

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM SUB-REGISTRY)**

AT DAR ES SALAAM

CIVIL CASE NO. 58 OF 2022

JALUMA GENERAL SUPPLIES LIMITED.....1ST PLAINTIFF

FEREJI SAID FEREJI2ND PLAINTIFF

LUCAS PIUS MALLYA.....3RD PLAINTIFF

VERSUS

INTERNATIONAL COMMERCIAL BANK

TANZANIA LIMITED..... DEFENDANT

JUDGMENT

17th April & 16th May, 2024

DYANSOBERA, J.:

The plaintiffs' claim against the defendant is for a declaration that the performance of the overdraft facility agreement between the 1st plaintiff and the defendant has been rendered impossible by the Government's acts and thus frustrated, an order discharging absolutely the 1st plaintiff from the obligations under the overdraft facility agreement, an order releasing the landed property held under the Certificate of Title No. 177932, Plot No. 4 Block "34", Kariakoo Area, Ilala Municipality, Dar es Salaam with Land Office No. 920260 registered in the name of the 2nd plaintiff which was charged as security for the overdraft facility and order against the defendant to hand

over Certificate of Title No. 177932 back to the 2nd plaintiff. The plaintiffs are also claiming costs of the suit.

It is pleaded in the parties' pleadings that on 18th November, 2018 the defendant advanced to the 1st plaintiff a secured overdraft facility to the tune of TZS 2, 100, 000, 000 as a working capital for its business. The overdraft facility was secured by, among others, mortgaging the landed property held under Certificate of Title Number 177932, Plot No. 4 Block 34, situated at Kariakoo area, Ilala Municipality, Dar es Salaam City registered in the name of the 2nd plaintiff.

According to the plaint, the overdraft facility advanced to the plaintiff was used to purchase consignment of goods for its line of business and that it was out of the proceeds of that business that the 1st plaintiff was used to service the overdraft facility, the very business for which the facility was advanced.

It is also pleaded by the plaintiffs that, some time in December, 2019, the Government Task Force led by the then Regional Commissioner of Dar es Salaam started a manhunt of the 3rd plaintiff on allegations that he owed Tanzania Revenue Authority a tax debt to the tune of TZS 15, 241, 075, 169 and on 29th December, 2019 the Tanzania Revenue Authority seized the 1st

2019 the TRA served an agency notice on the defendant instructing her to pay TRA TZS 8, 000, 000, 000.00 being a tax liability of the 1st plaintiff. Consequently, the 3rd plaintiff was arrested and required to pay TZS 15, 241, 075, 169 otherwise he would be prosecuted for money laundering. When the 3rd plaintiff queried on the legality of the tax liability, he was detained at Segerea prison and charged in court with money laundering. During that period, no business was conducted. The 3rd plaintiff was later released from prison after the allegations against him turned out to be unfounded. When the 3rd plaintiff sought to recover confiscated stock, he was told that it had been stolen and there was in court an ongoing criminal case in that respect.

The fate of the 1st plaintiff's business and the servicing of the overdraft facility was clarified by the plaintiffs at paragraph 16 of the plaint in the following words: -

'16. That the 1st plaintiff's hope of resuming business was completely frustrated, since the goods (business stocks) which she expected could be used to continue with its business operation were stolen while under the custody of the Tanzania Revenue Authority thus she had no any business stock to resume business with. The 1st plaintiff could not even claim for insurance compensation since the goods were no longer in

her possession and go down when they were stolen despite the fact that the business stocks were insured against theft, among others. '

Further, under paragraph 17 of the plaint, it is averred by the plaintiffs that 'owing to those eventualities it became impossible for the 1st plaintiff to repay the loan as her ability to do so was absolutely impaired and stagnated by the Government through wrongful seizure of her business stocks and thereafter, unforeseen theft of the business stocks under the custody of the Government through the Tanzania Revenue Authority. The acts of the Government through the TRA have totally frustrated the performance of the overdraft facility agreement between the 1st plaintiff and the defendant'.

The plaintiffs specified the particulars of the frustration under subparagraphs *a-g* of paragraph 17 of the plaint.

On her part, the defendant disputed most of the averments in the plaint and put the plaintiffs to strict proof. She contended, *inter alia*, that the tax liabilities by the 3rd plaintiff are not related to the 1st plaintiff's loan taken from the defendant and that the same did not invalidate the enforcement of the loan agreement entered into with the defendant in that the said dispute on tax liabilities is the company's internal matter which has nothing to do with the defendant's money disbursed to the 1st plaintiff. She, in the end, prayed the court to dismiss the suit in its entirety with costs.

At the commencement of the hearing of this suit, the court framed and recorded the following issues: -

1. Whether the performance of the overdraft agreement between the 1st plaintiff and the defendant was rendered impossible and/ or frustrated.
2. If the 1st issue is answered in the affirmative, whether the plaintiffs' liability to perform their contractual obligation was discharged thereby.
3. To what reliefs are the parties entitled.

In support of the case, the plaintiffs called three witnesses while, in opposition, the defence had one witness.

After closure of the defendant's case, the learned Advocates for the parties were, upon their request, granted opportunity to file their final written submissions and they did so. I duly appreciate the industry they exhibited in terms of research and the presented submissions.

