

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

**CIVIL CASE NO. 03 OF 2020**

**ZETAKI INVESTMENT CO. LTD..... PLAINTIFF**

**VERSUS**

**BANK OF AFRICA TANZANIA LTD..... DEFENDANT**

*Date of Last Order: 21.11.2022*

*Date of Judgment: 14.12.2022*

**JUDGMENT**

**KADILU, J.**

The plaintiff filed this suit claiming from the defendant the payment of Tsh. Five Hundred Million (Tshs. 500,000,000/=) being special damages for breach of loan agreement and general damages at the tune of Tshs. One Hundred Million (Tshs. 100,000,000/=) for disturbances, sleepless nights, loss of business reputation, financial paralysis and loss suffered due to honest and fiduciary relationship caused by the defendant. It also seeks for an order to stop the defendant's claim of interest from the plaintiff and payment of costs of this suit by the defendant. The plaintiffs suit against the defendant is based on a lender-borrower relationship. It is asserted by the plaintiff that by a Loan Facility Letter dated 17<sup>th</sup> April 2018, the defendant availed to the plaintiff a credit facility of Tshs. 400,000,000/=.

In support of the suit the plaintiff averred that it defaulted to repay the loan at an agreed interest rate of 20% per annum repayable within a period of 12 months. The defendant alleges that the plaintiff failed to repay the money borrowed and as at 19<sup>th</sup> November 2019, the principal amount together with interest accrued was a total of Tanzania shillings 351,686,745.81 and the same keeps on accruing interest. On 01/11/2018 and 31/10/2019, the defendant served upon the plaintiff Demand Notices requiring it to make full payment of the amount due and outstanding under the credit facility.

The plaintiff's Director, Zengo Tandula Kija filed a Witness Statement and his Advocate filed final submissions in which it admitted to have been availed with a credit facility of Tshs. 400,000,000/= by the defendant. It also admitted to have defaulted, but stated that its default was not intentional. It attributed it to the effects of COVID-19 which had hit the globe and the defendant's action of placing its security guards to the plaintiff's store to prevent the plaintiff from selling any crops without permission from the defendant. Even after the restriction, the crops' price never went high hence, the plaintiff sold the crops at lower price than the purchase price, henceforth incurred loss.

The plaintiff approached the defendant with a view to seeing how they could settle the situation, but was unsuccessful. Instead, the defendant appointed the receiver to sell the plaintiff's properties which were used to secure the loan. The plaintiff's contention is that the purpose of the loan was

use it as a capital in purchasing seasonal crops when the price was low and sale the same when the price is high. After having purchased the crops, the plaintiff alleges that business became frustrated due to the effects of COVID-19 which had hit the globe.

When the matter came for hearing, the plaintiff was represented by Counsel Thadeus F. Kivulunzi while the defendant was represented by Counsel Rosemary Makori. Four issues were framed as follows:

- i. Whether there was a loan agreement between the plaintiff and the defendant.
- ii. If the first issue is answered in affirmative, whether there was breach of contract.
- iii. Whether there was frustration of that contract.
- iv. What are the reliefs to which the parties are entitled?

From the pleadings, evidence and submissions of the parties, none of them is disputing the existence of a loan contract between the plaintiff and the defendant. For instance, the plaintiff states as follows in the third paragraph of final submissions:

*"What really triggered the event leading to this action is the loan agreement between the plaintiff and the defendant which was signed and executed on 17<sup>th</sup> April 2018, when the plaintiff obtained from the defendant the loan to the tune of Four Hundred Tanzanian Shillings (Tshs. 400,000,000/=)."*

What is in dispute between the parties herein is the terms of a loan agreement between them. The terms were that the loan was repayable

within a period of 12 months. On this loan the plaintiff committed certificates of title comprised of Plot No. 87 Block "A" Hani Hani, Igunga urban, Plot No. 489 Block "A" Hani Hani, Igunga urban and Plot No. 109 Block "A" Hani Hani, Igunga urban, all in the name of Zengo Tandula Kija. A legal mortgage was executed between the parties and was registered. The loan was also secured by a debenture of assets of Zengo Tandula Kija namely, Rice Miller machine and Sunflower Oil Milling machine and a guarantee of 60% of the approved amount by Private Agricultural Sector Support (PASS).

In terms of the credit facility letter, the loan was a short-term revolving credit line being a working capital for purchasing seasonal crops. The said facility was repayable in single instalment within a period of 12 months from disbursement. It is on record that the loan was disbursed to the plaintiff in two instalments; the first was Tshs. 200,000,000/= deposited on 7/6/2018 and the other was Tshs. 200,000,000/= deposited on 4/7/2018. The 12 months period expired on 4<sup>th</sup> July 2019 and according to the defendant, up to that time the plaintiff had not repaid the facility in full.

