THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MOROGORO)

AT MOROGORO

CIVIL APPEAL NO. 12 OF 2022

(Arising from civil case No. 13 of 2021, delivered by the Resident Magistrate Court of Morogoro on 15th February, 2022 by Hon J.Z Chacha SRM).

NMB BANK PLC..... APPELANT

VERSUS

SEIPH IDD SEIPH @ SEIFU IDDY SEIFU
@ SEIFU IDD SEIFU @SIFU IDDY SIF..... RESPONDENT

JUDGEMENT

Hearing date on: 12/05/2022
Judgement date on: 31/05/2022

NGWEMBE, J:

This appeal is a result of dissatisfaction of the appellant on the judgement and decree delivered by the trial Resident Magistrate Court of Morogoro in civil case No. 13 of 2021.

Brief recap of this appeal goes back to April 2020 where the appellant and the respondent harmoniously executed a term loan agreement for purpose of purchasing goods/stocks to a tune of TZS. 24,

million at the annual interest rate declining balance of 24% payable in 24 equal monthly installments of TZS. 1,268,906.33/= The repayment was agreed to commence from 24th May 2020. Such term loan was secured by a house located at Tingito Street Kauzeni in Morogoro.

However, in the course of business, the respondent on 25th September 2020 wrote a letter to the bank requesting for restructuring of that loan, the request was declined by the appellant and instructed the respondent to pay such loan as per their agreement. According to the appellant, on 29th September, 2020 the respondent refused to pay the requisite monthly installment, an act which amounted into breach of loan agreement. In turn the appellant wrote several demand notices to the respondent intended to remind him to settle the debt, but the respondent refused to heed to.

Finally, the appellant instituted an action in a court of law against the defendant, claiming among others, refund of TZS. 25,377,816.78/= accrued from 30th April 2020, at a commercial interest rate of 24%, up to the date of filing this matter, and at the rate of 12% from the date of filing of this suit until judgement, and at 6% from the date of judgement until full payment of the whole debt; Sale of the collateral house located at Tingito Street Kauzeni, Morogoro together with costs.

Upon hearing both parties, the trial court denied the prayer to sale the collateral of that loan, also directed parties to meet in a round table to discuss on a frustrated contract and champion on the way forward of settling that outstanding loan.

The appellant was aggrieved with such judgement and decree hence this appeal fully armed with four grounds: -

1. *That, the trial court erred in law when decided that the defendant breached the loan agreement and at the same time held that the contract was frustrated by corona.*
2. *That, the trial court erred in law when awarded remedies which were not prayed by the parties.*
3. *That, the trial magistrate erred in law when dealt with the issue of frustration of contract while it was not on court record and without involving the parties.*
4. *That, the trial court erred in law when held that the loan agreement was frustrated by corona while there was no evidence on record to prove the same.*

When this appeal came for hearing on 12/05/2022, both parties were represented by learned advocates. The appellant was represented by advocate Prof. Binamungu, while the respondent was represented by advocate Maria Kapama.

The learned Counsel for the appellant argued, on the 2nd ground related to award of remedies which were not prayed by the parties. He submitted that the reliefs prayed by the appellant were clear as per the Plaint, however the trial court awards the appellant contrary to what was asked for. That there was no prayer from either party to meet in a round table to discuss on the so-called frustration occurred and way forward for the defendant to pay outstanding unpaid loan with interest (if any). He substantiated his argument by referring this court to the case of **Edson Mbogoro Vs. Oc-cid Songea and Another, Civil Appeal No. 44 of 2004.** Concluded in this ground by submitting that the trial court made a serious error to grant what was not prayed for.

Submitting on the first ground, the learned advocate stressed that the trial court made a serious error by holding that the defendant breached the loan agreement, but at the same time held that the contract was frustrated by corona. The two terms are not synonymous and never used interchangeably. Rightly so, the trial court in page 4 of the judgement concluded that the respondent breached a loan agreement. However, the trial Magistrate erred seriously by introducing another aspect of frustration of loan agreement. Rested on this ground by insisting that one contract can not be breached and at the same time be frustrated.

Arguing on the third ground, which is similar to the second ground, he insisted that the issue of frustration of contract was not pleaded and there are nowhere in the whole trial court's record and that the trial court failed to invite parties to address the court on that ground of frustration of contract. Insisted that parties are bound by their pleadings and to the issues raised for determination. He referred this court to the case of **Tanganyika Chipstores Ltd Vs. National Bureau de change Ltd, Civil Appeal No. 93 of 1993** at page 5. Thus, it was wrong for the trial court to raise the issue of frustration which was not pleaded and was not an issue, and that Covid-19 did not frustrate the business but slowed it down.