In order to appreciate the parties' bone of contention in this case, a summary of evidence is apothegmatic. Charles Mabula (PW 1), a holder of Advanced Diploma in Certified Accountancy had been employed by the 1st plaintiff as an accountant between July 2014 and 2020. He recalled that the 1st plaintiff was dealing with selling hard drinks-spirit and wines. He recalled that on 28.12.2019 while in office of Jaluma General Supplies – Temeke

Sokota, heard the secretary welcoming the guests and he identified them to be officers from Tanzania Revenue Authority (TRA), Tanzania Foods and Drugs Authority (TFDA), the National Security Officers and the Police Officers. They were after Lucas Malya who was the managing Director of the 1st plaintiff company but who, by then, was on journey at Moshi. In the office of the secretary, they searched, took with them all the documents which were in the files and computer. Then in his (PW 1's) office, they made away with all files, and documents after printing what was in the computer. They then went to the office of the Managing Director, broke it and took all the files, the computer and also seized all hard drinks and wines which were kept in the store. The TRA officers issued a seizure certificate of the property bearing their value.

In court, PW1 tendered as exhibits, namely, the '*Thamani ya mzigo waliochukua TRA/POLISI/TASK FORCE WAKATI WA KUBAMBIKIWA TUHUMA ZA UKWEPAJI WA KODI MNAMO TAREHE 28/12/2019*' (Exhibit PWI/1) which he himself prepared and the 'Re-notices of seizure prepared by the TRA dated 29/12/2019 Exhibit PWI/2 (collectively).

According to PW 1, the total value of the seized property is 4,096,460,000. He explained that according to the Exh. PW1/2, the total number of cartons seized were 21422 and the purpose of seizure of the said

stock drinks was verification on the allegations that the 1st plaintiff had evaded tax payment. After the seizure, the goods were taken to Tambaza Auction Mart General Brokers Ltd.

PW 1 lamented that the seizure of these goods led to the fall of the whole business of the 1st plaintiff as the business for which the loan was obtained came to a standstill; there was nothing to do as that consignment had arrived from South Africa no sale had been started.

When cross-examined, PW 1 stated that the main reason for the seizure of the drinks according to Exhibit PW1/2 was the alleged tax arrears of 15,241,175,269 for 2016, 2017, 2018 and 2019 years and that the consignment was to be withheld/retained until the tax was paid.

Although PW 1 admitted that TRA has the duty to levy taxes which has to be paid according to law and that the tax is payable even when one is conducting business and further that failure to pay tax entails the taking of legal measures as evading tax is an offence, he was, however, quick to point out the claims by TRA that the 1st plaintiff owed the government any tax arrears were false and that is why the 1st plaintiff objected.

The next witness was Fereji Said Fereji who testified as PW 3. He admitted that the 1st plaintiff was dealing with hard drinks and wines

business and did secure an overdraft facility from the defendant. PW 2 also admitted that he mortgaged his property with CT No. 177932 located at Plot No. 4 Block "34", Kariakoo area, Ilala Municipality in Dar es Salaam City to the defendant for the 1st plaintiff to secure the overdraft facility to the tune of TZS 2,100,000,000/=. In proof of this fact, PW 2 produced in evidence the Certificate of Occupancy (Exhibit. PW2/3). After the 1st plaintiff defaulted payment of the loan, PW 2 was served with a Notice of Default (Exhibit PW2/4) in which defendant intimated to sell PW 2's property. The notice, according to PW 2, required him to pay the loan within sixty days although the mortgage deed was silent on that aspect.

The third and last witness to testify for the plaintiffs was Lucas Pius Malya (PW 3). He is the 3rd plaintiff in this suit and the Director of the 1st plaintiff. He supported the fact that the 1st plaintiff was dealing with ordering hard drinks and wine from South Africa and selling them. The same witness also admitted an overdraft credit facility to have been secured in November, 2018 after he and the defendant executed an overdraft facility agreement AA No. 2018/171 dated 13th November, 2018, the memorandum of Acceptance and An Extract from the Board of Directors dated 14.11.2018 (Exhibit PW3/5 (collectively)).

The purpose of the overdraft facility was, according to PW 3, the drinks were purchased from South Africa and were to be sold in Tanzania and there was a requirement of the overdraft facility with 19% as an interest. PW 3 went on testifying that the overdraft was for one year and the source of money for repayment was from the sale of the goods (drinks) and the repayment was being done as had been agreed upon and the 1st plaintiff managed to repay about TZS 390,000,000/=.

PW 3 explained that the repayment process was intervened on 29.12.2019 when the Task Force from TRA and the Police Force went to the 1st plaintiff's business premises that is the go – down and sale places saying that they were claiming a tax of Tshs 15,241, 075.169.95. As a result, PW 3 and the workers of the 1st plaintiff were put under restraint and the whole consignment was seized; their release being subject to the payment of the tax within fourteen days from 26.12.2019.

It was in the PW 3's testimony that the following morning, they the seized consignment which was the stock of hard drinks and wines was collected and kept at Tambaza Auction Mart Geneal Brokers Ltd. According to him, all go downs were locked with the seal and PW 3 and the workers were restrained from drawing near the premises. PW 3 told the court that

there was a demand note of 8bn/- addressed to the Managing Director of the defendant and a copy sent to PW 3.

