IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CAUSE NO. 81 OF 2017

BETWEEN

GROFIN AFRICA FUND LIMITED.....PLAINTIFF

VERSUS

H. FURNITURE AND ELETRONICS LIMITED.....1st DEFENDANT

HONEST JOHN MAKE.....2nd DEFENDANT

LINDA SIMONI MOSHI.....3rd DEFENDANT

HONEST JOHN MAKE

TRUSTEE OF HENRY HONEST MAKE.....4th DEFENDANT

Last Order: 3rd Dec, 2019

Date of Judgment: 11st Mar, 2020

JUDGMENT

FIKIRINI, J.

The plaintiff, Grofin Africa Limited sued the defendants jointly and severally for failing to repay outstanding amount of Tzs. 1,072,283,048.07 (Tanzanian shillings One Billion Seventy Two Million Two Hundred Eighty Three Thousand Forty Eight and Seven Cents) arising out of a loan facility plus interest which has accumulated on the loan and plus costs of the suit. The 2nd, 3rd , and 4th defendants

were sued as guarantors for having given personal guarantees for the loan advanced to the 1st defendant.

The plaintiff was seeking for the following orders against all the defendants.

1. A declaration that 1st, 2nd, 3rd and 4th defendants are in breach of the term loan facility agreements by their failure to discharge their duties and obligations in accordance with the agreement;
2. Those defendants jointly and severally be ordered to immediately pay to the plaintiff the outstanding amount of Tzs. 1,072,283,048.07 being the principal amount, interest and fees as of 31st March 2017;
3. Payment of default rate interest (2% per month) charged from 1st April 2017 to the date of judgment thereof;
4. Payment of interest (12% per annum) on the decretal amount from the date of judgment to the date of full payment thereof;
5. Payment of general damages to cover the loss of plaintiff suffered for the defendants failure to discharge their obligation under the said agreements;
6. The defendants pay the plaintiff costs of this suit; and
7. Any other relief (s) that the Honourable Court may deem fit to grant.

At the final pre-trial conference five (5) issues were framed for determination by the Court. The issues were;

1. Whether the term loan facility agreement dated 29th October 2012 has any legal effect;
2. Whether the defendants are in breach of term loan facility agreement dated 29th October 2012;
3. Whether at the time the loan was granted to the 1st defendant by the plaintiff, the plaintiff was duly licenced as a financial institution capable of charging interests on loan;
4. Whether the defendants are indebted to the plaintiff to the tune of Tzs. 1,072,283,048.07; and
5. To what relief are parties entitled.

During the hearing Mr. Mashaka Tuguta learned advocate appeared for the plaintiff while the defendants enjoyed the legal services of Mr. Issa Rajabu learned advocate. Each party called one witness. The plaintiff called PW1-Jordan Kassange – plaintiff's Investment Manager. The defendants called one witness DW1-Honest John Make - the 1st defendant's Principal Officer.

PW1 stated under oath, that he was not sure if the institution was registered with the Bank of Tanzania (BOT) which has the mandate of allowing charging interest. And that although there was no document to prove that the plaintiff was allowed to give loans and charge interest, that Grofin Africa Fund is a financial institution limited liability company by shares, which started operating in Tanzania, in 2010,

and it has been giving out loans to entrepreneurs for the development purposes. He also stated that the Institution charged interest on loans and that the 1st, 2nd, 3rd and 4th defendants were customers to the plaintiff.

It was PW1's further evidence that he was absent when the 1st defendant was loaned but all the documents related to the loan were available in the office. He submitted that these documents shows, the 1st defendant obtained a term loan facility following the execution of the term loan facility agreement dated 29th October 2012. And also shows the 2nd, 3rd and 4th Defendants were guarantors of the loan, and as exhibited in exhibit P_1. The loan was to be serviced with monthly installments of Tzs. 16,764,303, which, as exhibited in exhibit P_2, the 1st defendant owes the plaintiff Tzs. 1(one) Billion comprising of the unpaid principal amount, the unpaid fees, and the interest charges that has accumulated.

