**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**COMMERCIAL CASE 90 OF 2018**

**JIELONG HOLDINGS (TANZANIA) LIMITED ..... PLAINTIFF**

**VERSUS**

**TIB DEVELOPMENT BANK LIMITED .....DEFENDANT**

**Date of Last Order: 23/02/2021**

**Date of Judgement:29/03/2021**

**JUDGEMENT**

**MAGOIGA, J.**

The plaintiff, JIELONG HOLDINGS (TANZANIA) LIMITED by way of plaint instituted the instant suit against the above named defendant praying for judgement and decree in the following orders:

a. Payment of TZS.509,798,350/= as the outstanding amount held by the defendant as lien;
b. Interest on the sum at (a) above at the rate of 22% per annum from May, 25, 2017 to the date of judgement;
c. Interest on the decretal amount at the court's rate of 7% from the date of judgement up to the date of payment;
d. Costs of the suit; and

e. Any other relief which this Honourable Court may deem fit and just to grant in favour of the plaintiff.

Upon being served with the plaint, the defendant filed a written statement of defence disputing all claims prayed by the plaintiff on grounds that (defendant) was not a party to the Purchasing Agreement for supply of 1500 metric tonnes and that the terms of the letter of undertaking could not take effect for failure on the part of the plaintiff to deposit the amount of TZS.918,000,000.00 to be held as lien. The defendant on serious note invited the plaintiff into strict proof of her claims thereof and eventually urged this court to dismiss the instant suit with costs.

The facts pertaining to this suit are not complicated. It is on record that on 19th day of June, 2015 the plaintiff (as a **buyer)** and CHESANO COTTON GINNERY 2006 (T) LTD (not in this suit as **seller)** entered into Cotton Purchasing Agreement for supply of 1500 metric tonnes of 2015 season cotton seed at price of TZS.918,000,000.00. Among the notable terms, it was agreed that, the seller shall obtain bank confirmation letter as security to ensure the said quantity was to be supplied to the buyer. The seller obtained a bank guarantee from the defendant dated 25th June, 2015, with condition that, same will take effect upon receipt of TZS.918,000,000.00 to

be held under lien to make sure that Chesano Cotton Ginnery 2006 (T) Ltd delivers 1,500 metric tonnes of cotton seed as per the agreement.

Further facts go that in compliance with the terms of the agreement, the plaintiff transferred to Chesano Cotton Ginnery 2006(T) Ltd account TZS.918,000,000.00 but Chesano Cotton Ginnery 2006 (T) Ltd was only able to supply 664,265 Kg of cotton seeds out of the agreed amount of 1500 MT leaving undelivered balance of 835,735 kgs worth TZS.509,798,350.00. Following the breach of the terms of the agreement, the plaintiff instituted Commercial Case No. 20 of 2016 against Chesano Cotton Ginnery 2006 (T) Ltd which ended in favour of the plaintiff on 13/03/2017. Against the above background, the plaintiff has instituted again this suit claiming the same amount from the defendant on alleged breach of contract under the letter of undertaking, hence, this judgement.

Before hearing started the following issue were framed and recorded for the determination of this suit, namely:-

a. Whether the defendant breached the undertaking issued to the plaintiff on 25th June, 2015.
b. What reliefs are parties entitled to.

At all material time, the plaintiff has been enjoying the legal services of Ms.Faisal Salah, learned advocate from IMMMA Advocates. On the other hand, the defendant has been enjoying the legal services of Ms. Alice Mturo, learned Senior State Attorney and Ms.Greener Aden, learned State Attorney.

In proof of her case, the plaintiff called one witness to testify, Mr. JIE QI- hereinafter to be referred as 'PW1'. Under oath and through his witness statement dully adopted as his testimony in chief, PW1 told the court that, he is the director of the plaintiff business entity dealing with business of cotton buying seeds. PW1 equally told the court that he knows the defendant as the banker in this suit.

PW1 went on to the tell the court that, the plaintiff and Chesano Cotton Ginnery 2006 (T) Limited entered into Cotton Seed Purchase Agreement for supply of 1,500 metric tonnes of cotton seeds at the cost of TZS.918,000,000.00. According to PW1, it was agreed in that agreement that, the money was to be paid after obtaining a confirmation letter from the defendant on the availability of the volume to be supplied by November, 2015 and letter of undertaking on payments made by the plaintiff.

