

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 40 OF 2023

AZANIA BANK LIMITED.....PLAINTIFF

VERSUS

SAVERINA SILVANUS MWIJAGE.....DEFENDANT

RULING

Date of last order: 30.08.2023

Date of ruling: 20.10.2023

AGATHO, J.:

In this suit, the plaintiff claims against the defendant arises from alleged breach of consumer loan agreement. It is alleged that sometimes in May 2017 defendant being member of parliament of the United Republic of Tanzania, at her request she was granted the loan to the tune of TZS. 100,000,000/=. It was agreed that the loan was to be repaid in one instalment on 30th June, 2020 or on the end date of the 11th Parliament of United Republic of Tanzania whichever comes earlier. However, the defendant has failed to honour her obligation as the result, the unpaid amount now stands at TZS.134,613,931.67 as on 9th March,2023. The plaintiff issued a demand notice to the defendant but in vain. Hence, this suit for reliefs as claimed in the plaint.

Disputing the claims, the defendant filed a written statement of defence prefaced with a notice of preliminary objection. The preliminary objection is grounded on the following points:

- i. The suit untenable in law for non-joinder of the necessary party.
- ii. The plaint is incurably defective in law for offending Order VI Rule 4 of the Civil Procedure Code Cap 33 for failing to provide particulars of refusal, neglect, or rejection to pay loan as alleged in the paragraph 7,7.1,7.2 and 8 of the amended plaints.

When the matter was called up for hearing learned counsel for both parties unanimously agreed to dispose of the raised point of preliminary objection by filing written submissions. Their agreement was blessed by this court by drawing the submissions schedule and the parties complied with it. When the matter called on for hearing the plaintiff was under legal representation of Mr.MbagatiNyarigo learned Advocate, and the defendant had legal services of Edson Kilatu, learned counsel.

Upon going through the written submission by Mr. Kilatu, for the defence,this court noticed that the defendant has abandoned the second point of objection and argued the first limb of objection alone. Submitting on the first limb of objection which is to the effect that the

suit is untenable in law for no-joinder of the necessary party. It was Mr. Kilatu's submission that on 8th May, 2017 defendant applied for consumer loan with Azania Bank LTD under the guarantee of the parliament of United Republic of Tanzania in which Parliament committed itself to pay plaintiff any amount due to the defendant in the event of termination of employment.

Extending his submission, the learned counsel for defendant defined the term contract of guarantee to mean a contract to perform promise or discharge the liability of third person in the case of default, reliance was placed under Section 73 of the Law of contract [Cap 345 R.E. 2019]. He reasoned that, since the parliament guaranteed the repayment of the loan then it is a necessary party by virtue of being guarantor. Elaborating on guarantee, the learned counsel told the court that, the liability of defendant is co-extensive with the parliament to discharge the debt as such joinder of parliament as necessary party in this suit is mandatory failure of which is fatal and unjust. To cement his position referred this court to the case of **Exim Bank Tanzania v Dascar Limited & Another [2016] T.L.R. 251**. Where the court held that, save where it is provided in a contract the liability of the surety is co-extensive with that of the principal debtor.

The learned counsel for defendant contended that, the absence Parliament an effective decree or order cannot be passed because the parliament is bound to discharge the loan. He placed his reliance on the case of **Abdullatif Mohamed Hamis v MeboobYusuph Osman and Fatna Mohamed, Civil Revision No.6 of 2017 CAT** (unreported) and the case of **Julian Francis Mkwabi Vs LawrentChimwaga Civil Appeal No 531 of 2020 CAT** in which the court defined the term necessary party to mean, a party whose presence is indispensable to the institution of the suit and whose absence no effective decree or order can be passed. Submitting further the learned counsel for defendant contended that, non-repayment of the loan was frustrated by the parliament. Expounding on this point Mr. Kilatu stated that, unjustly and illegally defendant was ousted from parliament the act which rendered he financially important. On the above reasons the learned counsel for defendant prayed the suit to be dismissed in its entirety.

Submitting in reply to the Preliminary objection, the learned counsel for the Plaintiff argued that the preliminary objection should be a pure point of law only that does not require evidence to substantiate their arguments as enshrined in the landmark case of **Mukisa Biscuit Manufacturing Co. Ltdv West and Distributors Ltd [1969]1EA**

696 at 701. According to Mr. Nyarigo the preliminary objection raised calls for evidence as such does not fall within the test established in **Mukisa Biscuit Manufacturing Co. Ltd** (Supra). He argued that the question whether parliament guaranteed repayment of the loan upon default by the defendant, or whether nature and extent of alleged guarantee and whether the guarantee by the parliament discharged the defendant as borrower from liability are issues which require evidence. Mr. Nyarigo submitted that all these questions call for evidence. He contended that, the argument that in absence of the parliament as a necessary party the court will end up passing a decree which will be of no effect is misconceived because the Parliament did not commit itself to repay the loan in case of default but rather it committed itself to remit any benefits due upon her termination of employment.

