it was not approved by the 'approving authority' as it did not meet a favourable consideration in line with the bank's credit policy and risks inherent.

According to the plaintiff, apart from opening the two bank accounts which were a prerequisite for the loan, she had satisfied all the conditions required by the bank and, in the process, she incurred a lot of costs including among others: Tshs 16,450,000/= and USD 3,000/= for preparation of architectural and engineering drawings and bill of quantities for the proposed extension; USD 188,658.03 for importation of a multipurpose hall from Egypt; Tshs 1,638,4000 for securing building permits, Tshs 180,000,000/= for purchasing 2 plots for the intended extension, valuation costs at a tune of Tshs 6,820,00/= paid to Stan Property, a land valuer recommended by the defendant; and Tshs 29,500,000/= for purchasing of Plots at Kijichi in Temeke Municipality which were to be used as collateral for the loan. She had in addition, and at the request of the defendant, concluded a memorandum of agreement with a church owned by her director, the said Florian Josephat Katunzi. Her prayers are for this court to find the defendant in breach of contract and for consequential orders payment of specific damages at a tune of Tshs 5,908,308,800/= and USD 191,568.03 as well as Tshs 1,000,000,000/= as general damages and an interest of 18% per annum for the specific damages and 12% on the general damages.

While not disputing the existence of a banking relationship between her and the plaintiff, the loan applications and breakdown of the negotiations, the defendant through her written statement of defence filed in court on 7th May

2020 maintained that she has no liability whatsoever over any costs incurred by the plaintiff during the negotiation process as the duo had no enforceable agreement between them.

As the hearing, both parties had representation. The plaintiff was represented by Mr. George Mwalali, learned counsel whereas the defendant enjoyed the service of Mr. Juventus Katikiro, leasrned counsel. Before commencement of hearing, the court framed and recorded the following issues as issues for determination:

(1) Whether there was any agreement between the parties;
(2) If the 1st question is in the affirmative, whether the defendant is in breach of the agreement;
(3) Whether the plaintiff suffered any damages as a result of the breach; and
(4) What reliefs are the parties entitled to.

In support of her case, the plaintiff had two witnesses. Her director, Florian Josephat Katunzi, who testified as PW1 and Ruth Elias Mshana who appeared and testified as PW2. PW1's testimony was to the effect that there was a commercial relationship between the parties stemming from 2018 when the defendant enticed and promised her to advance her a credit facility for expansion of the school upon fulfilment of the following conditions: opening and operating an account with the defendant; servicing the account to establish cash flow; visitation and evaluation of the school by the bank; submission of a business plan, financial report; submission of valuation report and drawings of the envisages expansions and contributing 25% to the loan facility. He testified further that the plaintiff diligently satisfied all the conditions. She opened a local currency account and a USD account and

subsequently submitted a loan application for Tshs 2,500,000,000/= for purchase of land for construction and extension of the school buildings, dormitories and classrooms on 8/6/2018. Later on, and at the request of the defendant, she submitted a business plan and building permit for the intended expansion. At a request and on recommendation of the defendant, she commissioned Stan property Tanzania Limited, a registered land valuer who conducted a valuation of the building site and submitted the report to the defendant. She also procured architecture and engineering drawings and bill of quantities for the intended construction from Master Piece consultation Limited and submitted the same to the defendant.

After completion of all these processes, and on further consultation and the discussions between the parties, the plaintiff agreed to commute the loan amount from Tshs 2,500,000,000/= billion to Tshs 1,750,000,000/= and acting on the advice of the defendant, she found a n alternative construction site whereby she obtained Plot No. 9 Block 2 Mtoni Kijichi area. The plot was valued by Stan Property and the report thereto was submitted to the defendant and after several meetings the defendant verbally assured her that things were in good order and that all what was awaited was an approval from the bank's headquarters in Malaysia. Meanwhile, the defendant verbally allowed him to proceed with other actions in anticipation that the approval will be obtained. With that assurance, she ordered building materials worth USD 148,000 from various companies abroad and having paid the purchase price, the materials were shipped to Dar es Salaam at her costs.