Further testimony of PW1 was that, on 25th June, 2015 the defendant issued a letter of undertaking and guaranteed that the defendant will only release the 1,500 metric tonnes of cotton seeds to the plaintiff after the defendant received payment of TZS.918,000,000.00 from the plaintiff. Also it was agreed that, the defendant undertook to hold the amount paid by the plaintiff as lien until when Chesano has delivered to the plaintiff 1,500 metric tonnes of cotton seeds.

PW1 further testimony was that, in compliance with the Agreement and acting on defendant's letter of undertaking, the plaintiff transferred to Chesano's bank account held at the defendant's account an amount of TZS.918,000,000.00 for the defendant to hold as lien pending the delivery to the plaintiff of 1,500 metric tonnes of cotton seeds by Chesano. According to PW1, the defendant assured the plaintiff that Chesano will not be able to access the money until delivery of the cotton seeds in completed as per the terms of the agreement.

PW1 testified that, despite complying with the terms and conditions of the agreement, Chesano delivered only 664,265 kgs of cotton seeds out of 1,500 metric tonnes leaving undelivered balance of 835,735 kgs worth 509,798,350.00, hence, a breach of contract was confirmed in Commercial

Case no.20 of 2016. In the circumstances, PW1 told the court that, the defendant had an obligation to control and hold the deposited amount as lien until Chesano delivered the agreed cotton seeds to the plaintiff. PW1 told the court that, her efforts to have the defendant paid back the money has been in vain, hence, this suit claiming the reliefs as contained in the plaint.

In proof of the case, the plaintiff tendered in evidence the following exhibits, namely:-

1. **Cotton Seed Purchasing Agreement dated 19/06/2015 in evidence as exhibit P1.**
2. **Undertaking letter of purchase of cotton seeds dated 25/06/2016 from TIB Bank to Jielong Holding (T) Ltd in evidence as exhibit P2.**
3. **Judgement in Commercial Case No.20 of 2016 in evidence as exhibit P3.**
4. **Two demand notices dated 9/05/2018 and 25/05/2017 which were collectively admitted in evidence as exhibit P4a-b.**

Under cross examination by Ms. Mturo,learned Senior State Attorney, PW1 told the court that, exhibit P1 the parties were the plaintiff and Chesano. When asked to read clause 6 of exhibit P1, PW1 told the court that the duty of the defendant was limited to supply and availability of the cotton seeds. Further, PW1 when asked to read clause 11 of exhibit P1 told the court that, the clause was referring to the seller to return the deposit balance to the buyer and not the defendant. Further cross examined on exhibit P3, PW1 admitted that in Commercial Case No. 20 of 2016, the court decided in their favour of the plaintiff and this suit amounts to second claim on the same amount. PW1 pressed with questions admitted that the undertaking was between the plaintiff and defendant herein. PW1 insisted that the defendant had control of the account and that Chesano did not perform its obligations as per the contract.

Under cross examination by Ms. Greener, learned State Attorney, PW1 repeatedly told the court that in exhibit P1, parties were Chesano and plaintiff. Asked why Chesano was not sued, PW1 said he had no idea. PW1 told the court that the basis of undertaking was based on contract between plaintiff and Chesano.

Under re-examination by Ms. Salah, PW1 told the court that, Chesano got confirmation from the defendant ensuring the transaction on condition that upon receiving TZS.918,000,000.00 the defendant will release the money after the plaintiff receive 1,500 metric tonnes of cotton seeds. According to PW1, Chesano only delivered 664,256 kgs out of 1,500 metric tonnes. In the circumstances, PW1 told the court that, they first sued Chesano and now are suing the defendant based on undertaking letter. By suing Chesano, it was the testimony of PW1 that, did not preclude them from suing TIB. PW1 when asked whether in exhibit P1, there was specific account which was directed to be deposited with the money, said no such account was appointed. PW1 went to say the defendant issued an undertaking letter to control the stock and the money held in the account of Chesano from collateral management arrangement from the undertaking letter. PW1 further in re-examination told the court that, they were not obliged to notify the defendant that they have deposited the money into the account of Chesano. According to PW1, by defendant releasing the 664,256 kgs were performing the obligations under the contract. PW1 insisted that, it was the undertaking letter which made them release the money and based on the undertaking no case has been instituted than the

instant suit. PW1 prayed that the prayers as contained in the plaint be granted.