On cross-examination PW1 admitted that exhibit P_2 did not show the name of the person who prepared , and the amount of the debt involved. He however said that it was due to the fact that at the time when it was prepared the system was yet to be upgraded.

DW1-Honest John Make, on his party told the Court, that the loan agreement annexed as "G1" in the plaint has no legal force since the plaintiff is not a registered financial institution with powers to give loans and charge interest in the

mainland Tanzania. He admitted signing of the loan agreement for Tzs. 500,000.000/=, he being the 1st defendant's director, but refuted receiving the said amount in full. Instead he stated that what was deposited into the 1st defendant account was only USD 75,000.00 which was equivalent to Tzs. 120,750,000/= at the exchange rate of USD 1 for Tzs. 1,610/= existing at the time, which the defendant has already paid back Tzs. 180,000,000/=. DW1 also said that even though the plaintiff's disbursement component reads that in total Tzs. 518,103,625/= is what was deposited into the 1st defendant's account but the alleged advance payment of Tzs. 379,653,625.00/= was not received in the 1st defendant's account, he argued the above said outstanding amount has thus no justification or proof at all.

Countering the plaintiff's case, DW1 stated that the plaintiff evidence failed to show how much money was advanced and deposited in the 1st defendant account. Based on the evidence he prayed for the Court to dismiss the suit with costs and the Court order that he be reimbursed his Tzs. 60,000,000/= paid in excess as they have failed to prove to this Court that they were supposed to charge him interest on the amount advanced.

That was the defence case.

Counsels filed final submissions. The plaintiff's counsel in his final submission submitted that, PW1's testimony and exhibit P_1 proves that there was loan facility

agreement dated 29th October 2012, and thus the 2nd defendant's argument that the term loan facility had no legal effect, was the argument without substance. Exhibit P_1 executing the agreement was signed on every page by the 2nd, 3rd and 4th defendants. The 2nd, 3rd and 4th did neither plead nor testify that exhibit P_1 was executed without their consent. Fortifying his point, he referred this Court to section 10 of the Law of Contract, Cap. 345 R.E. 2002. Relying on the provision in the Law of Contract, the counsel contended that the term loan facility agreement had all elements of a valid contract and hence the agreement signed on 29th October, 2012, had a legal effect, and thus the 2nd defendant cannot be in a position to disown the document now.

It was the counsel's further final submission that there was breach of the term loan agreement as the loan was not repaid. The 1st defendant transaction history and summary exhibited in P_2 clearly show the outstanding as of 1st March, 2017 that the debt loan stood at Tzs. 1,072,283,48.07.

The defendants by signing in exhibit P_1 they had agreed and consented to be bound by the terms and condition of the exhibit P_1 which included interest under item 6, the defendants cannot therefore deny being bound by terms and conditions as stipulated in exhibit P_1. The defendants were therefore indebted to the plaintiff to the tune of Tzs. 1,072,283,48.07.

On the basis of the evidence and submission, the counsel concluded that the plaintiff had been able to prove its case on the balance of probabilities and thus entitled was to reliefs sought.

In his final submission, the defence counsel submitted that, the plaintiff during their testimony have failed to prove that the plaintiff was registered as a financial institution capable of advancing loan and charging interests. This was associated with failure to provide tax identification number, business license from Ministry of Trade and Bank of Tanzania, or produce a licence or any document from Bank of Tanzania evidencing the plaintiff was legally licensed to issue loan and charge interests. To support his position he cited the case of **David Charles vs Seni Manumbu, Civil Appeal No 31 of 2006** where the Court held that:

> *"charging interest on a loan by any description, a business transaction must comply with the provision of section 3 of Business Licensing Act Cap 208 R.E 2002, which provides that*
>
> *3(1) no person shall carry on in Tanzania whether he as a principal or an agent, business unless*
>
> *(a) is a holder of a valid business license issued to him in relation to such business"*

He further submitted that, the defendants cannot be in breach of the loan facility which was illegal in the first place, giving two reasons. *First,* the plaintiff was not authorized to issue a loan and charge interest. *Second*, the said amount of Tzs. 500,000,000/= (Tanzania Shilling Five Hundred Million) was not disbursed to the 1st defendant's account, as the plaintiff failed to tender bank statement showing transfer of funds into the 1st defendant's account.

