

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MOSHI

AT MOSHI

CIVIL CASE NO. 10 OF 2018

BETWEEN

CUTHBERT ROBERT KAJUNA

T/A C.R. KAJUNA & COMPANY..... PLAINTIFF

VERSUS

EQUITY BANK TANZANIA LIMITED..... DEFENDANT

JUDGEMENT

1/9/2021, 8/11/2021

MWENEMPAZI, J:

The plaintiff, has filed a suit against the defendant for breach of Loan Facility Agreement entered between them in June 2018. The plaintiff was in the agreement extended a loan facility for the sum of Tanzania Shillings Two Hundred Million Only (TZS 200, 000,000/=) being money for purchase of Motor vehicle, Machineries and working capital. The plaintiff received Tshs. 192, 245,950/= through account number 3012211438991 on the 3rd August, 2018

after deducting all necessary charges. The dispute in this case arose in the course of utilization of the loan money, when the plaintiff applied to transfer money to the account of Kipesile's Phone accessory Ltd with the description that they funds are intended for the purchase of truck -Machineries and Materials and the defendant blocked the money and later withdrew them out of the plaintiff's account. The suit is for the Judgement and decree against the defendant that:

1. A declaration that the defendant has breached fundamental terms of the business loan facility/contract dated the 29th day of May, 2018 for an amount of Tanzania shilling two Hundred Million (Tshs. 200,000,000/=)
2. An order of specific performance for the Defendant to be ordered to immediately refund the Plaintiff a Total of Tanzania Shilling One Hundred and Two Million Six Hundred Forty-One Thousand and Ninety-Six (Tshs. 102,641,096/=) unjustifiably withdrawn from the Plaintiff's Bank Account number 30122114991.
3. An order of payment of Loss of expected monthly profit at the tune of Tanzania Shillings Twelve Million Six Hundred Forty-Eight Thousand and Thirty-Five (Tshs. 12,648,035/=) from the date of breach to the date of Judgement.

4. An order of Payment of Loss of expected monthly profit at the tune of Tanzania Shilling Twelve Million Six Hundred Forty-Eight Thousand and Thirty Five (Tshs. 12,648,035/=) from the date of Judgement to the date of full settlement of the decretal sum.
5. An order for payment of specific damages amounting to Tanzania Shillings Four Hundred and Twenty-seven Million five hundred thousand (Tshs. 427,500,000/=).
6. An order of general damages Tanzania Shilling Two hundred million (Tshs. 200,000,000/=).

In this case, when the case was being heard, the Plaintiff had the services of Dismas Raphael whereas the defendant had the services of Edwin Lyaro, learned advocates. Prior to commencement of the hearing the following issues were framed and agreed:

1. Whether the Defendant breached the loan facility and mortgage agreement by withdrawing funds from the Plaintiff's account.
2. Whether the Plaintiff breached the Loan Facility Agreement by writing a letter being a request to hire a truck.
3. What remedies are entitled to the parties in this suit

In order to prove his claim, the plaintiff summoned two (2) witnesses. The plaintiff was the first witness as PW1; he testified that in April 2018 he applied

for a business loan facility of Tshs. 200,000,000/= which loan was extended by the defendant as agreed. The said loan was intended to purchase motor vehicle TATA and also to facilitate working capital. The loan, was secured by mortgage of a right of occupancy of the plaintiff's property situated on Plot No. 31-33 and 50-53, Farm No. 125, Kiboriloni within Moshi Municipality, joint registration of motor vehicle card for the TATA Tipper to be purchased as well as personal guarantee of Stanley Cainy Mwakipesile and cooperate guarantee of Kipesile's Phones Accessories Ltd. According to the Letter of offer of business loan facility, the loan was to be repaid within thirty-six (36) months on equal installments of Tshs. 7,638,090.64.