The fourth ground, the learned advocate referred this court to the argument of the third ground that they are similar in nature and in content. But concluded by referring this court to the case of **Abdallah Yusuph Omary Vs. People's Bank of Zanzibar [2004] T.L.R (CAT)**

whereby the Court held that a single default to pay a loan is a total breach of loan agreement.

In reply, Ms. Maria Kapama, prayed to reply generally on all four grounds of appeal because they are all interrelated. She submitted that the trial court was right to decide that the contract was frustrated and it was not a new issue as it was pleaded in WSD paragraph 4. The Pandemic disease (corona) contributed the failure of the respondent to repay the loan. She further submitted that, the respondent wrote a letter to the appellant to reduce monthly installments from Tsh. 1,268,906.33/= to Tsh 600,000/= and that until the suit was instituted the respondent was already paid Tsh. 7,544,771.98.

She referred this court to the book of Contract Law page 258, which explain on the theory of frustration. She prayed that this appeal be dismissed and the trial court's decision be upheld with costs.

In rejoinder, the learned advocate for the appellant reiterated to his submission in chief and added that, economic hardship does not constitute frustration. The loan agreement was on April 2020 when the Covid-19 was very strong, but still respondent was able to pay the loan, and that frustration was not an issue even in WSD. What was mentioned by the respondent was some economic difficulties. Rested by insisting that courts are bound to decide based on the pleading and that the grounds of appeal are very clear and same be granted with costs.

Having summarized the rival arguments from the learned advocates and upon thorough consideration on the real issue in controversy, I find prudent to begin my consideration with the first ground. To my considered opinion, it is capable of disposing off the

whole appeal. Consciously, the central areas of contention are on two issues, that is, whether there was a breach of loan agreement? and whether the loan agreement was frustrated? These two issues are answered by perusing the documentary evidences.

Before answering these two issues, let me highlight on matters which are not disputed by either party. First, the two disputants entered into a term loan TZS. 24 million executed by the disputants on 22 April, 2020. All necessary documentations were rightly executed by both parties including consent document from spouse of the respondent. Such amount including the accrued interest, in total the respondent at the end of contract was responsible to refund the appellant a total of TZS. 30,453,752.02.

The period of that loan agreement commenced from 24/4/2020 to 24/4/2022. It was agreed that the respondent was responsible to refund the appellant on instalment basis of TZS. 1,268,906.33 every month commencing from 24/5/2020 to 24/4/2022.

However, it is evident that the respondent complied with the loan agreement and refunded a total of TZS. 7,544,771.98 only. Thus, feuds and tensions erupted between the disputants which at the end landed in the court corridors to date.

Considering the arguments of the defence counsel, obvious two important issues are apparent, one the respondent failed to heed to his loan agreement due to business difficulties and or frustration due to Corona. Second the respondent requested the appellant to reschedule the agreed monthly instalments from TZS. 1,268,906.33 to TZS. 600,000 or TZS. 300,000/= the reason being economic hardships.

Undoubtedly, the issue of corona in our country and the rest of the world is well known. The disease entered in our country in year 2019 and by march 2020 it was at the pick. However, the record speaks itself that the respondent took loan from the appellant on 24/4/2020 when corona was at the pick. Thus, such pandemic cannot be a reason for failure of the respondent to heed to his loan agreement.

The issue of frustration of contract is a contractual term whose meaning by Black's Law Diction (8th Edition) defined to mean *prevention or hindering of the attainment of a goal, such as contractual performance. Commercial frustration* is also defined to mean an excuse for a part's non-performance because of some unforeseeable and uncontrollable circumstance.

The respondent's advocate argued quite eloquently that the respondent's responsibility to the loan agreement was intervened by unforeseen events which hindered him to be capable to perform his obligations. She rightly referred this court to the **Contract Law (5th Edition) by Catherine Elliott and Frances Quinn at page 255 & 258**. The author discussed in details on the doctrine of frustration which lead into discharge of contractual obligations by both parties. For instance, if advance payments had been made under the contract prior to the frustrating event they would not be recoverable.

Much as I would agree with the theory of frustration referred above, yet same do not apply in the case at hand. The question is, whether Corona was unforeseeable and uncontrollable circumstance between the disputants? The answer is obvious, Corona cannot be a source of failure of the respondent to perform his contractual obligation

because the respondent entered into such loan agreement at the pick of Corona pandemic, that is from March to September, 2020.

Moreover, it is evident that DW1 testified during trial that his last refund to the bank was 28th December 2021. The same transaction is well articulated in annexure T1 to the tune of Tsh. 7,544,771.98. This testimony proved that Corona was not the reason for his failure to heed to the terms and conditions of his loan agreement.

It is a trite principle of law of contract that, each party to a contract must fulfil his obligation otherwise will amount into an outright breach of contract. Section 37(1) of the **Law of Contract Act, CAP 345** insist that parties to a contract must perform their respective promises, unless such performance is dispensed with or excused under the provisions of the law. Since there is clear evidence that the respondent did not pay the remaining loan amount, indeed and without any slight doubt the respondent breached the terms of the loan agreement.