I will be examining the above issues in the light of the above evidence and exhibits presented before the Court as well as final submissions, although before that I wish to point out undisputed facts.

First, it was not disputed that the 1st defendant signed facility agreement with the plaintiff dated 29th October, 2012 of Tzs. 500,000,000/=. And that this loan agreement was guaranteed by the 2nd, 3rd and 4th defendants.

Second, it was also not disputed that the 1st defendant received a certain amount of money as a loan from the plaintiff and the 2nd, 3rd and 4th defendants, were guarantors. However what is disputed is the amount while the plaintiff claims to have paid TZS. 518,103,625/= into the 1st defendant's account, the 2nd defendant claims to have not received into the 1st defendant,s account Tzs.379,653,625/=.

Third, the evidence that the 1st defendant has so far serviced the loan amounting to Tzs. 120, 750,000/= claimed to be what was deposited into his account, has not been countered which make this Court to conclude there was indeed repayment of

that amount. The repaid amount totaled Tzs. 180,000,000/= from which he was praying he be refunded Tzs. 60,000,000/= for over servicing the debt loan.

Turning to the issues for determination, which I will address seriatim starting with the 1st issue:

"Whether the term loan facility agreement dated 29th October 2012 has any legal effect"

The law has placed burden of proof on, one who alleges. Section 110 of the Evidence Act, Cap 11 R.E 2002 (the Evidence Act), provides that:

> *"whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove those facts exist"*

Before the eyes of law present contract has no legal effect and is illegal and void based on the following reasons:

First, there is uncertainty, if the plaintiff was dully licensed as a financial institution capable of charging interests on loan, when advancing loan to the 1st defendant, because no proof was provided. A loan advanced with the condition of paying interest thereon implies that the transaction was a business deal, which could only be done by institution such as banks and other recognized financial institutions or any authorized organization. The only institution from which people borrow money to be repaid with interest are banks and financial institutions which

meet conditions imposed by the Banking and Financial Institutions Act, Cap 342 (the Banking and Financial Act). Based on the evidence adduced, there is no doubt that when the plaintiff was advancing the loan to the 1st defendant did not do so as a bank or as a financial institution and therefore that is illegal and the contract is void.

Section 29 of the Contract Act, Cap 345 R.E 2002 (the Contract Act) provides that:

> *"an agreement, the meaning of which is not certain or capable of being made certain, is void".*

Second, there was no evidence to prove that, the plaintiff is registered under Financial Institution Act, allowed to advance loans charging interest thereon. The case of **David Charles v Seni Manumbu, Civil Appeal No. 31 of 2006, High Court Mwanza**, is relevant to the case at hand.

Third, PW1 during cross-examination admitted that the plaintiff was a company limited by shares but its main activities was to issues grants/donations meaning not licensed to charge interests such the agreement entered with interest thereon being questionable. No licence was produced to prove the plaintiff was legally registered as a financial institution.

The 2nd issue as to:

"Whether the defendants are in breach of term loan facility agreement dated 29th October 2012"

Despite there being loan agreement signed and guaranteed by the 2nd, 3rd and 4th defendants, but in actual sense it is still closed up to now as whether the said amount of Tzs. 500,000,000/= was deposited into the 1st defendant account. The absence of any evidence of transaction or a bank statement showing transfer of funds from the plaintiff to the 1st defendant's account. With such crucial information missing, it has been difficult for this Court to conclude that there was breach. This is stated knowing that the plaintiff is bound to prove her case by bringing all the evidence pertaining to the claim before the Court.

