IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(TABORA DISTRICT REGISTRY)
AT TABORA

LAND CASE NO. 05 OF 2019
BETWEEN
ZETAKI INVESTMENT CO. LTD ..... PLAINTIFF
VERSUS
NATIONAL MICROFINANCE BANK ..... DEFENDANT

Date of Last Order: 2.11.2022
Date of Judgment: 21.11.2022

JUDGMENT

KADILU, J.

The defendant advanced loan facilities to the plaintiff in two categories; firstly, the loan term worth Tshs. 900 million and secondly, an overdraft facility at the tune of Tshs. 500 million. The two loan agreements were signed and executed on 20/3/2018. The loans were secured by three commercial houses which are in the name of Zengo Tandula Kija, the Director of ZETAKI Investment Co. Ltd and guarantor of the borrower. The term loan was to be repaid within a period of 24 months whereas overdraft facility was required to be repaid within 12 months.

It was agreed that repayment of the loan was to be by monthly instalments whereby the plaintiff was supposed to deposit Tshs. 45,806,222/= monthly and the first instalment was to be made after 30 days from the date of loan disbursement. It is alleged that after execution of the

said loan agreement, the plaintiff started defaulting as there was no single installment that was made to the defendant. On 5/9/2019, the defendant served the plaintiff with a statutory 60 days' notice of default. The notice demanded repayment of the principal sum, interest and penalty from the day the loan was issued to the date of notice.

The defendant claimed that up to the date of notice, the principal sum, interest and penalty for both loans had accrued to the total of Tshs. 1,811,084,888.11/=. In the notice, the defendant informed the plaintiff that if the default would not be rectified, the defendant could exercise its right to sale the properties pledged as security for the loans. Aggrieved by the notice of default, the plaintiff filed in this court the present suit and Misc. Land Application No. 45 of 2019 praying for an injunction order to restrain the defendant from selling the said properties pending determination of this case. The plaintiff claims for the following:

(a) *An order to stop the defendant from claiming his interest against the plaintiff.*

(b) *An order to stop the defendant from claiming from the plaintiff an amount which was not part of their agreement.*

(c) *The defendant be ordered to pay the plaintiff Tshs. 500 million as specific and general damages for causing disturbances, sleepless nights, loss of business reputation, financial paralysis and loss suffered by the plaintiff due to honest and fiduciary relationship by the defendant.*

(d) Costs of, and incidentals to the suit.

(e) Any other relief the court may deem fit and just to grant.

On the other hand, the defendant prays for a declaration that the plaintiff defaulted to repay the loan as contracted. It is also the defendant's prayer that the plaintiff's case be dismissed with costs for lack of merits.

At the hearing of this case, the plaintiff was represented by Mr. Thadeus F. Kivulunzi, learned Advocate and the defendant enjoyed the service of Mr. Mackanjero Ishengoma, the learned Counsel. Before the hearing, the following issues were framed for court's determination:

(i) Whether there was a loan contract between the plaintiff and the defendant.

(ii) Whether the loan contract was breached.

(iii) Whether the said contract was frustrated.

(iv) To what reliefs are the parties entitled?

The plaintiff called two witnesses while the defendant had one witness. Responding to the first issue, PW1, Zengo Tandula Kija testified that what triggered the dispute between plaintiff and the defendant is a loan agreement that was signed and executed in 2018 whereby PW1 obtained from the defendant a term loan of Tshs. 900 million and overdraft facility to the tune of Tshs. 500 million. It was PW1's testimony that the two loans were secured by the following commercial houses which are in the name of

Zengo Tandula Kija, the Director of ZETAKI Investment Co. Ltd and guarantor of the said loans:

(i) Plot No. 18 Block 'E' Kamando Area at Igunga Urban.
(ii) Plot No. 169 Block 'A' Hanihani area at Igunga Urban.
(iii) Plot No. 171 Block 'A' Hanihani area at Igunga Urban.

To support his testimony on this point, PW1 tendered a letter offer for a term loan and offer for an overdraft facility which were admitted by the court and marked as exhibits "P1" and "P2" respectively. On this aspect, PW1's evidence was not contradicted by the defendant. DW1, one Chediel Kasala who is the defendant's loan officer testified exactly what was stated by PW1 regarding the existence of a loan agreement between the parties. Therefore, it is not in contention between the parties that there was a loan agreement between them.