It is the contention of the plaintiff that the price of the crops which were the subject matter of contract did not go up during the entire contractual period. The plaintiff complains that the restriction imposed by the defendant on how and when could the plaintiff sell the crops was a condition which was not in a contract. Exhibits "P6" and "P7" were admitted in proof of this assertion. Nonetheless, the plaintiff managed to repay Tshs. 350,000,000/= out of Tshs. 400,000,000/=. According to the plaintiff's

Advocate, the remaining loan amount was Tshs. 80,000,000/= only which could be paid by PASS which guaranteed to repay 60% of the principal sum in the event of default by the plaintiff.

In the light of what I have endeavoured to explain above, it is evident that there was a loan agreement between the plaintiff and the defendant. The terms of that contract have also been demonstrated though briefly. Consequently, the first issue is answered in affirmative. The next issue is whether there was breach of the said contract. The **Black's Law Dictionary, 8<sup>th</sup> Edition** of 2004 at page 200 defines a term "breach of contract" as a violation of contractual obligation by failing to perform one's own promise by repudiating it or by interfering with another party's performance.

It is common knowledge that breach of contract occurs where its terms have not been performed as agreed. In the present case, one of the terms of loan agreement was that the plaintiff had to repay the loan in full not later than on 4<sup>th</sup> July, 2019. The record shows that on 31<sup>st</sup> October 2019 when the demand notice was served to the plaintiff, the outstanding amount was Tshs. 436,446,500/=. After demand notices, the plaintiff managed to reduce the outstanding amount to Tshs. 351,686,745.81 by 19<sup>th</sup> November, 2020.

PW1 testified that his failure to repay the loan in full within stipulated time was caused by the defendant's restrictions imposed on the plaintiff. DW1 denies this assertion and stated that the plaintiff was free to purchase

the crops in the manner it deemed suitable and the credit facility did not have any clauses, conditions or terms which enabled the defendant to exercise control over the plaintiff. The plaintiff's claim that he had repaid Tshs. 350,000,000/= in fulfilment of contractual obligation was denied by the defendant on the basis that the same was not proved. On the other hand, the defendant tendered exhibit "D4" which is the plaintiff's statement of accounts to prove the outstanding loan amount.

The defendant submitted that since the plaintiff does not dispute that the loan agreement was freely entered into by the parties, they are bound by the terms agreed therein. In the case of ***Philipo Joseph Lukonde v Faraji Ally Saidi***, Civil Appeal No. 74 of 2019, the Court of Appeal stated that:

*"Where the parties have freely entered into binding agreements, neither courts nor parties to the agreement should interpolate anything or interfere with the terms and conditions therein, even where binding agreements were made by lay people."*

In the light of the foregoing, this court finds that the second issue is answered in affirmative in the sense that the plaintiff breached a loan agreement for failure to repay the principal sum and interest within the agreed time.

The third issue is whether the contract was frustrated. This is a question of fact that has to be considered from the evidence. The **Black's Law Dictionary, 8<sup>th</sup> Edition** of 2004 at page 740 defines frustration of

contract as the doctrine which states that if a party's principal purpose is substantially frustrated by unanticipated changed circumstances, that party's duties are discharged and the contract is considered terminated. In the case of ***M/S Kanyarwe Building Contractor v The Attorney General and Another*** [1985] TLR 161 it was held that:

*"...The doctrine of frustration states that where events occur that make the performance of the contract impossible and these frustrating events are not the fault of either party, then the contract is brought to an end with neither party at fault..."*

From these definitions, a contract is frustrated where further performance becomes impossible due to unforeseen event or a series of events taking place through no fault of the parties to the agreement. In the present case, DW1 in his evidence in chief stated that the plaintiff managed to make partial payment of the loan, but did not clear the entire loan as a result of which the event of default as per agreement occurred. It was further evidence of DW1 that at the time of instituting this suit, the loan that remained unpaid was Tshs. 351,686,745.81. The plaintiff does not dispute that the loan was not fully repaid as per the agreement, but claims that the contract was frustrated.

To prove that the contract was frustrated, the plaintiff was expected to lead evidence in establishing that **firstly**, there was a frustrating event which occurred after the signing of contract and it paralysed the purpose of contract. **Secondly**, the frustrating event was not foreseen by the parties at

the time of signing the contract. **Thirdly**, the frustrating event was not a result of fault of the plaintiff or defendant. **Fourth**, such frustrating event rendered the performance of contract impossible. PW1 merely stated that business was frustrated by the effects of COVID-19 without showing how the pandemic had prevented him from performing the contract. He also told the court that the defendant had imposed restrictions on when, where and how to sell the crops, hence frustrating the contract.