As to his arrest, incarceration and being charged in court, PW 3 explained that on 29.12.2019, when the consignment was impounded and seized, he was in in Moshi on leave. Upon receipt of the information that his consignment had been impounded and his workers arrested, he approached the TRA Task Force and introduced himself. The security officers, however, arrested him, told him that they had not only freezed all his bank accounts but also taken with them all the book accounts. They required him to pay TZS 15,242,075,000/=. He objected and told them that the amount was huge and to deny liability, PW 3 produced documents showing that he was paying tax. He was then searched at his home, had his motor vehicles seized and after the arrest, he was taken to Sitakishari Police Station where he was detained for a month and later released on bail but subsequently charged in court with Economic Crimes Case No. 8 of 2020 before the Resident Magistrate's Court of Dar es Salaam at Kisutu. PW 3 tendered in court, as evidence, a charge sheet dated 29.1.2020 (Exhibit PW 3/6) which, under count number 6, he was alleged to have fraudulently evaded tax of TZS 15,241,075,169/= only.

PW 3 argued that he was not prosecuted but discharged and released after the charge was withdrawn in 2022 for lack of evidence. He was supported in this by the Discharge Order dated 29.9.2022 issued by the court of a Resident Magistrate at Kisumu (Exhibit PW3/7). He insisted that from the time he was arrested until the time he was discharged, he stayed behind the bars for one year and seven months and the case had been pending in Court for almost two and half years.

On how the charge against him was dropped, PW 3 told the court that upon communicating with the TRA which was retaining his goods and liaising with the accounts section to ascertain how the claimed amount of tax had been arrived at and after submitting the necessary documents, the TRA castigated its officers for flouting the procedure of arresting him and impounding and seizing the stock of drinks and directed his release after the allegations against him were found to be unfounded.

PW 3 wrote to TRA requesting them to release his goods. He was permitted to collect the consignment worthy TZS 4,185,800,000/= from Tambaza Auction Mart General Brokers Ltd. With the officers of TRA and the Income Tax Commissioner (Kamishna wa Kodi za Ndani), they went to the said go-downs but to be told that the go-downs had been broken into and the 1st plaintiff's business stock that were kept inside were stolen and a case

in that respect had been opened at Kinondoni District Court. PW 3 was given a list of the consignment which had been impounded, seized and kept in the go-downs. He was also given a list of the accused persons in Criminal Case No. 178 of 2021. PW 3 exhibited in court the charge sheet (Exhibit PW 3/8). In PW 3's knowledge, the said case is still in court. PW 3 further told this court that when he approached the TRA officers, he was informed that he would be given back his property. He supported this argument by the document titled "*Mashtaka ya Jinai dhidi ya Lucas Pius Malya*" (Exhibit PW3/9).

According to PW 3, exhibit PW3/9 indicated that the procedure in collecting or levying the tax was not followed and an order was issued for the restrained consignment to be released and closed bank accounts to be opened.

It was in PW 3's further evidence that after sitting together with TRA, it was found that the 1st plaintiff had not defaulted paying the tax and the 1st plaintiff's account owned by the 3rd plaintiff was unfrozen as evidenced by the letter titled "*Jaluma General Supplies Ltd Mmiliki wake ndugu Lucas Pius Mallya*" (Exhibit PW3/10).

With regard to the overdraft credit facility and exhibit PW1/4, PW 3 admitted that the 1st plaintiff failed to pay the bank loan from January 2020.

He explained that the defendant brought a letter to him while he was in prison and he received it on 6.4.2022 and the letter was in respect of the loan of TZS 3,456,936,205.59. He said that, according to that letter, the defendant was seeking to realise the loaned money by issuing a demand note which PW 3 signed and gave it back to the defendant. It was the contention of PW 3 that the overdraft facility secured by the 1st plaintiff from the defendant bank was to buy that stock which was impounded by the TRA task force and the re-payment of the overdraft facility depended on the sales of the impounded business stock.

PW 3 was emphatic that the task force detained all the goods that the 1st plaintiff had bought and which she intended to sell and repay the overdraft facility. PW 3 maintained that the purpose of the loan was to purchase the drinks and sell them and then service the overdraft facility.

With regard to the stock being insured, PW 3 argued that the stock though insured, the theft occurred while the said stock was in the custody of Tambaza Auction Mart General Brokers Ltd and the insurance was in respect of goods while at the 1st plaintiff's go downs and in their hands.

On that score, PW 3 prayed that the 1st plaintiff's liability of paying the loan to the defendant be discharged as there was an illegal intervention by the government and the plaintiffs could not go against the government

actions. In his view, the failure was not deliberate but was due to the reasons beyond their control. It is was prayed for the plaintiffs that the security be returned back to the 2nd plaintiff.

Maintaining that the defendant had no right to sell the mortgaged house though there was a contract, the house in question was made a security, there was default of repayment within the agreed time and the defendant was vested with the right to sell the house after issuing the statutory notice. PW 3 argued that the defendant had no justification to exercise that right of selling the house because it was quite aware of what had happened. Admitting that the dispute between the TRA and Jaluma (1st plaintiff) on evasion of payment of tax had no relationship with the overdraft facility between the 1st plaintiff and the defendant, PW 3 explained that the seizure of the stock had no basis in that the exercise of levying the tax employed by the TRA was unprocedural and uncalled for and that explains why the TRA admitted to have been at fault and there was no tax evasion on part of the 1st plaintiff.