It was testified further that by then, the mortgaged property had a market value of Tshs. 900,000,000/= with a forced sale value of Tzs. 761,000,000/=. The valuation report, mortgage deed, Personal Guarantee and indemnity and Corporate Guarantee were tendered and admitted as EXHIBIT P3(a, b, c and d respectively). Upon disbursement of the said loan that is, Tshs. 192,215,950/= (after charges), the plaintiff withdrew a total sum of Tshs. 86,000,000/= cash, as per the bank statement EXHIBIT P4. But when he wanted to transfer Tshs. 102,000,000/= to Kipesile's Phones Accessories Ltd. for the purchase of motor vehicle, the transfer could not be approved. Application form for fund transfer to Kipesile's Phones Accessories LTD dated

3/8/2018 and Proforma invoice of TATA dated 03/08/2018 were admitted as EXHIBIT P5a and P5b respectively. Later, on 29/8/2018, Tshs. 102,400,000/= was withdrawn by the bank hence the complaint vide letter by Advocate Tumaini Materu to Equity Bank dated 3/10/2018 admitted as EXHIBIT P6.

PW1 asserted further that he was involved in timber business, livestock food, POP manufacturing and beer production, he tendered permits and agreements which were admitted as EXHIBIT P7(a-d). According to him removal of the money in the account breached the agreements and affected the cycle of working capital. He stated also that he suffered loss of good will from customers and is indebted of Tshs. 427,500,000/=. Finally, he prayed for grant of reliefs as contained in his plaint.

PW2, Msafiri Michael Mhawi, former Loan Officer of the Defendant, identified the plaintiff as their customer who was given business loan to be used as working capital, purchase of a truck, machinery and raw materials. According to him, PW1 started utilizing the said loan upon its disbursement. However, there was a query on the transactions especially the applied transfer of Tshs. 102,000,000/= to the same person (Kipesile's Phones Accessories Ltd.) to purchase the required truck instead of TATA Africa Holdings (Tanzania) LTD. The unresolved queries led to blocking and later on removal of the said amount which in his opinion that was wrong though it was done to enable its usage.

During the defence the defendant also summoned two witnesses. Haikael Philip Bakuju, Business Manager, who testified as DW1, that on 31/7/2018 the Plaintiff applied for a loan of Tshs. 200,000,000/=. The purpose of the loan was to purchase machinery at the cost of Tshs. 50,000,000/=; purchase a motor vehicle – Tipper make TATA which had the cost of Tshs. 102,375,000/= and the balance to be used as working capital. The loan application letter was admitted as Exhibit D1.

According to her, business proposal is used internally by bank for assessment of business security and account of customer. The proposal prepared by the assigned loan officer is presented to the credit committee who will also be required to sign it before being forwarded and or sent to headquarters for approval. When shown Exhibit P1 she conceded that it was unsigned. On loan disbursement, she stated that there was a delay due to some doubts on the business and possibilities of refund. Nonetheless on the 3rd August, 2018 there was disbursement of the credit of Tshs. 192,245,950.00 after deductions of the loan charges. The loan was for working capital and purchase of motor vehicle (TATA) – Tipper. As per DW1, the plaintiff on 03/8/2018, withdrew Tshs. 6,000,000/= through cheque No. 000027. On 4/8/2018 he withdrew another sum of Tshs. 80,000,000/= vide cheque No. 000030 in favour of Kipesile's Phones Accessories Ltd. On the same date the Plaintiff drew a cheque No.

000029 in favour of Kipesile's Phones Accessories Ltd. for Tshs. 102,000,000/=; that cheque was admitted as EXHIBIT D2.

The last transaction was not approved by the bank and the sum of Tshs. 102million was blocked because the proforma invoice presented to the bank showed that funds were to be paid to TATA Africa Holding (Tanzania) LTD (by cheque, T.T. Bankers cheque) whereas the application for transfer of funds by the plaintiff was in favour of a third party, Kipesile's Phones Accessories Ltd. who was not intended to receive the funds. According to her all payments must be by way of cheque, T.T (TISS) or bankers' cheque; cash payment is not allowed or accepted. If customer intends to purchase an asset, then funds will be transferred directly to supplier as per the proforma invoice. The asset then becomes part of security of the loan and requisite documents are handed over to the bank and then they (the lender and the borrower) are registered as joint owners and comprehensive insurance is purchased.

