

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL CASE NO. 81 OF 2020

THEODORA ADELHELM MERU..... APPELLANT

VERSUS

URU DIAMONDS LIMITED.....1ST DEFENDANT

GEORGE ASSAF.....2ND DEFENDANT

EX-PARTE JUDGMENT

Date of last Order: 18/05/2023

Date of judgment 09/06/2023

E.E. KAKOLAKI, J.

The plaintiff herein is suing the 1st and 2nd defendants jointly and severally, the 1st defendant being a foreign owned company duly incorporated under Companies Act, No. 12 of 2002, directed, operated and or managed by the 2nd defendant as shareholder too among others, trading and carrying business of minerals. Her claims are for payment of USD 101,277.78 being money payable by the defendants for breach of loan agreements and their respective addendums and interest thereon, executed between her and the 1st defendant at the instance of the 2nd defendant. It is averred in the plaint that, on different dates between 10th December, 2016 and October, 2017, in

five separate agreements four of which were in written form, the plaintiff lent to the 1st defendant at the instance of the 1st defendant USD 77,777.78 with interest of USD 23,500, which makes a total of USD 101,277.78, for the purposes of supporting 1st defendant's business. On demand of repayment of the same it is asserted, the defendants were adamant the act which exposed the plaintiff to loss both business and economic, hence the present suit. The plaintiff is therefore praying this Court for judgment and decree on the following:

- (a) Payment of the unpaid loan amount of USD 101,277.78 being money payable by the defendants pursuant to the terms of the executed agreements and their respective addendums.
- (b) Payment of damages for breach of the loan agreements as shall be assessed by the Court.
- (c) Interest to the aforesaid amounts at seventeen percent (17%) from the date they fell due to the date of full and final payment and for interest on the decretal amount at seven percent (7%) from the date of judgment to the date of full payment.
- (d) Costs of this suit; and

- (e) Any other order(s) and relief(s) the Court may deem just and fit to grant.

When the defendants were served with the plaint, they filed their joint written statement of defence strongly disputing the plaintiff's claims. After the pleadings were complete, parties passed through mediation process which unfortunately did not bear any fruits, the result of which the final pre-trial conference was conducted on 27/09/2022 and four (4) issues framed for determination of their dispute, in the presence of Ms. Kulwa Shilemba, learned advocate for the plaintiff, who also held brief for Mr. Eliezer Kileo, learned advocate for the defendants with instruction to proceed. The issues framed are going thus:

1. Whether there were loan agreements between the plaintiff and defendants.
2. If the 1st issue is in affirmative, whether the defendants breached the terms of the said agreements.
3. If the 2nd issue is answered in affirmative, whether the plaintiff suffered damages.
4. What reliefs are the parties entitled to.

Following the framing of issues on 27/09/2022, the matter was set for hearing on 30/11/2022, the date in which advocate for the defendants informed the Court that, their firm **Reno Advocates** had filed a letter in Court dated 15/11/2022, notifying it of their withdrawal from representing the defendants in which the Court after discharging him made an order for him to notify the defendants in writing of the next hearing date, the order in which he complied with vide their letter of 24/01/2023, as hearing was adjourned to 22/03/2023.

On 22/03/2023 when the suit was called for hearing the defendants without any notice or justification defaulted appearance, the act which prompted Mr. Leonard Masatu, counsel for the plaintiff to move the Court under the provisions of Order VIII Rule 21(b) of the Civil Procedure Code, [Cap. 33 R.E 2019], for orders of striking out the defendants' written statement of defence and ex-parte hearing against them, the prayers which were cordially granted.

It is a rule of law under the provisions of sections 110(1) and (2), 112 and 3(2)(b) of Evidence Act that, he who alleges existence of certain facts must so prove and the standard of proof is on a balance of probabilities or preponderance of probabilities. See the cases of **Anthoni M. Masanga Vs.**

Penina (Mama Ngesi and Another, Civil Appeal No. 118 of 2014 and **Paulina Samson Ndawavya Vs. Theresia Thomasi Madaha**, Civil Appeal No. 53 of 2017 (both CAT-unreported). In a bid to discharge such noble duty the plaintiff called Court in two (2) witnesses, the first being Adelhelm James as PW1 and herself as PW2 and tendered in Court four (4) loan agreements with their addendum on their back, which were received as exhibits PE1, PE2, PE3 and PE4 respectively.