Extending his submission on the interpretation of terminal benefits the learned counsel for plaintiff elaborated that, the parliament paid defendant TZS. 9,380,588.88 after his termination of her defendant employment as terminal benefit. He added that parliament commitment did not extend to the obligation of discharging the loan in full as such plaintiff has no cause of action against the parliament of Tanzania for it discharged its obligation by remitting terminal benefits to the defendant.

The learned counsel for plaintiff insisted that, the obligation of defendant as borrower and that of the parliament as employer are different because the borrower was to discharge the loan in full and the employer to remit any benefits due to the employee. He placed his reliance on the case of **Magresson Joseph Dallota V. NBC Limited & Others, Commercial case No 134 of 2002, HCCD.**

Submitting on frustration of the arrangement of loan repayments, the learned counsel for plaintiff had it that the unfair termination of the defendant from employment does not make the parliament a necessary party to this suit. Basing on the above argument and cited authorities the learned counsel for plaintiff invited the court to overrule the preliminary objection with costs.

In brief rejoinder the learned counsel for defendant reiterated what he submitted in chief and added that, parliament was not remittance agency but surety for all reasons and the arguments that, plaintiff remittance was limited to TZS.9,380,588.88 is misconceived because extensive principle knows not of partial satisfaction of debt by surety. On the above reasons Prayed the Defendant's preliminary objection be dismissed with costs. This marked the end of hearing of the

preliminary objection and the task of this court is to determine the merits and demerits of preliminary objection.

Having dispassionately considered the rival submissions of the parties the first task shall be to determine if the objections raised fall squarely under the ambit of pure point of law as provided in the famous case of **Mukisa Biscuit** (supra). The learned counsel for defendant submitted that the parliament of Tanzania being guarantor is a necessary party. In contrast to that view, the learned counsel for the plaintiffs submitted that the Parliament of the United Republic of Tanzania is not a necessary party for it did not guarantee the debt. It should be noted that the test as to whether a party is a necessary party or otherwise is whether no effective decree can be issued in the absence of that party. Back to our case at our hand, the question is whether an effective decree cannot be issued without impleading the Parliament of United Republic of Tanzania? Looking at the annexure ABL-1 consumer facility, particularly under employer declaration, it is depicted that,

"We undertake to remit his/her salary to the account maintained at Azania Bank limited and the facility the instalment deduction via our payroll and remit the same to Azania. We further undertake to pay to Azania Bank

Ltd any terminal benefit to the employer in the event of termination of employment. We also confirm that we will not except any change to this instruction without prior written confirmation from Azania Bank."

From the above understanding, it crystal clear that parliament commitment was for remittance of defendant salaries to plaintiff and remittance any terminal benefit. There was no contract of guarantee between the parliament and the plaintiff. As such the issue of guarantee is wholly unfounded for there was no guarantee agreement. In that circumstance the parliament cannot be a necessary party because the plaintiff has no claim against parliament. Worse enough the absence of the Parliament as defendant cannot vitiate the court from passing an effective decree. It is worth noting that in determining who is necessary party, a clear distinction between the joinder of party who ought to have been joined as defendant and the joinder of one whose presence before the court was necessary for it to effectively and completely adjudicate upon the questions involved in the suit. See the case of **Departed Asians Property Custodian Board v Jaffer Brothers Ltd [1999] EA 55** and the case of **Abdullatif Mohamed Hamis**(supra). Basing on

above cases the implication of non-joinder of the parliament is not fatal because the decree is executable even in absence of the Parliament.

The court takes that stance because in banking business, there are two kinds of agreements. The first agreement is between the lender and borrower (the loan agreement). The second type of agreement is a contract of guarantee. This is the agreement between the lender and the guarantor say (plaintiff and guarantor). The latter agreement is an independent undertaking which arises only when in the first place there is a covenant to make good when the principal debtor defaults to repay the loan.

A scrutiny of the annexure ABL-1, part of the pleadings, shows that there was no covenant of guarantee by the parliament in case the defendant default as such the Parliament cannot be a necessary party. While the court appreciates the arguments by the learned counsel for defendant and the case cited on the criteria as to who is a necessary, the circumstance of the present case does not allow this court to hold that the Parliament of United Republic of Tanzania was a necessary party because plaintiff has no cause of action against it.

From the above analysis, the preliminary points of preliminary objection are devoid of merit, and they are overruled with costs.

It is so ordered.

DATED at DAR ES SALAAM this 20th Day of October 2023.



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U. J. AGATHO

JUDGE

20/10/2023

Court: Ruling to be delivered today this 20th October 2023 by the Hon.

Minde, the Deputy Registrar in the presence of the parties.



A handwritten signature in black ink, appearing to read "U. J. Agatho", followed by a horizontal line and a small flourish.

U. J. AGATHO

JUDGE

20/10/2023