PW 3 also maintained that the company is bankrupt and the performance of the overdraft agreement between the 1st plaintiff and the defendant was rendered impossible by frustration caused by the government's unjustifiably impounding and seizing the business stock for

which the overdraft facility had been secured and the 1st plaintiff failed to make any transaction.

Putting the plaintiffs' case in its proper perspective, it was established both in evidence and the closing final submission by Counsel for the plaintiffs that the business of the 1st plaintiff was to import and supply liquor, that is spirit and wine and the secured overdraft facility was intended as a working capital for the said 1st plaintiff's business but, unexpectedly, on 28th day of December, 2019 the TRA accompanied by Police Force, PCCB, TFDA led by the then Regional Commissioner did not only collect all documents from the files and the computers but also seized and impounded all the business stock of liquor (spirit and wine) and the 1st plaintiff's working tools. The impounded stock was stored in the go-downs of Tambaza Auction Mart General Brokers Ltd but later stolen. As if that was not enough, the TRA froze the accounts including that of the 1st plaintiff was operating at the defendant. The workers of the 1st plaintiff together with the 3rd plaintiff were arrested and subsequently detained. Although the 3rd plaintiff was charged in court for fraudulent tax evasion, the charge against him was dropped and he was thereby discharged after it was found that the allegations against him were unfounded.

Accordingly, due to those eventualities, it became impossible for the 1st plaintiff to repay the loan as her ability to do so was absolutely impaired and stagnated by the Government through wrongful seizure of her business stocks and thereafter, unforeseen theft of the business stocks under the custody of the Government through the Tanzania Revenue Authority occurred. It was insisted on part of the plaintiffs that the acts of the Government through the TRA have totally frustrated the performance of the overdraft facility agreement between the 1st plaintiff and the defendant.

On part of the defendant, Jackson Jeremiah Mushi (DW 1), a head of credit working with the defendant, testified. He stated that his duties include supervising the credit department and is the overall in charge of the said department charged with issuing loans and following up the repayment of loans. He recalled that Pius Malya (PW 3) is the Director of Jaluma General Supplies Ltd (1st plaintiff) who is the defendant's customer who was advanced an overdraft facility of 2,100,000, 000/= secured in November, 2018. DW 1 supported the plaintiffs' argument that the overdraft credit facility was for working capital to buy hard drinks and wines and to increase the capital.

It was DW 1's testimony that before the overdraft credit facility was issued, the 1st plaintiff was given an offer letter with terms and conditions.

The 1st plaintiff then, after reading and understanding its contents, wrote to the defendant a memorandum of acceptance agreeing with the terms and conditions of the credit facility. In court, DW 1 identified exhibit PW3/5.

After the terms and conditions were accepted by the 1st plaintiff, a Mortgage Deed (Exhibit D 1) was executed on 14th November, 2018 between the 2nd plaintiff (PW 2) and the defendant for Plot No. 4 Block "34", located at Kariakoo, Ilala Municipality with CT No. 177932 for securing overdraft facility of TZS 2,100,000,000/= by the 1st plaintiff. According to DW 1, one of the terms and conditions in exhibit D1 is found at p. 14 clause 10 (2) (iii) which is to the effect that in case 1st plaintiff failed to pay the loan the bank would sell that collateral by private or public auction under Sections 133 and 134 of the Laws of Contract Act. The other security, according to DW 1 was the Guarantee (Joint and Several) (Exhibit D2)). After the 1st plaintiff defaulted payment of the overdraft facility, the defendant issued a Demand Notice dated 18th May, 2020 (Exhibit D3) followed by a default notice dated 31 March, 2022 issued to the mortgagor (PW2) and copied to other Directors of the 1st plaintiffs (exhibit PW2/4). By the time, the debt was TZS 3,456,936,205.59 and PW2 was informed that the 1st plaintiff had defaulted payment and required PW2 to pay within sixty days failure of which the bank could exercise its right to sell the stated mortgaged property.

It was in DW 1's further testimony that the plaintiffs did not pay after sixty days; instead, they rushed to court to object their collaterals from being sold. It was his view that in the contract between the parties, there was no clause that in case the borrower was confronted with an individual issue had not to repay the borrowed money. Not only that but also no written information by the 1st plaintiff reporting that her business had been seized by the TRA was relayed to the defendant. The defendant also asserted that the TRA did not write to her on seizing the property of the 1st plaintiff.

With regard to the initiatives taken by the defendant to have the loan repaid, it was contended on her part that efforts undertaken to look for the 1st plaintiff's Directors so that the matter was discussed but they were uncooperative.

Respecting the plaintiffs' request to have the title deed of the mortgaged property returned, the defendant asserted that there is no clause in the mortgage deed that the same should be returned back to PW2 where the loan remains unpaid.