It was PW2's evidence that, she knew the 2nd defendant who is also the director of the 1st defendant through her father in December 2013 when he had business challenges and wanted to borrow some money to support it. That, the 2nd defendant requested her (PW1) for the advancement of loan of USD 40,000 repayable within six (6) months with interest rate of 3% per month in which she advanced to him and the loan agreement signed, before in June 2017 he asked for extension of loan repayment time and an addendum executed to that effect. The said loan agreement duly signed on 10/12/2016 and its addendum were admitted at exhibit PE1.

PW1 went on testifying that, in February, 2017 through her father, the 2nd defendant asked for another loan of USD 15,000 payable within two (2) months with interest rate of USD 500 per month in which she advanced him

and reduced the terms in writing, the contract which also had addendum signed in August, 2017 for extension of payment period both admitted as Exhibit PE2. In April, 2017 she also advanced to the same person loan of Tshs. 13,000,000 and USD 1000 payable in two months with interest rate of 3% reduced in writing, with an addendum for extension of its repayment period signed June, 2017, the agreement which was admitted as exhibit PE3. Again as per evidence in July the same person was advanced with loan of USD 15,000 payable in two months with interest rate of 3% per month, reduced into writing which agreement was admitted in Court as exhibit PE4. She further informed the Court that, in October, 2017 there was also oral loan agreement between the same parties to the tune of USD 1,000, this time without interest. It was her evidence that, the defendants therefore owe her a total amount of USD 101,277.277.78 being principal loaned amount plus interests thereof. As no amount has ever been repaid by the defendant this witness prayed the Court to grant her the claimed amount which was due up to December, 2017 plus interest thereof as claimed. She also prayed for general damages and costs of the suit.

Next in evidence was the plaintiff's father PW1 who told the Court that, the plaintiff is her daughter who by the time the transactions in dispute took

place she was working with international organization, hence earning enough money. This witness testified that, the 2nd defendant who is his friend approached him for loan for the purposes of boosting his mineral businesses as he owned a plant located at Msasani area within Dar es salaam Region, for processing gemstones such as bracelets decorated with Tanzanite, Ruby, Diamonds and other precious stones. As he had asked for huge amount of USD 40,000 PW1 intimated to the Court that, he could not get that amount hence advised him to approach banks for loans but the 2nd defendant pleaded him to assist borrowing the said money from someone else on the promise to repay it as per the agreed terms. He voiced further that, he spoke to his daughter who agreed to advance that amount to the defendant and the terms and conditions were reduced down into writing duly witnessed by a lawyer. This witness also gave a detailed and similar account of evidence on the five (5) loans advanced to the defendants and the agreements executed, in which I find no reason to reproduce. In short that marked the end of plaintiff's case in which after its closure the Court proceeded to enter ex-parte judgment date.

It is the understanding of this Court as provided under Order XIV Rule (1) of the Civil Procedure Code, [Cap. 33 R.E 2019] (the CPC) that, issues arise

when a material proposition of fact or law is affirmed by one party and denied by the other. In this matter as alluded to above the defendants' written statement of defence was struck out hence there is no denied claims by the defendant that would invite the Court to frame issues. However, the striking out of the WSD ensued after the Court had framed issues, thus I find it apposite to address the one after the another as it is trite law that, he who alleges must proof as demonstrated above.

To start with the first issue as to whether there were loan agreements between the plaintiff and defendants. The law under section 10(1) of Law of Contract Act, [Cap. 345 R.E 2019] a lawful contract is that made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object. As per the evidence adduced by PW2 and corroborated by PW1, the five agreements exhibits PE1, PE2, PE3, PE4 with their addendums and the oral one were executed between her and the 1st defendant on 10/12/2016, 06/02/2017, 05/04/2017, 10/07/2017 and October 2017, at the instance of the 2nd defendant who is the managing director of the 1st defendant for business purposes, in which in terms of clause 5 of all written agreements the factory machines were pledged as security for loaned money. In my considered view the parties to the contracts were competent