This Court finds that evidence lacking. Even the amount received by 1st defendant of Tzs. 120,750,000/= is considered proved only because DW1 did not dispute receiving the amount out of the intended Tzs. 500,000,000/= In additional, even the evidence to prove that the 1st defendants repaid Tzs. 180,110,744 to the plaintiff servicing the debt loan is taken on board based on the fact it was coming from the one who alleged paid, which without the plaintiff acknowledging receipt, becomes difficult to be taken as hard proof. In the whole claimed transaction besides exhibit P_1, the loan agreement there was no any other document tendered and admitted into evidence to prove what was being alleged by either the plaintiff or the defendants.

The 3rd issue as to:

"Whether at the time the loan was granted to the 1st defendant by the plaintiff, the plaintiff was duly licensed as a financial institution capable of charging interests on loan"

A good part of this issue has already been dealt with when addressing the 1st issue.

The 4th issues that of:

"Whether the defendants are indebted to the plaintiff to the tune of Tzs. 1,072,283,048.07"

The answer is "no" because the contract was illegal and void. Therefore, no one can enjoy benefits from own wrongs. This is due to the fact that the time the parties entered into the loan agreement the plaintiff had no capacity, because she has failed to provide proof that she was registered as bank or financial institution capable of advancing loan and charge interest thereon.

The whole case even considered from the layman's account, still there was evidence lacking to support the plaintiff's case. It is true there was a signed agreement, but that alone does not suffice to prove the loan was advanced. The transaction showing the amount loaned be it whole or partly was transferred into the applicant's account in this case the 1st defendant was crucial and was not availed to the Court. From the evidence adduced including exhibit P_2, the Court could not deduce whether the document was made up one, as it had no letter head, account number, dates of the alleged transactions, signature of the one who

prepared or issued the document and even the institution or bank stamp usually seen on the bank statements. I am stating this, while mindful that not all transaction could necessarily be through the banks, but the internal arrangement of how borrowers are monitored by the lender, in this case the plaintiff was a must. The transaction history and summary of the 1st defendant's as exhibited in P_2, had no history at all or was not even close to any credible document one can rely on. Even the figures reflected therein could not be easily understood. Just an example, the payment of Tzs. 180,110,744/= is shown but when was it paid and how can the Court know it related to the 1st defendant, had it not been for DW1's acknowledgement. His acknowledgement was however not related to exhibit P_2. Exhibit P_2 as it is was of no assistance at all and could be a printout for any other reason and not necessarily in relation to the case before the Court. The document can also be related to any other person out there and not the defendants. For the loan agreement signed in October, 2012, I am beyond baffled that no credible records were availed to the Court.

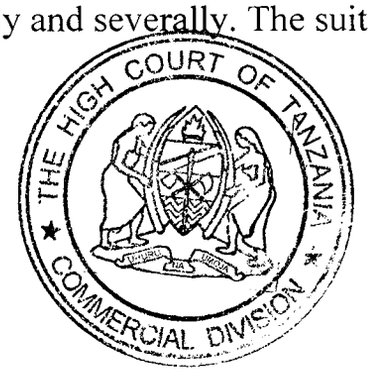
All these examined together brings this Court to a conclusion that the plaintiff has failed to prove her case on the balance of probabilities the standard required in law.

The final issue on:

"What reliefs are parties entitled"

Since the contract is illegal, parties cannot benefit from it. This extends to the 1st defendant who claimed for the repayment of Tzs. 60,000,000/= as overpaid amount. DW1 never produced any document to show that there was payment which was made to call for the refund of the claimed amount.

It is without doubt that omission of important evidence renders the plaintiff be considered as to have failed to prove his case against the 1st defendant the principle debtor as well as the 2nd, 3rd and 4th defendants who were guarantors and held liable jointly and severally. The suit is dismissed with costs. It is so ordered.



P. S. FIKIRINI

JUDGE

11th MARCH, 2020