According to DW 1, failure to pay the loan has occasioned a big loss to the defendant as the money belongs to the depositors whereby the defendant fails to give back to them their money inasmuch as the money is in the hands of the 1st plaintiff and the bank is duty bound to protect it. It

was also complained on part of the defendant that she cannot pay interests for the depositors and the defendant fail to conduct her transaction owing to the fact that she expects to earn money through interests.

It was further complained on part of the defendant that both the capital and the gross are affected as she has to write off the unpaid loan. According to DW 1, the defendant is under impression that where the stock is taken and there is a failure to repay the loan, the bank takes the action to sell the mortgaged property and if the realized amount is insufficient, the bank has to resort to selling the property of the guarantors.

In fine, it was prayed for the defendant the plaintiffs' suit be dismissed with costs. The court was also persuaded not to return to the 2nd plaintiff the title deed as the loan remains unpaid.

In cross examination, DW 1 admitted that the overdraft facility was to be serviced by the customer withdrawing the credit facility, buying his consignment, sell it and deposit the sale proceeds and pay interest at the end of the month. He maintained that at the end of 12 months, the customer had to clear the whole debt or renew it subject to the conduct of the performance of the secured overdraft facility. He also admitted that the interest was being paid by deposit though he could not recall the account number.

DW 1 insisted that the overdraft facility was disbursed in November, 2018 and by November, 2019 the whole loan had to be repaid underscoring that from November, 2018 to November, 2019 the overdraft facility remained unpaid but that the 1st respondent was paying interest up to November, 2019.

It was in the DW 1's further argument that the bank can recall the overdraft facility if there is no turn over but admitted that in between there were no circumstances obliging the bank to recall the facility. He said that he could not tell the amount of the interest the 1st plaintiff had already paid owing to the fact that the interest varies.

It was also in the defendant's admission through DW 1 that while at work, the defendant received information in respect of the tax debt against the 1st plaintiff and that the TRA wanted the payment of the tax from the 1st plaintiff's account.

The defendant through DW 1 admitted that they knew the objects of that credit facility and that the 1st plaintiff was selling hard drinks and wine. DW 1 admitted that there was an order from TRA to the defendant stopping the operation of the 1st plaintiff's account. admitted that the 1st plaintiff's account was closed and that when frozen, the account could not operate unless it is unfrozen.

DW 1 was emphatic that it is the proceeds of sale that were used to service the loan and that the defendant knows the 1st plaintiff's business of drinks.

Having outlined the parties' pleadings and summarized their evidence I am now in a position to discuss and determine the framed and recorded issues.

As far as the first issue, that is whether the performance of the overdraft agreement between the 1st plaintiff and the defendant was rendered impossible and/ or frustrated, is concerned, it is the plaintiff's case that the reason for failure to pay the overdraft facility was due to the confiscation of the 1st plaintiff's business stock on allegations of tax debt to Tanzania Revenue Authority and the said stock was stolen while in the custody of the TRA in one of its warehouses at Tambaza Auction Mart Geneal Brokers Ltd. This line of argument was refuted by the defendant. According to her, the performance of the overdraft facility between the plaintiff and defendant was not rendered impossible or frustrated. Both sides gave reasons to buttress their positions. However, the bedrock of the defendant's argument on the plaintiffs' argument that the failure by 1st plaintiff to honour her obligation under the loan agreement was due to confiscation of the 1st plaintiff's stock on allegations of 4 years' tax debt by the TRA. According to

the defendant, the 1st plaintiff as a prudent person ought to have foreseen that the said tax liability would one day jeopardize his business activities. This, according to the defendant, cannot be taken as unforeseen event capable of rendering the performance of the agreement impossible. Reliance was placed on section 8 (1) of the Income Tax Act [Cap. 332 R.E.2019] and Section 4 (a), (b) and (c) of the Value Added Tax Act [Cap. 148 R.E.2019] which imposes a duty on the importer, supplier and purchaser to pay value added tax

The defendant's argument on this aspect, in my firm but considered view, presupposes that the 1st plaintiff was evading taxes and knew or had reason to predict that the TRA could resort to the move complained of. This is clear from the written final submission of the defendant's counsel at p. 7 that if the 1st plaintiff was evading taxes and the Tanzania Revenue Authority having demanded the same and the same leading to confiscation of the 1st plaintiff's business stock the same cannot be termed as frustration by government act of which can render non-performance of contract between the defendant and 1st plaintiff.

With unfeigned respect, if that defendant's line of argument is accepted, then clearly the defendant misapprehended the evidence before the court. I will explain.

According to the evidence unfurled before the court, P W1 and PW 3 were clear in their testimonies that the 1st plaintiff at no time evaded paying any tax to the government and that the confiscation of the 1st plaintiff's business stock was illegal and unjustified. These witnesses were supported in this by the *'Thamani ya mzigu waliochukua TRA/POLISI/TASK FORCE WAKATI WA KUBAMBIKIWA TUHUMA ZA UKWEPAJI WA KODI MNAMO TAREHE 28/12/2019* (Exhibit PWI/1) which was prepared by PW 1 and subsequently tendered in court by him.