DW1 testified further that the plaintiff failed to observe and or perform his obligations under the Loan facility Agreement, by transferring the funds to the right person, hence the default and breach of the agreement. As such the plaintiff was supposed to start paying to service the loan by instalments on October, 2019. The plaintiff was advised to restructure the loan he had used because it was not performing but he denied and did not refund the loan. As a

result, the breach and default to refund the loan the bank default notice to the plaintiff who could not comply to the demands by the defendant bank. She thus prayed the case be dismissed.

DW2, Humphrey Kenedy Lupembe, credit Administration manager for the defendant supported DW1's evidence. He asserted further that allowing the plaintiff to purchase the motor vehicle (which was to be part of the collateral) in the manner he opted and contrary to credit policy and terms of the loan agreement would have put the bank at risks. In his testimony the witness testified that the plaintiff complained on the way the loan had been handled to the Bank of Tanzania and the defendant was required to explain how they had dealt with the said loan. He also tendered letters of complaints over the said loan which were referred to the central bank (BOT); and the response thereto by the Bank, EXHIBIT D3 and D4 respectively. The letter shows the procedures followed in that loan, as well as the advice and directives given to the plaintiff following the default the plaintiff was advised to comply with the agreement entered by the defendant. The plaintiff continued with default.

According to DW1, upon the default, the Bank successfully resorted to loan recovery measures; the loan is now closed after the sale of the mortgaged property. He also prayed the case be dismissed.

At the conclusion of hearing the court was availed with the Proposal documents for loan applied by the plaintiff dated 21/4/2018, which was also admitted as

C1. As per the said Exhibit C1, which according to DW2 Proposal is necessary for the customer to acquire the loan; it is apparent that the document was prepared by PW2, one Msafiri Michael Mhawi.

Both parties filed their respective final submissions as per the order of this court, and I thank them for their industrious research.

In the submission by the Counsel for the plaintiff, he has reiterated the history behind the establishment of the relationship between the plaintiff and the defendant, which led to the arise of the conflict in the course of implementation of the agreement. In his view the defendant has breached the loan facility agreement. That breach has affected the business of the plaintiff and he prays the court to grant the prayers made in the plaint and which were reiterated at the end of PW1's testimony. The reverse of the views of the plaintiff is the understanding by the defendant through her attorney one Mr. Edwin Lyaro, learned advocated. The defendant in turn prays for dismissal of the entire suit with cost as the plaintiff is in default.

Now dealing with the first issue, **whether the Defendant breached the loan facility and mortgage agreement by withdrawing funds from the Plaintiff's account**; the evidence on record clearly shows that the parties herein entered into a business loan agreement to the tune of Tshs. 200 million, Exhibit P2. Upon signing the same, both parties accepted to be bound by the terms and conditions contained therein. The said loan was secured by among

other things a right of occupancy of the plaintiff's property situated on Plot No. 31-33 and 50-53, Farm No. 125, Kiboriloni within Moshi which was mortgaged in favour of the defendant.

As per clause one of that agreement, the purpose of that loan was to purchase motor vehicle TATA Tipper and also to facilitate working capital. Clause 5 (b) of Exhibit P2 shows further that the said TATA Tipper to be purchased was to be registered as joint ownership between plaintiff and defendant and thus be used as additional collateral. It is not disputed that on 03/8/2018 the defendant disbursed a loan of Tshs. 192,215,950/= after deducting necessary charges. It is also undisputed fact that upon the disbursement of the said loan the plaintiff began to utilize it by withdrawing Tshs. 6,000,000/= cash using cheque No. 27; and also transferred Tshs. 80,000,000/= by cheque No. 30 to Kipesile's Phones Accessories as shown in the Bank Statement admitted as Exhibit P4. That is about 45% use of the whole loan.