The agreed terms were that the term loan would be repaid within 24 months and overdraft facility was to be repaid within 12 months. Repayment of both loans was agreed to be by monthly installments whereby the plaintiff was supposed to deposit Tshs. 45,806,222/= monthly. The first installment was to be deposited after 30 days from the date of loan disbursement. It was also agreed that at the end of loan tenor, the plaintiff was required to pay the entire principal sum and interest in full. In case of default to repay the loan, the parties agreed that the defendant would exercise his right to sale the mortgaged property.

Having regard to the witnesses' testimonies, exhibits tendered and arguments presented during the hearing, I have no hesitation to conclude the first issue in affirmative. This is so because, section 10 of the Law of Contract Act, Cap. 345 provides that:

> *"All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void."*

It was stated earlier that neither the plaintiff nor the defendant disputes to have entered into a contract with the other party. Moreover, the facts of this case do not reveal in anywhere that any of the parties was forced to enter into a loan agreement. Further, capacity of the parties to enter into the said contract was not challenged. For the plaintiff, which is an incorporated company, Resolution of the Board of Directors authorising the borrowing was presented as annexure "D1" to the plaint. There is also no doubt about the lawfulness of the consideration herein and, no illegality was raised concerning the parties' agreement.

As it appears, what is in dispute between the parties is not the existence of a loan agreement between them, rather, the exact loan amount that the plaintiff is required to repay. PW1 asserts that for the term loan of Tshs. 900 million, the repayment is Tshs. 1,099,349,337/= being the principal sum plus interest. For overdraft facility, the plaintiff is of the view that the payable amount is Tshs. 590,000,000/=, although PW1 did not show

how the same was calculated. To him, the total loan amount is Tshs. 1,689,349,337/=.

DW1 contends that the plaintiff is supposed to repay Tshs. 1,811,084,888.11/= being the principal sum, interest and penalty up to the date of notice that is, 28/8/2019. He stated that the interest and penalty continue to accrue on daily basis until the date of full payment of the loan by the plaintiff. PW1 claims to be totally unaware about how the defendant has reached at the claimed amount of Tshs. 1,811,084,888.11/=. He indicated during the hearing that the amount has been inflated by the defendant. He however expressed that, if the anomaly will be rectified, he will be ready to repay the loan.

Therefore, the parties are at issue as to whether the loan to be repaid by the plaintiff is Tshs. 1,689,349,337/= or Tshs. 1,811,084,888.11/=. The defendant did not disclose how the Tshs. 1,811,084,888.11/= was arrived at even by identifying the amount constituting the principal sum, the interest and penalty. Given the circumstances, the court cannot rely on speculations in deciding this point. I would advise the parties to invoke the doctrine of "*a document must speak by itself*" to resolve the dilemma. In which case, the answer will be apparent from the loan contract itself. That said, I conclude that the first issue has been answered in affirmative.

The next issue is whether there was breach of the loan contract. DW1 alleges that from March 2018 when the loan was disbursed to the plaintiff to

September, 2019 when the plaintiff was served with the notice of default, no single installment was made by the plaintiff in repayment of the loan as per the agreement. He narrated the steps that are usually taken by the defendant in following up customers' loans where repayment trends turn to be poor. He said, the loans' officials used to visit the concerned customer with a view to sharing his business challenges and render financial advice. They usually prepare reports to that effect. DW1 was cross-examined as to whether or not the said procedure was invoked before serving notice of default to the plaintiff. He stated that it was, but he failed to produce the report alleged to have been prepared after the visit.

The defendant is of a firm view that the plaintiff contravened the terms of loan agreement for failure to deposit the monthly installments as agreed. The Advocate for the defendant referred to section 37 (1) of the Law of Contract Act, Cap. 345 which provides that:

> *"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."*

The learned Counsel referred this court to the decision by the Court of Appeal in the case of *Private Agricultural Sector Support Trust & Another v Kilimanjaro Cooperative Bank Ltd,* Civil Appeal No. 171 & 172 of 2019 in which it was stated that:

> *"The parameters of a loan are pretty straightforward. If you borrow money, you must ultimately pay it back, in most cases with interest. There is no shortcut."*

He maintained that there is no alternative way to repayment of the loan. It was argued by DW1 that failure by the plaintiff to repay the loan as agreed justifies the defendant's action to recover the loan by selling the mortgaged property or any other measure desired by the defendant. He resorted to section 126 (d) of the Land Act, Cap. 113 which stipulates that where the mortgagor is in default, the mortgagee may exercise any of the remedies available to him, including sale of the mortgaged land.