Not only that but also, there is a Discharge Order dated 29.9.2022 issued by the Court of a Resident Magistrate at Kisumu (Exhibit PW3/7) tendered in court by PW 3 in which the Republic through the DPP dropped the charges against PW 3 in Economic Case No. 08 of 2020. This led to PW 3 being discharged for good. The PW 3's discharge was, according to the evidence, prompted by the TRA letter Ref. No. CMA. 71/510/02 dated 28th July, 2022 (Exhibit PW 3/10) whereby the TRA was informing the both the DPP and PW 3 on *kuchukua vifaa vya kazi na vifaa binafsi, kumbukumbu na hati mbalimbali*, admitted the whole exercise to have been flouted and ordered release of the confiscated items and unfreeze PW 3's accounts that had been frozen. The said letter was copied to PW 3 and *Mkuu wa Mashtaka, Ofisi ya Taifa ya Mashtaka*, Ministry of Home Affairs.

There was also an argument from the defendant that PW 3 failed to provide tangible evidence as proof of the alleged theft of the stock and there was no proof of any effort taken by the 1st plaintiff to recover the stolen goods from either TRA or Tambaza Auction Mart.

This defendant's argument is, with respect, preposterous. It was in PW 3's evidence that he was supplied with a charge sheet for Criminal Case No. 178 of 2021 in respect of *inter alia*, go-down breaking and stealing. In his evidence, PW 3 tendered as exhibit a charge sheet in respect of the said criminal charge (exhibit PW3/8) which shows not only a list of the suspects as accused persons but also the 1st plaintiff's business stock of liquor with its value which was impounded and seized from the 1st plaintiff's warehouse and kept in the go down at Tambaza Auction Mart Geneal Brokers Ltd where they were alleged to have been stolen. The particulars of the offence in the 2nd count in exhibit PW 3/8 supports this fact. Further, with regard to the notice of seizure (Exhibit PW1/2), PW 3 maintained that the 1st plaintiff had not received any claims on tax and added that the TRA did not specify the amount of tax on each year. He concluded that the response from TRA was that the procedure adopted by the Task force was flawed.

Indeed, PW 3 was clear in his evidence that he did not sue the TRA because the Task Force which committed the complained of act was

disbanded and he, PW 3, was still in negotiation with the TRA. The defendant should also not be in oblivion of the fact that the 1st plaintiff's business stock is still the subject matter in a criminal case No. 178 of 2022 which is still pending at Kinondoni District Court. This waters down the import of the presence of the tax clearance document and the challenging in court the move by TRA as claimed by the defendant.

Aside that, the correctness and validity of the defendant's argument that the conflict between the 1st defendant and TRA on matters of payment of tax did neither involve the defendant nor was it communicated to her is defeated by the plaintiff's evidence and the defendant's admission through DW 1. My course is clear as indicated hereinbelow.

On the one hand, PW 3, in his evidence, swore that the defendant was aware of what was taking place between the 1st plaintiff and the defendant. Indeed, he is supported in this by the TRA's letter Ref. No. CMA. 71/510/01 dated 16th November, 2021 tendered in court by PW 3 and admitted in evidence as Exhibit PW 3/10. That letter which was addressed to Meneja, Benki ya ICB, S.L.P. 9362, Dar es Salaam and was A.J. Kidata, Kamishna Mkuu reads: -

'Yah: Jaluma General Supplies Ltd na Mmiliki wake ndugu Pius Lucas Mallya

Tafadhali husika na somo tajwa hapo juu, mtajwa ni mlipa kodi wetu mwenye namba ya Utambulisho wa Mlipa Kodi Na. 104-870-643 ambaye ofisi hii ilikuwa inafuatilia taarifa zake za kodi na hivyo kushikilia ATM card pamoja an akaunti yake.

Baada ya kukamilika kwa uchunguzi ofisi hii imeridhia kumrejeshea ATM card yake an kuomba akaunti zake zilizokuwa zimefungwa zifunguliwe na kumwezesha kuendelea na majukumu uake kama wateja wengine.

Tunashukuru kwa ushirikiano wako

“ Pamoja tunajenga Taifa Letu ”

On the other hand, DW 1, admitted that while at work, the defendant received information in respect of the tax debt against the 1st plaintiff and that the TRA wanted the payment of the tax from the 1st plaintiff's account.

It was in the DW 1's further admission that the 1st plaintiff's account was closed and that when frozen, the account cannot operate unless it is unfrozen and furthermore, that there was a stop order from TRA to the defendant to stop the operation of the 1st plaintiff's account.

Besides, in his sworn evidence, DW 1 did not mince his words when he told this court that *'it is true TRA wanted the payment of the tax from the*

1st plaintiff's account..... I do not recall the amount of tax the TRA required us to pay from the 1st plaintiff's account. TRA wrote a letter to that effect. We did not pay that tax. There was no credit balance in the 1st plaintiff's account.

All this evidence shows that the defendant was aware of the tax conflict between the 1st plaintiff and the TRA and, to a large extent, the defendant was involved. It is my finding that the defendant quite knew that the fact that there was a supervening event which brought about a fundamentally different situation in the 1st plaintiff's performance of the contractual obligations was reality and not a fiction.

With that analysis, I now turn to determine when the contract was frustrated.

It is an undeniable fact that a contract is frustrated when its performance becomes impossible due to a "supervening event". In other words, a contract will be frustrated if a supervening event occurs which makes it impossible to perform the contractual obligations involved.