The dispute arose when the Plaintiff applied to transfer another sum of Tshs. 102 million to the said Kipesile's Phones Accessories Ltd. as seen on Exhibit P5 (a) and P5 (b). As per Exhibit P2, it was specifically agreed and stated that a motor vehicle TATA Tipper will be purchased. Exhibit P5 (b), the proforma invoice of TATA dated 22nd May, 2018, it shows the same was for purchase of TATA Tipper on consideration of Tshs. 100 million and not 102 million as

requested. Clause 6 of that invoice categorically provides for mode of all payments to be made against Cheque, T.T or Bankers cheque in favour of TATA Africa Holdings (T) Ltd.; cash payment mode is not accepted. The bank details including the account numbers are availed in that invoice. It is not true, as alleged by PW1, that payment could be made in form of cash for certain favours (two motor vehicles at a discount price) or at all that the said Kipesile's Phones Accessories Ltd. was the authorized dealer of TATA vehicles. There was also no any shred of evidence that the said Kipesile's Phones Accessories Ltd. was ever appointed by the plaintiff to be the procurement officer as alleged by PW1. For all that is, the latter was a mere Cooperate Guarantor to the loan facility.

As clearly testified by DW1 and DW2, the Bank has a duty to oversee the disbursement of loan/funds and make sure they comply with the terms and conditions of that facility. They further testified that transfer of fund for purchase of asset, as it was herein, has to be made directly to the vendor/supplier/manufacture and not through a third party. The plaintiff applied for transfer as per Exhibit D2, indeed the said Kipesile's Phones Accessories was a third party in that purchase. Allowing the transfer would be tantamount to divergence of funds which would lead to inability to pay hence exposing the defendant into a financial risk.

In the submission by the counsel for the defendant, the plaintiff was offered Plan B for his loan transaction with the defendant. he was offered an option for loan restructuring by the defendant. The purpose of this restructuring was to review the loan which the plaintiff has already taken or consumed Tshs. 86,000,000/= so that he could pay the same in manageable instalments and at a time frame which was convenient to him. The plaintiff rejected the restructuring proposal. He insisted on being paid the balance of the loan, Tshs. 102,400,000/=. This is in the evidence of DW1 which was not shaken during cross examination.

The counsel for the defendant referred to Section 38 (1) and 39 of the Law of Contract Act, 2019, Cap 345 R.E. 2019 which provides for the effect of refusal to accept offer of performance: ***"Where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract."*** Section 39 of the same Act (supra) provides: ***"When a party to a contract has refused to perform, or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract..."***

There is no dispute that the said sum of Tshs. 102 Million was blocked/frozen and later on withdrawn from loan account. The question is 'was the move

justified?' According to DW1, the said sum was frozen because the amount stated in the invoice did not tally with the amount stated in the transfer; the plaintiff also intended to diverge and transfer funds to a third party other than the vendor hence subjecting the Defendant into financial risks. As per clause 6 (f) of Exhibit P2, the security documents, including the registration card of the said vehicle, were to be executed and perfected. The plaintiff on his loan application promised to use the funds as working capital and purchase of machineries including the said motor vehicle TATA Tipper as per the invoice he presented to the defendant. The defendant agreed to disburse funds for completion of those purposes.

Had the plaintiff presented the said Exhibit P5 (b) invoice and applied for transfer (Exhibit P5a) in favour of TATA Africa Holdings (T) Ltd. and then the defendant refused to effect the transfer, the Defendant could be held liable for breach. However, there was no any deed of variation signed by both parties and tendered in court to vary the terms and what was to be purchased and the mode; it is evident thus, the terms in Exhibit P2 remained intact. The Plaintiff ought to have adhered to the terms and conditions of the said agreement. The plaintiff's failure to abide by the terms of agreement led to the breach as was held in the cited case of **Heavenlight Sadikiel Mneney versus Kenya Commercial Bank (T) Ltd, Hassan J. Magogo@Nkaya Company Ltd**

and Mr. and Mrs Gratis Francis Sakaya, Land Case No. 19 of 2015, High Court of Tanzania, at Moshi (Unreported). The relevant part reads as follows:

*"Be it clearly known that, like any other contract, the terms and conditions agreed under the mortgage contract should be respected and performed by the parties. That is an obligation of the parties under the agreement as provided for under section 37(1) of the **Law of Contract Act, Cap. 345[R. E. 2002]**. Failure to do so amounts to breach of the contract. It reads as follows:*

"The parties to a contract must perform their respective promises, unless such performance is dispensed with or excused under the provisions of this Act or of any other law."