PW1 testified further that, as the loan had not been disbursed yet, on 15/12/2018 she served the defendant with a formal demand notice

requesting for progress of the loan. The defendant replied to the demand notice on 3/1/2019. Among others, she denied any obligation to the plaintiff. Interestingly, even after these letters, the parties continued with the negotiations whereupon on 25/1/2019, the defendant represented by its chief executive officer and its General Manager a meeting with PW1 and proposed a further reduction of the loan facility to Tshs 1,200,000,000/=. Further, they directed him to withdraw the valuation report already submitted and to furnish a memorandum of understanding between the plaintiff and the The Evangelistic Assemblies of God (EAGT) (T) City Centre Church (owned by PW1) through which the church agreed to guarantee repayment of the loan. All the two conditions were complied with. Meanwhile, the plaintiff looked for a new construction site at per the defendant's recommendations and managed to secure Plot No. 9 Block 2 Mtoni Kijichi area in Dar es Salaam and upon obtaining an approval of the defendant, the plaintiff proceeded to pay the initial instalments of the purchase price. To his surprise, on 25/2/2019, pw1he was served with a letter from the defendant informing him that, the plaintiff's application for the credit facility of Tshs 1,750,000/= did not obtain the approval of the approving authority as it could not meet a favourable consideration in line with the bank's credit policy and risks.

When cross examined by Mr. Katikiro, PW1 maintained that, the defendant is liable for the costs incurred as all the expenditures were done in compliance with the defendant's directives. He stated further that, save for the response to the demand notice (Exhibit P9); an email dated 25/1/2019 (Exhibit P10) and the loan rejection letter (Exhibit P12) all directives from the defendant were verbally communicated. He maintained further that, although there was no written agreement, the parties had an agreement for

advancement of the loan and having fully discharged her obligation, the plaintiff is entitled to the remedies sought. On further cross examination he stated that, agreements are concluded after the end of the negotiations. In the present case, the parties had completed the negotiations but the defendant refused to honour her promise, thus there is an enforceable agreement between the parties.

PW2 did not have much to offer. Her evidence was merely corroborating story of two assertions, that is: First, Stan Property conducted land valuation for the two sites; second, the plaintiff was the one who paid for the service and third, the valuations were solely for purposes of obtaining the loan.
For the defendant, DW1, Carlos Mvalimba, testified that the plaintiff applied for a loan facility in 2018 and upon his application being received he was verbally instructed to produce a bank statement of 12 months from his bankers, financial statements, business license, TIN Number, Articles and Memorandum of the Company and other documents in proof that the business was legally owned as well as a collateral for the loan but he never met these requirements. He stated further that, the collateral was the school, a printing factory, a fenced house and an empty plot which the applicant intended to buy if the loan was approved. For purposes of valuation of the collateral, the defendant prescribed to the plaintiff a list of three valuers, namely, Majengo developers, Land Master and Stan Property who, works with the bank and left it upon her to choose and negotiate the terms as costs for valuation of collaterals are borne by borrowers. The plaintiff chose Stan Property who conducted the valuation and submitted a report.

Moreover, he testified that, the defendant did not advance the loan to the plaintiff as she did not qualify. He stated that, there are three crucial things

for consideration in determining whether or not to advance a credit facility to an applicant. These are: the character of the client assessed by looking at different things including his reliability in payment of essential bills such as water and electricity bill repayment of previous loans if any; the capital of the client as its ability to repay the loan applied for is assessed through bank statement; and the conditions and status of the collateral. He stated that, in the instant case, having evaluated all the three, the plaintiff was found to be ineligible and was forthwith informed through exhibit P12. He stated further that, the plaintiff was found ineligible as she did not produce sufficient materials upon which the bank could make a sound decision on risk mitigation.