As correctly submitted by learned Counsel for the defendant, frustration is defined in the Black's Law Dictionary, 8th Edition of 2004 at p. 740 as *'a 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 as terminated '

I also join hands with counsel for the defendant on his placing reliance on what the doctrine of frustration is all about as elucidated by the court in the case of **M/S Kanyarwe Building Contractor Vs. Attorney General and another**, [1985] TLR 161 in which it was held that: -

'...the doctrine of frustration states that where events occur that make the performance of 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'.

However, on to how the frustration can be determined, I think the English case of **Davis Contractors Ltd Vs. Farenham Urban District Council** [1956] 3 W.L.R. 37 relied on by the plaintiffs in their counsel's closing submission is of the highest importance and assistance for determination of the first issue. In that case, the House of Lords observed, *inter alia*, that: -

'frustration depends, at least in most cases, not on adding any implied term but on the true construction of the terms which are , in the

contract, read in light of the nature of the contract and of the relevant surrounding circumstances when the contract was made.'

Although the above authority is not binding on this court but only persuasive, I undertake to be guided by it owing to the fact that its principle is sound and applicable in the circumstances obtaining in this case.

Having evaluated the totality of evidence in the case under consideration, I am satisfied that the following factors have been established. One, the 1st plaintiff was prevented from performing the contractual obligation due to the supervening event which was not her fault. Two, the contract between the 1st plaintiff and the defendant did not have a force majeure clause indicating that the event in question could either have occurred with human intervention or could have been reasonably foreseen by the parties and could reasonably have been prevented by them because it was not beyond their control. In that respect, the argument of DW 1 that it was not part of an agreement in their contract that in case the 1st plaintiff encounters a personal issue then she should be discharged of his duty to pay the loan holds no water.

Three, the 1st plaintiff could not feasibly have predicted or foreseen the event as it was outside her control.

Indeed, the evidence reveals that the magnitude of the frustrating event imposed by the government that befell both the 1st and 3rd plaintiffs was too high for an individual of 1st and 3rd defendant's calibre to withstand and overcome. It can be safely observed that the Government in impounding and seizing the 1st plaintiff's documents which were in the files and computers, in confiscating the 1st plaintiff's business stock of liquor, freezing all accounts of the 1st and 3rd plaintiffs and arresting and detaining PW 3 for a considerable period of time for no justifiable cause was nothing but wielding its enormous powers through the TRA, PCCB, TFDA, Police Force led by the then Regional Commissioner against the Poor Innocent Victims leading to the stagnation of the 1st plaintiff's business causing absolute impossibility of her servicing the loan.

The situation was made worse when the 1st plaintiff's confiscated business stock of liquor was stolen while in the hands of the TRA at Tambaza Auction Mart Geneal Brokers Ltd as evidenced by the Criminal Case No. 178 of 2021 now pending in Kinondoni District Court as evidenced by Exhibit PW 3/8.

With that analysis, I am satisfied that the plaintiffs have, on preponderance of probabilities, proved that the 1st plaintiff's performance of the overdraft agreement between her and the defendant was, in the

circumstances, rendered impossible by way of frustration through the government's act. The first issue is answered in the positive.

Having answered the first issue in the affirmative, the next issue for determination is whether the plaintiffs' liability to perform their contractual obligation was discharged thereby.

While the plaintiffs want the court to answer this issue in the positive, the defendant believes that the plaintiffs' liability to perform their contractual obligation still stands firm on account that the confiscation of the 1st plaintiff's stock does not relieve her from paying the said loan.

According to the plaintiffs' closing submission, the obligation of the plaintiffs towards the defendant is two-fold. One, the 1st plaintiff who is the principal borrower was duty bound to service the overdraft facility which she partly did before the acts of the government official via TRA intervened. Two, the obligations of the 2nd and 3rd plaintiffs lie on their guarantying for the 1st plaintiff as per exhibits D 1 and D 2 but that, their obligations cannot come into effect where the default of the 1st plaintiff is not attributable to her fault. It is argued that, according to the evidence, the 1st plaintiff through the acts of the government suffered a colossal loss of TZS 4, 096, 460, 000/= out of seizure of the business stock leading to the discharge of the overdraft facility

impossible hence discharging the obligation of the 1st plaintiff towards the defendant.

In the defendant's final submission, Counsel for the defendant correctly relied on the case of **Lulu Victor Kayombo Vs. Oceanic Bay Limited and another**, Consolidation Civil Appeal No. 22 and 155 of 2020 in which the court stated that: -

'it is common knowledge that parties to a contract are bound by terms of their contract.'

Likewise, the holding in the case of **Philipo Joseph Lukonde Vs. Faraji Ally Said**, Civil Appeal No. 74 of 2019 [2020] TZCA that, '*once parties have duly entered into a contract, they must honour their obligation in that contract*' relied on by Counsel for the defendant is sound in principle.

Notwithstanding the above sound authorities, it should be noted that the breach of contract lies in the failure, without lawful excuse, to perform a contractual obligation. It is, however, important to stress that not every failure to perform a contractual obligation amounts to a breach of contract. In some instances, the law provides a party with a lawful excuse for non-performance where, prior to the time for performance, the contract between the parties is frustrated as was the case here. It cannot be gainsaid that the effect of frustration is automatically to determine the contract between the

parties and to release them from their future obligations to perform under the terms of the contract.

