

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM REGISTRY)
AT DAR ES SALAAM
CIVIL CASE NO 61 OF 2020**

JAMES PAUL WAMBA.....PLAINTIFF

Vs

TITUS MICHAEL GAMNAZI.....DEFENDANT

EX PARTE JUDGEMENT

Date of Last Order: 2/12/2022.

Date of Judgement: 4/3/2022.

MASABO, J.:-

The plaintiff is suing for reimbursement of Tsh.680, 000,000.00 (an estimated equivalent of the sum of USD 300,000), general damages for breach of contract, interest on the amount claimed and costs for the suit. In the plaint it is alleged that, sometimes back, the defendant approached the plaintiff seeking a loan of Tshs.680, 000,000.00 (an estimated equivalent of USD 300,000). He was advanced the same on the understanding that he would repay the money without due delay but he defaulted. In spite of acknowledging indebtedness and making several promises for repayment, the sum has remained due hence this suit.

The defendant did not file his written statement of defence. While appearing in court 17th November 2020 through his counsel one Ngoitama, he prayed and was granted a 14 days extension of time reckoned from the 17th November 2020. It would appear that, having obtained the leave he went to sleep. Until 10th May 2021 he had not filed his defence. Consequently, a leave to proceed ex parte against him.

In proof of his claims against the defendant, the plaintiff testified as PW1. He narrated that, in 2015 he advanced the defendant a sum of USD 300,000 but the defendant never repaid the same in spite of several demands and commitments. He stated that the monies were intended for purchase of a machine known as I-site Lesser Scanner for use in mining activities. At the material time, the defendant was working as a metrological Engineer at Bulyankulu Gold Mine undertook to help the plaintiff to purchase the machine as he had the technical know-how and he made him to believe that he can get the machine at a fair price. He proceeded that the fruits of this verbal agreement have not been realised as the defendant has neither delivered the machine as greed nor repaid the money. His promises to repay the monies have remained elusive. In fortification he produced a promissory

note signed by the defendant on 28/1/2018 (Exhibit P1). He also tendered an email dated 9/3/2018 in which the defendant promised to pay USD 54,000 (Exhibit P2). Other documents tendered and admitted as Exhibit P3 and P4 comprise of *Makabidhiano ya Hati ya kiwanja, Hati ya Mauziano ya nyumba/kiwanja, Hati ya Mauziano ya Kiwanja*.

George Jonathan Kassa, testified as PW2. He narrated that he was the one who introduced the plaintiff to the defendant. He was not a witness to the transaction but he learnt from the plaintiff that he advanced the defendant a sum of USD 300,000 for purchase of a mining exploratory equipment from South Africa. He also stated that, the plaintiff has made several attempts to recover the money in vain. In one of the numerous attempts to recover the money, the plaintiff was arrested and upon interrogation by police he promised to repay the money and deposited two title deeds and covenanted that should he fail to repay the money the properties in the two-title deed be confiscated to the plaintiff.

Three issues await my consideration and determination, namely: **one**, whether there was a loan agreement between the parties; **two**, whether the

defendant is in breach of the agreement and **three**, to what reliefs are the parties entitled.

Regarding the first issue, having gone through the evidence, I have observed that, much as the plaintiff has consistently asserted that the defendant owes him the claimed sum of USD 300,000 or its equivalent of Tshs 680,000,000, there are three material contradictions on record. The first regards how the monies landed into the defendant's hand. While paragraph 3, 4 and 14(1) of the plaint and Exhibit P1 show that the claimed sum landed on the defendant by way of a verbal loan agreement, the oral testimony of PW1 and PW2 reveal that the defendant was entrusted the claimed sum to buy a mining exploration equipment from South Africa. This contradiction casts a serious doubt as to the existence of the loan agreement between the parties.

Assuming that the money landed in the defendant as a loan or was entrusted on him for purchase of the machine, there is yet no certainty as to the actual amount entrusted/advanced to the defendant. Whereas it is pleaded that the loan advanced to the defendant was USD 300,000 an equivalent of Tshs 680,000,000/=, PW1 and PW2 testimony was to the effect that the amount

entrusted upon the defendant by the plaintiff was USD 300,000 equivalent to Tshs 680,000,000/=.

The third disparity is on the identity of borrower/defaulters. Whereas the testimony of PW1 and PW2 coincides with the allegations fronted in the plaint that the monies were advanced to the defendant, Exhibit P3 paints a different story. According to this Exhibit the sum of USD 300,000 is owed from a company in the name of **Vox Minerals (Pty) Limited**. To derive this point, I will let the most relevant extract from exhibit P3 speak for itself:

Dear James

I trust you are doing splendidly. I am delighted to write this email to you on behalf of Vo Vox Minerals (Pty) Limited. "THE Company" concerning the subject.

Following conclusion of the Company's business in Hong Kong, this is to delineate to you that your money (USD 300,000) as payment towards the total amount that the company owes you, will be paid back in full between 30th June and 31st July 2018. The transaction shall be made payable to you from the Company's bank account.....

Kindly note that, this notice is considered an indispensable component of the transaction and it may be used as evidence in law if my side "the Company" fails to uphold this promise or otherwise as required.

Best regards

Titus Gamnazi/Operations Manager/Vox Minerals (Pty) Ltd [emphasis added]

This revelation entertains a serious doubt as to whether the defendant owes the money in his individual capacity or as Operations Manager for Vox Minerals (Pty) Ltd in which case, he would not be personally liable unless the veil of incorporation has been lifted as per the Salmon principle propounded in **Salmon v Salmon** (1897) A.C.22. Under this principle which has been cited with approval in **Yusuf Manji Versus Edward Masanja and Abdallah Juma** [2006] TLR 127 CAT, **Mussa Shaibu Msangi Vs Sumry High Class Limited & Sumry Bus Service Ltd** Misc. Commercial Cause No 20 of 2012 (HC Commercial Division) and many more cases in our jurisdiction, a registered company is regarded as cooperate being with legal personality distinct from its members or director. A director or member of

the company is exonerated from being held personally responsible for the deeds of the company save where there are special circumstances warranting the lifting of veil of incorporation. Having been presented with an exhibit bearing the self-spoken extract above, it would be a lucid misdirection to condemn the defendant to pay the loan seemingly advanced to the company.

In addition to the disparities above, there is clarity as to how much the defendant owes the plaintiff as contrary to the allegation and the evidence that the he owes him a total of USD 300,000, Exhibit P4 shows that the total amount owed is USD 140,000 (of which USD 20,000) was to recovered from the property described in this exhibit.

Winding up, I would like to stress that, a plaintiff in an ex parte hearing is not relieved of the burden to prove his claim. Just like in inter vivos hearing, the burden rests on the plaintiff to prove his claims to the required standard. As stated by the Court of Appeal in **Mustapha Raphael vs East African Gold Mines** Ltd Civil Appeal No. 40 of 1998, CAT at Dar es Salaam (unreported), the words used in rule 14(2) (b) from which the order for ex

parte hearing in this case emanates are quite clear that even in an *exparte* hearing the claim has to be proved.

The discrepancy and inconsistencies above have well demonstrated that the plaintiff has failed his duty and for that reason, the suit is dismissed in entirety for want of proof.

DATED at DAR ES SALAAM this 4th day of March 2022.

X



Signed by: J.L.MASABO

J.L. MASABO

JUDGE