one, the loaned money constituted a lawful consideration secured by the factory machines and it was for lawful object of financing the business, hence fitting within the precincts of the provisions of section 10(1) of the Law of Contract Act. In clause six (6) of all written agreements it is categorically stated that, all necessary consents and approval of the borrower to apply for loans were obtained and that, lender shall not be prejudiced in the event any such consents and approvals were not obtained. In any event the agreements having been signed by the 2nd defendant for and on behalf of the 1st defendant, the company or its directors are estopped from denouncing its existence for being signed by a single director as the said clause 6 of all agreements, in my opinion is in tandem with the provision of section 37 of the Companies Act, which does not bind the party entering into contract with the company to establish first as to whether the same is permitted by its memorandum or sanctioned by the board of directors to enter into such contract. The provision of section 37 of the Companies Act reads:

37. A party to a transaction with a company is not bound to enquire as to whether it is permitted by the company's memorandum or as to any limitation on the powers of the

board of directors to bind the company enquire as to capacity of company or an authority of or authorise others to do so.

As the said agreements were entered by the competent parties, for a lawful consideration and object, I find the first issue is answered affirmative.

I turn to the second issue as to whether the defendants breached the terms of the said agreements. It is exhibited to this Court through evidence of PW2 corroborated with that of PW1 and clause one (1) of all agreement exhibits PE1, PE2, PE3, PE4 and oral one that, it was one of the terms that, the loans extended to the defendants were to be repaid within six (6) months for exhibit PE1 and two (2) months for the rest of the agreements, plus the added time in the addendums ending on 03/08/2017 as per exhibit PE3. However, both PW1 and PW2 confirmed to this Court, that up to the time of filing this suit the defendants had never paid a single penny as per the terms of agreements. It is a principle of law that, parties to the agreement are bound by their terms. This was the position of the Court of Appeal in the case of **Uniliver Tanzania Ltd Vs. Benedict Mkasa trading as BEMA Enterprises**, Civil Appeal No. 41 of 2009 (CAT- unreported) when cited with approval the Nigerian Supreme Court decision in **Osun State Government**

Vs. Dalami Nigeria Limited, SC. 277/2002 (<http://www.nigeria-law.org> of

2nd day of March, 2007 where it was stated:

*"...parties are bound by the agreement they freely entered into. **No party would therefore be permitted to go outside that agreement for remedy.**" (Emphasis supplied)*

Basing on the above principle of the law, since the defendants were bound to repay the loaned amount with its interests as specified in exhibits PE1, PE2, PE3, PE4 and oral agreement but defaulted to so do, it is the findings of this Court that they were in breach of the terms of agreements, hence the second issue is answered in affirmative.

Next for consideration is the third issue as to whether the plaintiff suffered damages. With the affirmative response to the second issue, I answer this issue in affirmative too since the defendants' act of breaching the terms of contract for failure to repay the loaned money to the plaintiff in time or/and at all, no doubt rendered the latter to suffer damages.

Lastly is the issue as to what reliefs are the parties entitled to. As alluded to above the defendants entered into loan agreements with full knowledge that, were duty bound to repay the extended loans with interests as per the agreed terms, but without justifiable cause they breach such terms. It is the

law under section 73(1) of the Law of Contract Act, that a party who suffers breach of contract is entitled to compensation. The provision of section 73(1) provides:

73.-(1) Where a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

It also the law that, specific damages must be specifically pleaded, particularized and strictly proved hence establishment of three P's before the same is awarded. See the cases of **Zuberi Augustino Vs. Anicet Mugabe**, (1992) TLR 137, **Reliance Insurance Company (T) Ltd and 2 Others Vs. Festo Mgomapayo**, Civil Appeal No. 23 of 2019 (CAT-unreported) and the paper by Justice Yaw Appau, Justice of the Court of Appeal, Presented at Induction course for newly appointed circuit judges at the Judicial Training Institute (Ghana), **Assessment of Damages**, (www.jtighana.org) which wisdom therein I find relevant and persuasive to this Court and adopt it. Justice Yaw Appau at page 6 of his paper on proof of special damages had this to say:

"Unlike general damages, a claim for Special damages should be specifically pleaded, particularized and proved. I call them three P's."

The Court of Appeal on the same subject in **Zuberi Augustino Vs. Anicet Mugabe**, (1992) TLR 137 at page 139, although not in comprehensive express said:

"It is trite law, and we need not cite any authority, that special damages must be specifically pleaded and proved."