This marked the end of hearing of plaintiff's case.

The defendant fended oneself through Mr.ZACHARIA KICHARO SAMHENDA-to be referred hereinafter as DW1. DW1 under oath and through his witness statement adopted in these proceedings as his testimony in chief told the court that, he is the principal officer Industrial Financing department of the defendant. According to DW1, his duties are to review document application to assess the completeness of the information required in the appraisal and in so doing engage technical units of legal and risk, conduct detailed project appraisal, monitoring and supervision.

According to DW1, Chesano Cotton Ginnery (2016) Limited had several loans with the defendant between 2014 and 2015. The deposited amount by the plaintiff was deposited without informing the defendant so that she could take necessary steps as per the letter of undertaking. Not only that but also the plaintiff did not inform the quantity and quality of the cotton seed to be delivered.

DW1 went on to tell the court that given the situation, the plaintiff instituted a case against Chesano and got a judgement but because of failure to realize the money has instituted the instant suit against the defendant. Eventually, DW1 prayed that the instant suit be dismissed with costs.

In disprove of the case for the plaintiff, DW1 prayed that exhibits P1, P2 and P3 already admitted be part of their defence in this suit. DW1 tendered Credit Facility Agreement between Chesano and TIB dated 3/04/2013 as exhibit D1.

Under cross examination by Ms. Salah, DW1 told the court that he has been with TIB since 2008. DW1 went on to tell the court that, he knows Peter Noni, as the Managing Director of Chesano. Chesano had loan of 2.1 billion from the defendant for Structured Trade Finance, overdraft and term loan. Under the Structured Trade Finance was managed through collateral management whereby TIB appointed collateral manager who was care taker of the interest of the bank on daily basis in fulfillment of clause 2:3:04 of exhibit D1. DW1 when asked to read clause 2:3:6 on release of cotton products it was to be released only after receipt of equal amount of funds in customer's account with TIB.

DW1 admitted to know the plaintiff through Chesano whereby they wanted TIB to supervise their transaction for buying cotton seed. In the course, the bank issued a letter of undertaking on agreement that the money for purchase worth TZS.918,000,000.00 was to be deposited into the account of TIB held under lien but no money was deposited with the bank at all. On the amount of cotton seeds delivered, it was the reply of DW1 that, same was delivered after getting release from Chesano. DW1 insisted no money was deposited to be held under lien, and as such, no breach of contract can be imputed to them. DW1 pointed out that the money was deposited into the account of Chesano and not into the account of TIB bank.

Under re-examination by Ms. Mturo, DW1 told the court that the release order was given by the bank upon request by Chesano. DW1 went on to tell the court that, Credit Facility Agreement was between Chesano and TIB Development bank and any money was to be deposited into TIB bank account. DW1 insisted that they could not pay Jielong because the money was not deposited as agreed. Further, DW1 told the court that, according to the Agreement between Chesano and Jielong, the refund, if any, was between Chesano and the plaintiff. DW1 went on to insist that, they have

never held the money under lien as the plaintiff never deposited the money into their account to enable the bank to have control of the same.

This marked the end of hearing of this suit. The trained legal minds of the parties prayed for leave to file their final written submissions under rule 66(1) of the Rules in support of their respective sides. I granted the leave and gave them 14 days. Nevertheless, in the course of second reading of the pleadings and testimony of the parties, I summoned the learned counsel for parties and tasked them to address me on legal tenability of this suit under the provisions of Order II Rule 2 (2) and (3) of the Civil Procedure Code. The learned trained legal minds complied with the directives.

Let me record my sincere gratitude and commend them for their brilliant research on the legal point raised and other input on the matter.