It was averred that the plaintiff was advised on the modality to remedy the affairs so as to enable him to fully discharge his obligations under the loan facility but efforts were in vain.

In the case of **AGENCY CARGO INTERNATIONAL V. EURAFRICAN BANK (T) LTD**, High Court of Tanzania at Dar Es Salaam, Civil Case No. 44 of 1998 cited in *PIL Trade and Services Enterprises Ltd vs TIB Corporate Bank Ltd and Tambaza Auction Mart & General Broker*, Misc. Land Application No. 17 of 2019, High Court of Tanzania at Dar Es Salaam, (unreported) at page 8:

*"The object of security is to provide a source of satisfaction of the debt covered by it. The Respondent to continue being in banking business must have funds to lend and which [h] as to be repaid by its debtors. **If a bank does not recover its loans, it will seriously be an obvious candidate for bankruptcy.... It is only fair that banks and their customers should enforce their respective obligations under the banking system.**"*

I am of the settled view therefore that the bank was simply trying to protect its interest against divergence of funds when withholding the said sum to be transferred to a third-party contrary to the loan facility agreement. Her action was justified and she cannot be held liable for breach of the loan facility and or mortgage deed.

The second issue on whether the Plaintiff breached the Loan Facility Agreement by writing a letter being a request to hire a truck; it is clear from the record Exhibit P2 that the plaintiff was set to purchase TATA Tipper from TATA Africa Holdings (Tanzania) Ltd. According to DW2, if the said vehicle had been bought as per the loan agreement it would have been advantageous in servicing the loan.

The plaintiff in testimony asserted that following the unapproved transfer of funds to the Kipesile's Phones Accessories, he applied to the defendant to hire

a vehicle as an alternative to the purchase of a new vehicle. DW1 stated that hiring another vehicle adversely affected the loan facility. Even so, as per the loan facility (Exhibit P2) there was no such option or at all any deed of variation to that effect. To make matters worse the plaintiff never applied to transfer funds to the right person according to the agreement, that is to the vendor. That is TATA Africa Holdings (Tanzania) Ltd. That ought to have been done prior to the freezing of the said sum 102million. That shows lack of due diligence on his part.

The second issue is thus answered in affirmative that the plaintiff's move to apply for divergence and use of funds for hiring a motor vehicle instead of purchasing the agreed TATA Tipper from the actual vendor was contrary to the loan facility agreement hence the breach. That would have been made right if the plaintiff had an agreement to vary the terms they had entered into the previous contract.

Now on what reliefs are the parties entitled to, there is no dispute that the plaintiff successfully applied for loan facility of Tshs. 200million on condition that he would refund the same on monthly installments of Tshs. 7,638,090.64. The Plaintiff utilized Tshs. 86million whereas 102million was frozen. As per DW1, the loan was due to be refunded from October 2019 upon lapse of one

year; but that loan was never fully repaid by the plaintiff and or restructured by the Defendant though she was willing.

As per clause 7 (a) (g) (j) (k) if the borrower (plaintiff) is in violation any covenants therein that was tantamount to default and hence entitled the defendant to recall the whole loan and even begin recovery measures. In this case upon the default, it appears the plaintiff was duly notified; however, no proof was produced on the mode used in remedying the default. It was alleged and undisputed by the Plaintiff that the loan is now closed following disposition of the mortgaged property.

In view of the fact that the plaintiff breached the terms and conditions of the loan agreement facility as explained above, this suit is devoid of merits. Consequently, there is no doubt that the claim by the plaintiff has failed. I therefore dismiss the suit with costs. It is so ordered.

DATED and DELIVERED at MOSHI this 8th day of NOVEMBER, 2021.




T. M. MWENEMPAZI

JUDGE

The Judgement is delivered this 8th day of November, 2021 in the presence of Mr. Cuthbert Robert Kajuna, the plaintiff; Mr. Oscar Mallya, Plaintiff's advocate and Mr. Edwin Lyaro, Advocate for the defendant.



T. M. MWENEMPAZI

JUDGE