PW1 refuted DW1's story about default in repayment of the loan and stated that up to 5/9/2019, the plaintiff had already repaid the loan to the tune of Tshs. 450,000,000/=. When asked if there he had any proof of the said deposits, PW1 replied that it is the defendant who should prove it as it is the custodian of customers' bank statements. He told the court that up to September 2019, each party was fulfilling its contractual obligation and there were 5 months more before the expiry of the loan period. PW1 stated further that after the notice of default, he made several attempts to meet the defendant and settle the matter amicably, but all were in vain.

He tendered a letter of request to meet the defendant for reconciliation and another letter of request for extension of time for repayment of the loan. Nevertheless, the defendant did not cooperate. Instead, the plaintiff was served with another notice of default and intention to sale the mortgaged property in case he fails to repay the loan within 14 days. In that notice, the amount claimed by the defendant was indicated as Tshs. 2,017,485,632.59/= instead of Tshs. 1,811,084,888.11/= claimed earlier. In

addition, PW2 testified on the manner in which the notices of default were served to the plaintiff and the extent to which attempts to sell the mortgaged property had ruined the plaintiff's business.

PW1 maintains that the defendant breached a loan agreement by issuing notice of default while the plaintiff was still depositing loan installments and the loan period was not yet expired. Moreover, PW1 elaborated that he stopped to repay the loan after the amount was exaggerated unilaterally by the defendant at the same time, the defendant avoided all suggestions by the plaintiff in quest to resolve the matter amicably. It was PW1's contention that his business was affected negatively by the global economic trends and pandemic. Notwithstanding, the defendant disregarded the proposal to restructure the loan repayment schedule.

In resolving the issue whether there was breach of loan agreement, it is clear that the plaintiff does not dispute to have taken the loan from the defendant. Neither does it object the obligation to repay the loan. However, it is apparent from the records and testimonies that the plaintiff did not deposit the monthly installments as agreed. The plaintiff's dissatisfaction is about the timing of notice of default and the manner in which the claimed loan amount was calculated. Pw1 stated categorically that he is completely ignorant about how the claimed Tshs. 1,811,084,888.11/= was reached at. He does not however dispute that, a default clause in the loan agreement carried with it the aspect of interest and penalty. It is incomprehensible how

the plaintiff could expect the loan amount to remain the same even after default to repay. Section 74 (1) of the Law of Contract Act, Cap. 345 provides:

> *"Where a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated."*

Regarding the plaintiff's contention that the notice of default was issued before date, I find this argument devoid of merit as the period of more than 12 months without any deposits in repayment of the loan was a sufficient indication of breach which justified the issuance of notice by the defendant. The plaintiff failed to prove the alleged deposits of Tshs. 450,000,000/= installments before the notice of default, not even by mentioning the months in which the said deposits were made. Even if the same could be proved, yet the amount was just peanut compared to the claimed amount of Tshs. 1,811,084,888.11/= and the remained duration of the loan agreement.

The failure by the plaintiff to deposit monthly installments as agreed constituted an anticipatory breach of contract since the plaintiff failed to honour its contractual obligation before the end of contractual period. Under

the circumstances demonstrated by the facts of this case, no reasonable person could come to the conclusion that the plaintiff had intention to fulfil its contractual obligation. Clause 6 of the general terms and conditions of the loan facility provided:

> *"Occurrence of any of the following events shall constitute an event of default which shall automatically entitle the Bank to recall the facility and enforce any securities pledged towards the payment of the facility:*
> *6.1. ... Any failure by the Borrower to repay the principal amount or pay any installment of interest or other sum, on its due date."*

As alleged, the plaintiff failed to deposit any installment from the date the loan was issued to the date of notice of default. It is evident that when notice of default was issued, the remaining loan period was 5 months only. Based on the foregoing, I am of the considered view that the notice of default that was issued to the plaintiff was justifiable and in accordance with the requirements of section 127 of the Land Act, Cap. 113. Ultimately, it is hereby concluded that the plaintiff breached the loan agreement by failure to deposit monthly installments as agreed.