In the present case, the plaintiff was at fault for failing to repay the loan until when several demand notices were served on it. For the doctrine of frustration to be invoked, it is not sufficient to merely show that conditions have changed rendering the performance of contract difficult or more expensive. It should be shown that it really became impossible to perform the contract. What transpired in this case was the 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 plaintiff asserts that the defendant breached a contract by imposing restrictive conditions which were not among the contractual terms. The defendant denies to have imposed any such restrictions. This brings to the fore the provisions of section 110 (1) of the Law of Evidence Act [Cap. 6 R.E 2019] which provides that;



*"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts he asserts, must prove those facts exists."*

The Court of Appeal in the case of **Anthony Masanga v Penina (Mama Mgesi) & Lucia (Mama Anna)**, Civil Appeal No. 118 of 2014 (Unreported) emphasized this principle by stating that; *"...generally, in civil cases, the burden of proof lies on the party who alleges anything in his favour."* As to whether the evidence adduced by the plaintiff is sufficient to prove the alleged restrictions on the balance of probability, a decision in the case of **Paulina Samsoni Ndawanya v Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017 (unreported) is relevant in which the Court of Appeal stated that:

*"It is equally elementary that since the dispute was in civil case, the standard of proof was on a balance of probabilities which simply means that the Court will sustain such evidence which is more credible than the other on a particular fact to be proved."*

Guided by the above legal authority and by weighing the weightier evidence, I am persuaded that, the defendant managed to prove on the balance of probability that the plaintiff breached a loan contract. See also the case of **Geita Gold Mining Ltd v Ignas Athanas**, Civil Appeal No. 227 of 2017, (unreported). In these cases, the defendants' evidence appeared weightier than that of the plaintiffs. The Court of Appeal of Tanzania in

***Paulina Samson Ndawavya v Theresia Thomas Madaha (supra)***, observed as follows on how to discharge the burden of proof in civil cases:

*"... the degree is well settled. It must carry a reasonable degree of probability, but not so high as required in criminal cases. If the evidence is such that the tribunal can say- we think it is more probable than not, the burden of proof is discharged."*

Subjecting the above legal authority to the present suit, it is my opinion that, given the enumerated set of events and the documents tendered, it is more probable than not that the defendant in this case has discharged the burden of proof to the required standard.


I now resolve the last issue as to what reliefs are the parties entitled. In the first place, after having found that the plaintiff was in breach of the loan agreement, the reliefs prayed by the plaintiff cannot stand. Therefore, labouring to resolve this issue is a mere academic exercise which I volunteer to undertake albeit briefly. The plaintiff has claimed in his plaint for payments of compensation amounting to Tshs. 500,000,000/= being specific damages for breach of loan agreement and general damages at the tune of Tshs. one hundred million (Tshs. 100,000,000/=) for disturbances, sleepless nights, loss of business reputation, financial paralysis and loss suffered due to honest and fiduciary relationship caused by the defendant.

As argued by the defendant, being a corporate person, the plaintiff could not suffer disturbances and sleepless nights. Notwithstanding, the law

is well settled that specific damages need to be specifically pleaded and strictly proved. This was underscored in the case of **Anicet Mugabe v Zuberi Augustino** [1992] TLR 137. The plaintiff in the present case failed to adduce material evidence on how it has arrived at Tshs. 500,000,000/= million compensation. The plaintiff just stated that it was the compensation for breach of contract, thus unable to justify the specific loss incurred. I therefore find the claim for specific damages to the tune of Tshs. 500,000,000/= million shillings was not proved by the plaintiff as per the required standards of the law. In that situation, the court has also failed to exercise discretion to award the claimed general damages.


Consequently, the plaintiff is not entitled to reliefs pleaded in the plaint as it was found in breach of loan agreement and the damages claimed were not proved as required by the law. In the upshot, the case is dismissed with costs for lack of merits.

**It is so ordered.**

  
**KADILU, M.J.,**  
**JUDGE**  
**14/12/2022**

Judgement delivered on the 14<sup>th</sup> Day of December, 2022 in the presence of Mr. Kelvin Kayaga, Advocate holding brief for both the plaintiff and the defendant. Right of appeal is fully explained to the parties.



  
**KADILU, M. J.**  
**JUDGE**  
**14/12/2022.**