Cross examined by Mr. Mwalali, he told the court that, although it is true that the plaintiff applied for the loan and submitted some supporting documents, the bank has no responsibility towards her as there was no agreement between the two. He stated further that, the costs incurred by the plaintiff if any are irrecoverable as they were incurred in the course of negotiation. The plaintiff can not be reimbursed the costs incurred as the deal collapsed because she did not satisfy the conditions for the intended loan. Thus, she cannot blame the bank. Cross examined further, he admitted that the negotiations between the parties was protracted and took more than 6 months and that throughout this period communication between the bank and the plaintiff was mainly verbal. He further admitted that the bank instructed the plaintiff to procure the guarantee of the church and to change the collateral to a less costly collateral. Asked on the time frame for negotiations, if any, he responded that there is no specific time frame within which to conclude the negotiations.

At the conclusion of hearing, the parties prayed and were granted leave to file final written submissions. Both filed their respective submissions. Having perused through the submissions, I am tempted to say that, the plaintiff counsel did not sufficiently avail himself to the opportunity to assist the court in answering the questions posed as all he did was to summarise the evidence and to recite the law as to the burden of proof while making no slight attempt to argue the issues. On his part, Mr. Katikiro, invited the court to answer the 1st and second issues in the negative as there was no any agreement between the parties which would entitle any of them to the legal remedies arising from the provision of section 37 and 59 of the Law of Contract Act [Cap 345 R.E. 2019] which obliges the parties to perform their contractual obligations. In Mr. Katikiro's view, all what was existent between the parties were negotiations which aborted after the plaintiff failed to meet the requirements. He concluded that, in the absence of a legal agreement, an action for breach of contract and remedies thereto cannot be sustained.

Having carefully assessed the evidence on record and considered the submission for and against the claims, I am now well poised to determine the issues. Before I proceed to this delicate undertaking, I feel obliged to state the law as to the burden of proof. As correctly submitted in the final submissions made by the parties, the burden of proof in civil cases rests on the person who alleges the existence of a certain fact. This cardinal principle is embodied under section 110(1), 111 and 112 of the Evidence Act [Cap 6 R.E. 2019] and have been highlighted in numerous authorities. I need not cite them as they are a plethora. In a recent decision in **Ernest Sebastian v Sebastian Sebastian Mbele & 2 others**, Civil Appeal No. 66 of 2019, CAT (unreported), the Court of Appeal of Tanzania while citing its previous decision and a persuasive authority of the Supreme Court of India, it had

this to say regarding the burden of proof in civil cases and the standard thereto:

> It is in that respect, in **Godfrey Sayi v. Anna Same as Legal Representative of the late Mary Mndolwa**, Civil Appeal No. 114 of2012 (unreported) we said:
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> > "It is similarly common knowledge that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on a balance of probabilities."
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> Proof on a preponderance of probabilities was well explained by the Supreme Court of India, and we seek inspiration, in the case of **Narayan Ganesh Dastane v. Sucheta Nayaran Dastane** (1975) AIR (SC) 1534 that: -
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> > "The normal rule which governs civil proceedings is that a fact can be said to be established if it is proved by a preponderance of probabilities. This is for the reason that ...a fact is said to be proved when the court either believes it to exist or considers its existence so probable that a prudent man ought to act upon the supposition that it exists. A prudent man faced with conflicting probabilities concerning a fact situation will act on the supposition that the fact exists, if on weighing the various probabilities he finds that the preponderance is in favor of the existence of the particular fact. As a prudent man so the court applies this test for finding whether a fact in issue can be said to be proved. The first step in this process is to fix the probabilities, the second to weigh them, thought he two may often intermingle. The impossible is weeded out at the first stage, the

> improbable at the second. Within the wide range, of probabilities the court has often a difficult choice to make but it is this choice which ultimately determines where the preponderance of probabilities lies."

Thus guided, I will now proceed to the issues. Starting with the first question as to whether there was a contract between the parties, under the traditional law of contract, an agreement is established where there exist an offer and an acceptance to the offer coupled with other key ingredients of a valid contract. Pursuant to Section 2 (1) (a) and (b) of the Law of Contract Act (supra), unless the context otherwise requires, a contract is formed when a person signifies to another, his willingness to do or to abstain from doing anything (offer) and when the person to whom the proposal is made signifies his assent in which case, the proposal is said to be accepted and the agreement or contract is formed. To be an enforceable agreement, a contract (whether written or oral), must have all the traits provided for under section 10 of the Law of Contract Act (supra), namely, free consent of the parties, competency of the parties to contract and a lawful consideration. Where, as in the instant case, the competence of the parties is undoubted, the aggrieved party to an agreement must prove that there was an offer, acceptance and consideration. It is only when those three elements are available that the injured party can bring a claim against the party in breach.

