

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 76 OF 2020

SIMPLY FRESH TANZANIAL LTD.....1ST PLAINTIFF

KENTAMKUMAR PATEL.....2ND PLAINTIFF

MAHESHKUMAR PATEL.....3RD PLAINTIFF

**GLASS & GLAZING AFRICA LIMITED .4TH PLAINTIFF
(NECESSARY PARTY)**

Versus

YASMINE HAJI.....DEFENDANT

Last order: 25th March, 2021

Ruling-Date: 24th May, 2021

RULING

NANGELA, J.

This Ruling is concerning a preliminary objection raised by the Defendant, **Yasmine Haji**, in objection to the hearing and determination of this suit.

The Plaintiffs in this suit are praying for judgment and decree as follows:

- (i) Declaration that the said Defendant has derogated from her contractual obligations as a Guarantor of a loan duly issued by Bank M Tanzania plc which loan amounted a total of USD.2,017,000.00/= and Tshs. 1,453,000,000/= respectively, as 18th January 2018 thereby forcing the 1st, 2nd and 3rd personally and through the 4th plaintiff to step in and to pay the outstanding loans aforesaid in order to prevent the said Bank, which was under the administration of the Bank of Tanzania, from taking recall measures that would have impacted very adversely on the 1st, 2nd and 3rd plaintiffs.
- (ii) For an order that the Defendant pay by way of refund to the 1st, 2nd and 3rd plaintiffs, individually and collectively, a total of USD. 504,205.00 and Tshs. 363,250,000/= being her share of the guaranteed loan amount of 2, 017,000.00 and Tshs. 1,453,000,000/= respectively.
- (iii) For payment of General Damages to the 1st, 2nd and 3rd plaintiffs to be assessed by the Court for the Defendant's unconscionable acts that have exposed the 1st, 2nd and 3rd Plaintiffs to the said damages
- (iv) For payment of interest of the respective sums of a total of USD.504,250.00 and Tshs.363, 250,000/= at the commercial rates from the date the loans became due for payment by the Defendant to Bank M Tanzania plc.
- (v) For payment of interest at the court's rate from the date of judgment to date of full and final payment.
- (vi) For Costs of this Suit.
- (vii) Any order of the Hon. Court will deem just and fit to grant.

Before I delve into the nitty-gritty of the objection, let me state the facts of this case, albeit, briefly. From the pleadings, it is gathered that, the 2nd and 3rd Plaintiffs and the Defendant together with one, Mr Kelvin Stander, are Directors of the 1st Plaintiff, a company duly registered under the laws of Tanzania.

It has been alleged that, sometime on 17th August 2017, through a Facility Letter, the 1st Plaintiff borrowed monies from the defunct Bank M (T) Ltd in form of overdraft facilities and a term loan.

The Facilities granted were as follows: (i) an Overdraft Facility worth **TZS 1,100,000,000/=** (ii) Temporary Overdraft Facility worth **TZS 250,000,000/=** (iii) Term Loan of **USD 250,000/** and (iv) Term loan of **USD 2,000,000/-**.

To secure the loans, the following were offered as security:

- (i) 1st Legal Mortgage over lease rights on Plot No.1870 Oysterbay Area, Dar-es-Salaam, with CT No.23371 (subtitle No.58364) in the name of Pius Mbawala, currently leased to Keven Stander;
- (ii) Debenture over all fixed and floating assets of the 1st Plaintiff,
- (iii) Personal Guarantee of Messers: Ketan (Kumar) Patel; Mahesh(Kumar) Patel; Keven Stander and the Defendant (**Yasmine Haji**).

It happened that, the 1st Defendant fell into financial doldrums and failed to repay the loan in full. In view of that, the Directors of the 1st Plaintiff took pre-emptive measures, including calling upon the Guaranteeing Directors to meet their respective Guarantee obligations.

It is averred that, the 2nd and 3rd Plaintiffs were further forced to utilize their equity in the 4th Plaintiff Company to repay the outstanding loan sums amounting to **USD 816,685.54** and **TZS 1,454,637,330**.

It is averred, however, that, the repayment was made possible notably, when the 4th Plaintiff borrowed from the same Bank (M) Tanzania, Plc, on 18th January 2018, a total of **USD 1,600,000.00** termed as 'working capital.

Besides, it is averred that, the 2nd and 3rd Plaintiffs were additionally forced to source **USD 1,200,000,000.00** from M/s Export Trading Co. Ltd, based in Dar-es-Salaam, which monies were allegedly transferred to the 1st Plaintiff on 25th January 2018.

While the 2nd and 3rd Plaintiffs took all such efforts as part of fulfilling their obligation under their respective guarantor-ship agreements, it is alleged that, the Defendant derogated from his contractual obligations as a guarantor, and hence this suit.