The third issue is whether the loan agreement was frustrated. Frustration of contract occurs where there is a supervening event which renders performance of the contract impossible. It is a settled position in law that difficulty in performance of contract is not impossibility, hence, no frustration. In the case of ***Kanyarwe Building Contractor v Attorney***

General & Another, [1986] TLR 17, Mwalusanya, J. (as he then was) stated that:

> *"Frustration is a sort of shorthand: it means that a contract has ceased to bind the parties because the common basis on which by mutual understanding it was based has failed. It would be more accurate to say, not that the contract has been frustrated, but that there has been a failure of what in the contemplation of both parties would be the essential condition or purpose of the performance."*

In the case at hand, it was argued by PW1 that a contract was frustrated because the loan was intended to be invested in the business of agricultural products whose market deteriorated drastically. He elaborated that between the year 2018 and 2019, business trends in the world changed completely. India, which used to be one of his biggest markets for peas (*mbaazi*), stopped purchasing the same from Tanzania immediately after the plaintiff had accumulated the stock. As a result, the price fell drastically from Tshs. 3,000/= @ kg to Tshs. 200/= @ kg. To mitigate the situation, PW1 tried to apply for a loan from other banks to repay the defendant's loan, but he was unsuccessful because the defendant had spoiled the plaintiff's name to other financial institutions which caused his name to be blacklisted. To him, the loan agreement was frustrated.

Concerning the doctrine of frustration, Advocate for the plaintiff referred this court to the Australian case of ***Codelfa Construction Pty Ltd.***

v State Railway Authority, NSW [1982] which defines the term, "frustration." He further referred to the English case of ***Krell v Henry*** [1903] 2 KB 740 in which it was stated that frustration of contract occurs when unforeseen event renders performance of a contract impossible. The learned Counsel submitted that the contract between the plaintiff and the defendant was frustrated by two events. Firstly, exaggeration of the loan amount by the defendant made the repayment by the plaintiff impossible. Secondly, the sudden change of price in crops rendered the performance of loan agreement impossible since the profit was extremely low while the outstanding loan amount was increasing day by day.

With due respect to the Counsel, I hold a different opinion on this point. While it is contended that the contract was frustrated, PW1 stated in testimony that the reasons for him to stop repayment of the loan were untimely notice of default and after seeing that the loan amount was becoming unbearable to him. In Tanzania, frustration of contract is provided under section 56 (2) of the Law of Contract Act. Generally, for the frustrating event to be regarded as had paralysed the contract, neither of the parties should be at fault.

In the current case, the plaintiff was at fault for failing to deposit monthly installments. Further, for the doctrine of frustration to be invoked, it is not sufficient merely to show that conditions have changed so that one party is in a more onerous position, financially or personally. It should be shown that it is really impossible to perform the contract. What transpired in

this case was hardship to perform the contract, rather than the impossibility of performance as alleged. As such, I am satisfied that the loan contract between the plaintiff and the defendant was not frustrated, but it became difficult for the plaintiff to discharge his contractual obligations.

The last issue is about reliefs to which the parties are entitled. Having established that the plaintiff breached a loa contract, I will not labour to discuss the reliefs as prayed by the plaintiff. Thus, this court finds that the plaintiff defaulted to deposit monthly installments in repayment of the loan as agreed. In the final analysis, the case is dismissed with costs for lack of merits.

Right of appeal explained to the parties.

It is so ordered.

KADILU, M.J.,
JUDGE
21/11/2022

Judgement delivered on the 21st Day of November, 2022 in the presence of Mr. Thadeus F. Kivulunzi, Advocate for the plaintiff, and Mr. Amos Japhet Gahise (Advocate), holding brief for Mr. Mackanjero Ishengoma, Advocate for the defendant.

THE HIGH COURT OF TANZANIA

KADILU, M. J.
JUDGE
21/11/2022.