The major contention, however is whether the contract was frustrated. From the outset, frustration of a contract is an evidential matter, who alleges frustration must establish and prove it by evidence. Usually frustration of a contract refers to a particular way in which contractual obligations can be discharged with. As aforesaid Black's Law Dictionary issued explanation on the term of frustration of contract as follows:-

"Where the entire performance of contract becomes substantially impossible without any fault on either side, the contract is prima facie dissolved by the doctrine of frustration"

Thus, the contract is frustrated when further performance becomes impossible due to unforeseen events or act of god or series of events taking place through no fault of the parties to the agreement.

In respect to this appeal, the respondent in his defence during trial paragraph 4 alleged some difficulties resulted from the eruption of pandemic disease of Covid-19. However, he did not raise the issue of frustration of contract, but rather some difficulties resulted from the eruption of Covid-19. Considering the meaning of frustration and the circumstances which prevented the respondent to perform his contractual obligation are not similar. I therefore, agree with the arguments of the Counsel for the appellant that a contract cannot be frustrated and at the same time be breached. Once a contract is frustrated it means each party to that contract is exonerated from performing it. In other words, a frustrated contract is incapable of being performed. What constituted frustration of contract must be unforeseen circumstances or act of god where parties never thought of, when they were executing such contract. The disputants executed a loan agreement on April 2020, where pandemic Covid – 19 was at the pick. Therefore, the respondent was well aware of the existence of Covid-19, notwithstanding such well-known existence of pandemic, yet he boldly with full business determination entered into a loan agreement with the appellant, hence he cannot rely on it as the reason for failure to heed to his contractual obligation.

This ground alone is capable to dispose of the whole appeal, however, in this appeal there is another important issue to be discussed hereto. The appellant raised an interesting legal issue that parties are

bound by their pleadings and the court is mandated to decide on what is before it. In other words, the court cannot grant what is not asked for? These are fundamental legal principles which should not be forgotten. Some jurists dared to say that court is not your mother who can give even those which are not asked for.

In this appeal, the appellant/plaintiff in its plaint asked three issues, first an order to compel the respondent to pay a total of TZS. 25,377,816.78 and interest therein; second an order to sale the collateral, house located at Tingito Street Kauzeni and third, costs of the suit. Likewise, the WSD from the respondent/defendant insisted that the plaintiff is not entitled to the relief claimed as he has an interest to pay that loan. From the pleadings, the issue of parties to meet in a round table to discuss on the frustration of contract and the way forward was not prayed by either party.

The Court of Appeal in the case of **Fatma Idha Salum Vs. Khalifa Hamis Said, Civil Appeal No. 28 of 2002** held:-

> *"With all due respect to both the district court and the Resident Magistrate Court, this issue was not pleaded and should not have been considered. It is now settled law that the only way to raise issue before the court for consideration and determination is through pleading and as far as we are aware off, this is the only way"*

Another similar decision was made in the **Civil Appeal No. 44 of 2004 between Edson Mbogoro Vs. OC-CID Songea District and Attorney General**, at page 6 the Court held:

Since the respondent did not apply for costs, we will not make an order for costs"

In fact, these precedents, expounded rule 7 of Order VII of Civil Procedure Code Cap 33 R.E. 2019 whereby the rule insist on specific reliefs in the plaint. When a relief is not claimed in pleadings, same cannot be granted by the court. Therefore, parties are bound by their pleadings and out of their pleadings the court is mandated to grant or refuse to grant it.

In respect to this appeal and the way the trial court decreed, I have no slight doubt the trial court failed to heed to its statutory duties, instead it turned into a mediator or issued a compromise decision contrary to the pleadings.

Having so said, this appeal must succeed, it is meritorious, same is upheld. Consequently, the judgement and decree of the trial court is set aside. I proceed to order that the respondent breached the terms and conditions of the loan agreement. Accordingly, the respondent is liable to pay the remaining balance of TZS. 25,377,816.78/= together with interest rate of 24%, from 29th September 2020 (date of breach) up to the date of filing this suit in the lower court, and 12% from the date of filing civil case until the date of judgement of the lower court, and 6% from the date of judgement until full payment. Failure to comply with this order, the appellant may realize its sum of money by selling the collateral provided for. Costs is provided for to the appellant in this appeal and in the court below.

I accordingly Order.

P.J. NGWEMBE

JUDGE

31/05/2022

Judgement: Delivered at Morogoro in Chambers on this 31st day of May, 2022 in the presence of Prof. Binamungu for the Appellant and Ms. Mtweve for Maria Kapama advocate for the Respondent.

Right to appeal to the Court of Appeal explained.

P.J. NGWEMBE

JUDGE

31/05/2022