The Defendant filed his defense and, as I stated earlier herein above, raised a preliminary objection in

objection to the suit. The objection raised was to the effect that:

“the Plaintiff does not disclose Plaintiffs’ joint or several cause of action against the Defendant.”

On 24th February, 2020, when the matter was called for necessary orders, the Plaintiffs were represented by Mr. Omari Msemwa, learned Advocate, while the Defendant enjoyed the legal services of Sumaya Jaffari, also a learned counsel. Since the pleadings were complete and, noting that the Defendant had raised the preliminary legal issue, this Court ordered the preliminary objection to be disposed of by way of written submissions.

A schedule of filing such written submissions was issued, and the parties have duly complied with it. In particular, the Defendant’s written submission was filed by Mr Jovinson Kagirwa, learned advocate while the Plaintiffs’ written submissions were signed by Mr Peter Kibatala, learned advocate.

I will briefly summarize and consider their written submissions. To begin with, the Defendant’s main concern raised in his submission is that, the Plaintiff does not disclose the Plaintiffs’ joint or several cause of action against the Defendant.

According to Defendant’s learned counsel, Mr. Jovinson Kagirwa, for a plaintiff to be accepted by as valid before a Court of law, such plaintiff must disclose

recognized and acceptable cause of action against the Defendant. Mr Jovinson Kagirwa contended that, the Plaintiff filed in this Court does not meet that standard.

To amplify on that, the learned counsel for the Defendant contended that, it is unheard of, whether under the Tanzanian law, the governing principles or the existing jurisprudence, that, a principal debtor has the right to sue a guarantor for the loan advanced by a lender to the principal debtor.

As regards how one should determine whether a Plaintiff discloses a cause of action, the learned counsel for the Defendant referred this Court to the cases of **Stanbic Finance Tanzania Ltd v Giuseppe Trupia and Chiara Malarasi [2002] TLR 221**, **Musanga Ng'andwa v Japhet Wanzagi and 8 Others [2006] TLR 351** and **Mashado Game Fishing Lodge Ltd and 2 Others v Board of Trustees of Tanganyika National park (TANAPA) [2002] TLR 315**.

He also cited the cases of **Mukisa Biscuit Manufacturing Co. Ltd [1969] EA 696** arguing that the preliminary objection can validly dispose of the suit because, looking at paragraphs, 7, 8, 9, 13, 15, 21, 23 and 25 of the plaint and annexures TAL 4 and TAL5 attached to the plaint, all these do not disclose any cause of action, it was argued.

He noted that, what is clear from the Paragraphs is that the 1st Plaintiff borrowed monies from the now

defunct Bank M (T) Ltd, and that, the Defendant, 2nd and 3rd Plaintiffs were the Guarantor who signed the Deeds of Guarantee in case of any default.

He argued, however, that, from the attached documents in the Plaintiff, it is clear that the loan has already been discharged by the 1st Plaintiff through internal mechanism of 2nd and 3rd Plaintiffs who are directors of the 1st and 4th Plaintiff, and that, the Defendant is not being sued by the Bank/ Creditor for failure to discharge her obligation.

In view, of the above, the learned counsel for the Defendant concluded his submission by stating that, the suits does not disclose any cause of action against the Defendant, failure of which renders it open to being struck out with costs by the Court.

In rebuttal to the Defendant's submission, the Plaintiff Counsel Mr. Peter Kibatala, criticized the Defendant's objection to the suit as one not qualified as such. It was Mr Kibatala's submission that the Defendant seems to have lacked insight of what a preliminary objection is all about.

Mr Kibatala contended that, it was erroneous to refer this Court to the cases of **International Commercial Bank (T) Ltd v Yusuf Mulla and another, Commercial Case No. 108 of 2008** and **Musanga Ng'andwa v Chief Japhet Wanzagi and 8**

Others (supra), since they underline and amplify the point on cause of action.

He contended that, as regards paragraphs 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 and 29 it is clear that, the Defendant, as a Director and Shareholder of the 1st Plaintiff, guaranteed the repayment of a loan issued to the 1st Plaintiff.

He further stated that, when the loan became due for repayment and the 1st Plaintiff failed to pay, it was the 2nd and 3rd Plaintiffs who, as part of the guarantors, paid for their share of it, including the share of it which ought to have been paid by the Defendant, and the Defendant as one of the guarantors, did nothing.

He submitted further that, the 2nd and 3rd Plaintiff had to utilize their respective equity in the 4th Plaintiff, who is necessary party, to meet the repayment obligations by scrambling to secure other funds for the repayment of the loan.