The plaintiff's advocate on the legal issue raised by the court and asked to submit on the same on whether the instant suit is barred by the provisions of Order II rule (2) and (3) of the Civil Procedure Code, was brief to the point and of the strong view that, this case is not barred under the provisions of Order II rule 2 of the CPC. According to the learned advocate

for the plaintiff, what is to be considered under Rule 2 is cause of action subject of the suit and not reliefs claimed. In support of her stance, the learned advocate for the plaintiff cited the case of GHELA MANEK SHAH AND TWO OTHERS vs. MOHAMED HAJI ABDULLA AND ANOTHER [1962]EA 769 in which the Supreme Court of Kenya dealing with Order II rule (1) of the Civil Procedure (Revised) Rules which are pari material with our Order II rule (1) of the CPC held that, the rule could not apply where the cause of action is different and that the plaintiff could on their election file separate suit. The learned advocate for the plaintiff cited the case of SAMINATHAN vs. PANA LANA PALANIAPA (8) (1914) A.C 618 in which the court was dealing with section 34 of the Ceylon Civil Procedure Code, 1889 in which the court held that "their lordships are of the opinion that the learned judge took an erroneous view of the object and meaning of this section. It is directed to securing the exhaustion of relief in respect of a cause of action, and not to inclusion in one and the same action of different causes of action, even though they arise from the same transaction."

Guided by the above holdings in the above cases, the learned advocate submitted that the present suit and that of Commercial Case No.20 of 2016 are different though one may say arise from the same transaction which is

sale and purchase of cotton seeds. Further difference according to the learned advocate, is that the plaintiff in Commercial Case No.20 of 2016 was suing over breach of contract under Cotton Seed Purchase Agreement dated 19$^{Th}$ June,2015, while in the present suit the cause of action is on breach of undertaking letter which are two separate cause of actions araising on 25$^{th}$ May 2017 for failure to heed to the demand notice issued on 25/05/2017.

On that note, the plaintiff's learned advocate concluded and urged this court to find and hold that, the two suits are different and that the bar envisaged under Order II Rules 2 and 3 of the CPC does not apply in the instant suit.

On the other hand, the learned Senior State Attorney on this point and guided by SARKAR CODE OF CIVIL PROCEDURE, 11$^{TH}$ Edition Vol. 1 at page 923 in order for the bar to operate the following four conditions must exist; these are:

(i) The previous suit and second suit must arise out of the same cause of action

(ii) The cause of action on which the subsequent cause is founded should have arisen to the claimant where he sought for enforcement of the first claim before any court.

(iii) Both suit must be between the same parties

(iv) The earlier suit must have been decided on merits.

The learned Senior State Attorney based on the above factors, submitted that, the instant suit is barred under the provisions of Order II rule 2 notwithstanding that one ingredient on the same parties is missing because according the learned Attorney, the missing ingredient becomes redundant and ceases to operate because the instant suit is based on same transaction, same cause of action and same reliefs and equated the instant suit as a forum shopping on the part of the plaintiff. In support of her stance, the learned Attorney cited the cases of UNION vs. BAIJNATH 1956 ALJ 918 in which it was held that, when there are two branches in one and same contract only one suit will lie.

Further the learned Attorney charged that under Order II rule 2 (3) of the CPC still the plaintiff ought to have sought and be granted leave before instituting this suit to avoid double payment.

On that note, the learned Attorney urged the court to find and hold that the suit is barred and should be dismissed with costs.

Having carefully considered the rival written arguments of the learned minds for the parties and having carefully gone through the provisions of Order II rule 2(1), (2) and (3), I hasten to say with certainty that, the object and purpose of Rule 2 of Order 2 of the CPC is to avoid multiplicity of suits which arises from the same cause of action. For easy of reference and albeit in brief for better understanding of the object of this Rule I will produce the provisions of Rule 2 of Order II. The said Rule provides:

***Rule 2(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the same cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of the court.***

***(2) Where the plaintiff omits to sue in respect of or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.***

***(3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if***

***he omits except with the leave of the court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.***

***Explanation: For purposes of this rule an obligation and collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.*** (Emphasis mine)

It should be noted from the wording of the above sub rule (1) of rule 2 of the Order II same is imperative to be read together with Order I Rule 3 of the CPC, which gives directions of the person who may be joined as defendants. For easy of reference and understanding the intention of the parliament, rule 3 of Order 1 provides:

***Rule 3. All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, or severally or in the alternative where, if separate suits were brought against such person, any common question of law or fact would arise.*** (Emphasis mine).