To be precise, it is trite that the effects of frustration is to kill the contract and discharge the parties from further liability under it; the contract is discharged. In that sense, all parties are released from their obligations and nobody involved can sue the other for breach of contract. In other words, the effects of frustration is to have the contract declared invalid, and the parties to it no longer have to perform their contractual obligations.

In view of the glaring fact that in this case the frustrating event relied upon by the plaintiffs was truly an outside event and extraneous change of situation and was an event which the plaintiffs had neither means and opportunity to prevent nor did they cause or permit it to come about, the contract between the 1st plaintiff and the defendant entered into on is declared invalid and the parties thereto are no longer obliged to perform their contractual obligations.

With regard to the cases of **Lulu Victor Kayombo Vs. Oceanic Bay Limited and another** (supra) and **Philipo Joseph Lukonde Vs. Faraji Ally Said** (supra) relied on by Counsel for the defendant, it is noteworthy to state those cases clearly distinguishable from the facts in the case under consideration. As counsel for the defendant might be aware, the subject

matter in those cases was enforcement of the contract by way of specific performance, while the instant case the subject matter is discharge of performance of contractual obligation by frustration.

For instance, in the case of **Philipo Joseph Lukonde Vs. Faraji Aily Said**, the respondent was asking for an order to enforce the contract by directing the appellant to receive the remaining contractual sum and sign all necessary documents.

The Court of Appeal observed at p. 20 that: -

'We take any such deliberate breach of contracts very seriously. Once parties have duly entered into a contract, they must honour their obligations under that contract. Neither this Court, nor any other court in Tanzania for that matter, should allow deliberate breach of the sanctity of the contract'.

While in the above case, it was found that the appellant had no good reason not to fulfil his agreement for sale and the Court took any such deliberate breach of contracts seriously, in the case on hand, there is nothing showing that the 1st plaintiff has deliberately breached the contract for which this court can take such a deliberate breach seriously. After all, I have previously indicated, the subject matter is not specific performance of contract and the cause of action is not breach of contract rather, the subject

matter is frustration of the contract by acts of the government through the Tanzania Revenue Authority. Here, I think learned Counsel for the defendant sees his mistake. All in all, I am satisfied that the above cited cases are inapplicable to the facts in the present case.

It is trite that the effects of frustration is to kill the contract and discharge the parties from further liability under it; the contract is discharged. In that sense, all parties are released from their obligations and nobody involved can sue the other for breach of contract. In other words, the effects of frustration is to have the contract declared invalid, and the parties to it no longer have to perform their contractual obligations.

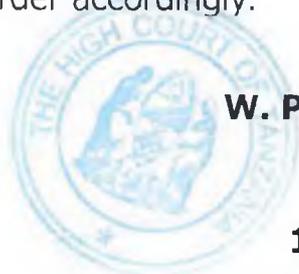
As the frustrating event relied upon by the plaintiffs was truly an outside event and extraneous change of situation and was an event which the plaintiffs had neither means and opportunity to prevent nor did they cause or permit it to come about, the contract between the 1st plaintiff and the defendant entered into on is declared invalid and the parties thereto are no longer obliged to perform their contractual obligations.

The second issue is answered in the positive that the plaintiffs' liability to perform their contractual obligation was discharged thereby.

With regard to the third issue on reliefs, having resolved the first and second issues the way I have done, I hereby enter judgment and decree for the plaintiffs against the defendants as follows: -

1. I declare that the performance of the overdraft facility agreement between the 1st plaintiff and the defendant has been rendered impossible by the Government's acts and thus frustrated.
2. I make an order discharging absolutely the 1st plaintiff from obligations under the overdraft facility agreement.
3. I order the release of the landed property with Certificate of Title No. 4, LO No. 92026, Block "34", Kariakoo Area, Ilala Municipality, Dar es Salaam registered in the name of the 2nd plaintiff which was used to secure the overdraft facility.
4. I order the defendant to hand over the Certificate of Title No. 177932 for Plot No. 4 Block "34" situated at Kariakoo Area, Ilala Municipality, Dar es Salaam City with Land Office No. 920260 registered in the name of the 2nd plaintiff back to the 2nd plaintiff.
5. Costs of the suit shall be borne by the defendant.

Order accordingly.



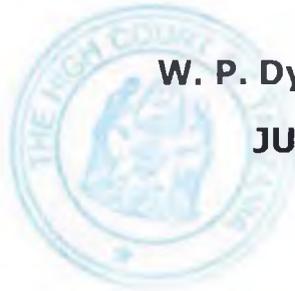
W. P. Dyansobera

JUDGE

16.5.2024

This judgment is delivered under my hand and the seal of this Court on this 16th day of May, 2024 in the presence of Mr. Kassim Mussa, learned Counsel for the plaintiffs also holding brief for Mr. Norbert Mlwale. Present also is Ms. Genoveva Kalolo, learned for the defendant.

Rights of appeal to the Court of Appeal are explained to the parties.



W. P. Dyansobera

JUDGE