According to Mr Kibatata, a cause of action can, as a progressive view, be gauged in terms of whether there are triable issues emanating in aggregate between the Plaintiff and Defence.

To strengthen his position, he cited the case of **Steven Semakula v Samuel Sserunjogi, Civil Suit No. 187 of 2012** (High Court of Uganda at Kampala, (pages 2&3)) and, argued that, the case of **Stanbic Finance Tanzania Ltd** (supra) cited by the Defendant,

was decided much earlier than Semakula, hence, had been overtaken by legal evolution.

In conclusion, he relied on the case of **Zebedayo Mkodya v Best Microfinance Solutions Limited and 4 Others, Commercial Case No. 95 of 2016 (unreported)** and, argued, that, the cases relied on by the Defendant are distinguishable. As such, he contended that, the objection is intended to derail the course of justice and prayed that, it should be overruled with costs.

In a brief rejoinder, Mr Kagirwa insisted that the plea as to the cause of action is a pure point of law and, that; it was a well placed preliminary objection. He rejoined further, that, what had been raised by the Defendant is a plea which once argued successful; the matter can be struck out.

Mr Kagirwa laid emphasis on the cases of **Stanbic Finance Tanzania (supra)** and **Musanga Ng'andwa (supra)**, **Mashado Game Fishing Lodge Ltd (supra)**, just to mention a few, as some of the key relevant cases supporting his legal position. He maintained that, the Plaintiff's submission has not addressed the key issues to be determined by the court which is whether the Plaintiff really discloses a cause of action.

I have objectively considered the rival submissions of the learned counsel for the parties. As it may be gathered from these rival submissions, on the one hand

the Defendant argues that, the Plaintiffs has not disclosed cause of action against the defendant because the Principal Debtor has already paid all its debt and cannot, as such, sue the Defendant as a guarantor who guaranteed the repayment of the loan to the creditor in case of default.

On the other hand, the Plaintiffs deny that proposition by the Defendant. The Plaintiffs are arguing that the Defendant, being a Director, a shareholder of the 1st Plaintiff, and one of the guarantors who guaranteed the repayment of the loan taken by the 1st Plaintiff when it became due for repayment, but failed/refused or neglected to fulfill her repayment obligations, is to be held liable to the 2nd and 3rd Plaintiffs who, as co-guarantors, had to carry the additional burden of repaying the entire loan on their shoulders.

In view of the above, the issue which I am called upon to address is: **whether the objection raised by the Defendant is meritorious.**

In law, a **cause of action** may be defined as a set of facts sufficient to justify suing to either obtain money, property, or the enforcement of a legal right against another party.

It is a well-settled rule that a cause of action requires, as essential elements, not only a legal right of the plaintiff and a correlative duty of the defendant, but also an "act" or "omission" of the defendant in violation of

said legal right. That is to say, the cause of action does not accrue until the party obligated refuses/neglected, expressly or impliedly, to comply with its duty.

The principles for determining whether a Plaintiff discloses a cause of action or not, are also well settled. The legal position is that, when deciding whether or not a plaintiff discloses a cause of action, one had to look at the plaintiff as a whole together with its Annexures, if any.

The cases of John M Byombalirwa v Agency Maritime [1983] TLR, 1; Musanga Ng'andwa Andwa v Chief Japhet Wanzagi and Eight Others [2006] TLR 351 and Lucy Range v Samwel Meshack Mollel and others, Land Case No. 323 of 2016 (unreported) confirm that legal position.

In this case, the Plaintiff does disclose that the 2nd and 3rd Plaintiffs and the Defendant guaranteed a loan which was advanced to the 1st Plaintiff sometimes in 2017. Furthermore, the Plaintiff discloses that, the 1st Plaintiff failed to repay and, that, as guarantors, the 2nd and 3rd Plaintiffs, cleared it in full, meaning that they paid as well the amount which the Defendant ought to have paid as a guarantor. They are now asking for a refund from the Defendant.

Even without further mentioning of the relevant paragraphs of the Plaintiff, that disclosure in the Plaintiff and its annexure alone sufficiently negates the Defendant

counsel's proposition that the Plaintiff does not disclose a cause of action against the Defendant.

Having looked at the Plaintiff and its annexure, I am fully satisfied that it does disclose, not only that the Plaintiff has a claim or a legal right against the Defendant, but also that, there the Defendant has a correlative duty which requires him to take corrective measures, failure of which leads to a violation of the alleged Plaintiff's legal right.

In the upshot, this Court settles for the following orders, that:

1. the Defendant's preliminary objection has no merit and is hereby overruled.
2. Costs shall be in the cause.

It is so ordered.

DATED at **DAR-ES-SALAAM**, this **24th May 2021**



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HON. DEO JOHN NANGELA
JUDGE