It is my further considered opinion that, reading the two provisions together (ie Rule 3 of Order 1 and Rule 2(2) of Order II of the CPC) it is crystal clear that, our parliament had a purpose to achieve and that is, in my view, to avoid multiplicity of suit in respect of or arising out of same act or transaction or series of acts or transactions alleged to exists where any common question of law or fact would arise.

In deed going by the provisions of sub rule (2) of Order II it is plainly clear and strictly prohibits claim of the portion of the claim omitted or relinquished. Furthermore, under sub rule 3 of Order II read together with explanation thereto deals or talks of collateral security for its performance and successive claims to be treated as one cause of action.

Now back to our suit and against the above background, I am inclined to find and hold that this suit is barred under the provisions of sub rule (3) of rule 2 of Order II of the CPC. The reasons am taking this stance are not far to fetch. **One,** there is no dispute that, the cause of action against the defendant arises from the undertaking Letter (exhibit P2) as correctly argued by the learned advocate for the plaintiff in his submissions which was meant to be security in the performance of terms in exhibit P1 (which was to stand as security or collateral for the performance of the Cotton

Seed Purchasing Agreement entered between the plaintiff and Chesano) as such falling within same cause of action as envisaged under sub rule 3 of Order II with exhibit P1. **Two,** both learned trained legal minds in their input on this point none went into details of each sub section to find out their object and purpose they intended to achieve in judicial proceedings. **Three,** there is no dispute as well that the reliefs claimed are the same in the former suit as such as correctly argued by the learned Senior State Attorney, the plaintiff, hence, is considered as doing a forum shopping of the reliefs in dispute. This was fit case to claim jointly and severally against the defendants. **Four,** There is no dispute that no leave of the court was sought and granted before the institution of this suit as required by Rule 2(2) of the CPC. **Five,** without exhibit P1, the cause of action against the defendant in respect of exhibit P2 cannot stand, hence cause of action arise from same transaction which cannot be severed because exhibit P2 is series of acts in the performance of exhibit P1.

On the above reasons, therefore, it is the firm and considered opinion of this court that, the instant suit is strictly among the suit envisaged to be barred under the provisions of sub rule (3) of Rule 2 of Order II of the CPC.

Notwithstanding the above holding, I would have ended up here and dismiss this suit, nevertheless, let me not for academic exercise but as matter of passing try to answer the issues framed in respect of this suit. The first issue was couched that whether the defendant breached the undertaking issued to the plaintiff on 25th June, 2015.

Before answering this issue, I find it imperative to know and understand what is a lien is in law. According to **Black Law Dictionary 9th edition,** the word lien is defined to mean "a legal right or interest that a creditor has in another's property lasting usually until a debt or duty that it secured is satisfied." From the above definition, and after going thoroughly on evidence on record, there is no dispute that the defendant did not breach any term of the lien because the amount of TZS.918,000,000.00 expected to be kept by the defendant was deviated and deposited into the account of Chesano contrary to the term of exhibit P2. In deed as correctly defended by the defendant, the amount to be held under lien was deposited by into the account of the Chesano and not into the account of the defendant. The fact that the Chesano had an account with the defendant was not enough and no explanation was offered by PW1 nor exhibit tendered to explain why the money was deviated to the account of

the Chesano. The argument of the defendant that the money was not received to create binding legal relationship between parties carries the day on the part of the defendant and negates the contractual obligation that was to be created by exhibit P2. In the case of CRDB BANK LIMITED vs. UAP INSURANCE LIMITED, CIVIL CASE NO.70 0F 2018 in which cited with approval the case of EXIM BANK (T) LIMITED v. DASCAR LIMITED AND ANOTHER, CIVIL APPEAL NO.92 OF 2009 it was held and insisted that if a creditor does any act which is inconsistent with right of the surety or omits to do any act which is his duty to the surety required him to do so impairs the obligations under that surety.

On the same analogy, the act of the plaintiff depositing the lien money into the account of Chesano and instead of the defendant without his written consent in law exonerated the defendant from further obligations on the same.

On account of the above reasons, issue number one must be and is hereby answered in the negative that the defendant breached no term of the undertaking letter.

All the above said and done, this suit is amenable to fail in its entirety and is hereby dismissed with costs.

It is so ordered.

Dated at Dar es Salaam this 29th day of March, 2021.


**S.M. MAGOIGA**

**JUDGE**

**29/03/2021**