In the view of the above, it was therefore upon the plaintiff in this case to prove that there was an offer, acceptance and consideration. Looking at the evidence available on record, I am not fortified that there existed any enforceable contract between the parties. In my firm view, what existed between the parties were pre-contractual negotiations which are legally not

enforceable due to, among other things, uncertainty of the terms of such negotiations. Dealing with a relatively similar issue in **Courtney v Fairbairn Ltd v Tolaini Bros (Hotels) Ltd** [1975] 1 All ER 716 at 720, Lord Denning MR held that:

> 'If the law does not recognise a contract to enter into a contract (when there is a fundamental term yet to be agreed) it seems to me it cannot recognise a contract to negotiate. The reason is because it is too uncertain to have any binding force . . . It seems to me that a contract to negotiate, like a contract to enter into a contract, is not a contract known to the law . . . I think we must apply the general principle that when there is a fundamental matter left undecided and to be the subject of negotiation, there is no contact.'

I may also add here that, much as the modern contract making process is often a set of multifaceted complex process involving huge amounts of money and time to be concluded, that in itself does not render the negotiations enforceable. It is my considered view that, holding such negotiations as enforceable agreements would certainly encroach upon the freedom of contract which is one of the axioms of contract law. As stated in **William Lacey (Hounslow) Ltd. V. Davis** [1957] 1 W.L.R. 932, 934 (Q.B. 1957), the law presumes that, being a free agent, a party to negotiations enjoys the freedom to negotiate the best deal for the agreement, terminate the negotiations and personally bear the costs he might have incurred in the course of negations. Firming up its finding, the court stressed that a party to negotioations:

> '... undertakes this work as a gamble, and its cost is part of the overhead expense of his business which he hopes will be met out of the profits of such contracts as are made.'

Lord Ackner had a similar view in ***Walford v. Miles*** [1992] 1 All ER 453 where he stated that:

> "Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that interest he must be entitled, if he thinks it appropriate, to threaten to withdraw from further negotiations or to withdraw in fact in the hope that the opposite party may seek to reopen the negotiations by offering him improved terms. ..... In my judgment, while negotiations are in existence either party is entitled to withdraw from these negotiations, at any time and for any reason. There can be thus no obligation to continue to negotiate until there is a 'proper reason' to withdraw. Accordingly, a bare agreement to negotiate has no legal content (...)".

I fully subscribe to this view. Much as it can be argued that the parties have a duty to negotiate in good faith, the breakdown of the negotiation, whether actuated by a good faith or an ill motive, cannot be enforceable as a breach of contract. In the present case, since no evidence has been rendered that the parties had a contract stipulating a duty to complete the negotiations and there are no materials as to the specific terms of the agreement if any, I am constrained to hold that, the agreement if any is unenforceable. Under the premise, I answer the first and the second questions negatively.

Regarding the third and the fourth issue, much as it is clear from the record that the defendant is the one who withdrew from the agreement and that the decision to withdraw happened after the plaintiff had incurred considerable costs in the course of negotiations, having found that there was no enforceable agreement to negotiate, these two questions will not detain

as for the reasons assigned above, the plaintiff cannot recover the benefit of the bargain which ended barren.

Having observed as above, I can summarily conclude that the plaintiff has failed to prove his case and the suit is forthwith dismissed for want of merit. Although the general rule is that costs should follow event, in the circumstances of this case, I find it to be in the interest of justice that the costs be shared by each party bearing its respective costs.

**DATED** at **DAR ES SALAAM** this 7th day of September 2021.

21/09/2021

X 

Signed by: J.L.MASABO

**J.L. MASABO**

**JUDGE**