In this case the claimed money the specifically pleaded and particularized in paragraphs 4 to 16 of the plaint is summed up at USD 101,277.78 being USD 77,777.78 as principal sum of loaned money and USD 23,500 as agreed interest. It has been evidenced to this Court vide exhibits PE1, PE2, PE3, PE4 and oral agreement as per the evidence of PW1 and PW2 that, loans of USD 40,000, USD 15,000, Tshs. 13,000,000 and USD 1,000 and USD 15,000 and USD 1,000, respectively the first loan payable in six (6) months and the rest in two months from the dates of execution of agreements, were extended to the defendants. This makes a total of USD 72,000 and Tshs. 13,000,000/=. I therefore find that amount is proved to the extent stated above. Regarding to the claimed interest of USD 23,000, though specifically pleaded and particularized, I find the same was not strictly proved as neither

PW2 nor PW1 exhibited to the Court as to how it was arrived at apart from merely stating the chargeable interest rate per each loan extended. It is not for the Court to do calculation as to how much is the plaintiff entitled to from the percentage of chargable interests to the loans extended to the defendants but rather plaintiff's duty to expressly demonstrate and prove to the Court on how the claimed interests is arrived at, since pleadings does not constitute evidence as evidence has to be adduced in Court.

The plaintiff also prayed for general damages, which no doubt is grantable at Court's discretion. As a matter of law general damages is compensatory in nature not intending to enrich the party but rather restore him in the same position, as far as money could do so, as if his rights had been observed. See the case of **Victoria Laundry Vs. Newman** [1949] 2 K.B. 528 at p. 539 by Asquith, C.J as cited in **Peter Joseph Kilibika Vs. Patric Aloyce Mlingi**, Civil Appeal No. 37 of 2009 (CAT) and **P.M. Jonathan Vs. Athuman Khalfan** [1980] TLR175 (HC). It is the function of the Court to determine and quantify the general damages to be awarded to the injured party, but it is also the claimant's duty to aver it during his evidence that, such damage was suffered as it was stated by Lord Dunedin in the case of **Admiralty Commissioners v SS Susquehanna** [1950] 1 ALL ER 392 which

was also cited with approval by the Court of Appeal in **Peter Joseph Kilibika** (supra) where it was stated:

"If the damage be general, then it must be averred that such damage has been suffered, but the quantification of such damage is a jury question."

In this case though pleaded in paragraph 16 of the plaint that, defendants' failure to repay the loaned money suffered the plaintiff both business and economic loss, neither PW1 nor PW2 demonstrated to the Court on how the claimed general damages was suffered to enable the court exercise its discretion on quantification of damages. As there is no materials placed before the Court's table for the consideration of such damage I find the plaintiff is not entitled to the same as claimed.

Lastly is the interest claimed of 17% to the loaned money from the date they fell due to the date of full payment and 7% on the decretal amount from the date of judgment to the date of full payment. Save for interest of 7% of the decretal amount which no doubt is chargeable at Court's rate the rate of 17% of interest to the claimed loan amount I hold remains unproved as there is no convincing materials presented before the Court, for it to base its decision before granting it. As to the costs of the suit since she engaged the advocate to prosecute this case and brought in court witnesses for proving her case,

plus other incidental costs, I find she incurred costs in which she is entitled to be refunded. I therefore find the plaintiff is entitled to reliefs to the extent explained above.

In the end I enter judgment in favour of the plaintiff and order the defendants to pay the plaintiff the following:

- (1) USD 72,000 and Tshs. 13,000,000 being the outstanding loan advanced to the defendants by the plaintiff.
- (2) Interest of 7% on the decretal amount from the date of judgment to the date of full payment.
- (3) Costs of the suit.

It is so ordered.

DATED at Dar es salaam this 09th June, 2023.



E. E. KAKOLAKI

JUDGE

09/06/2023.

The Judgment has been delivered at Dar es Salaam today 09th day of June, 2023 in the presence of Mr. Leonard Masatu, advocate for the plaintiff, and Ms. Asha Livanga, Court clerk and in the absence of the defendants.

Right of Appeal explained.



E. E. KAKOLAKI
JUDGE
09/06/2023.

