

TANZANIA / JUDGMENT

bank of baroda tanzania limited vs nkt limited and 6 others 2021 tzhccomd 3439 18 august 2021

COURT
TZHCCOMDDECIDED
18 August 2021

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (COMMERCIAL DIVISION) AT
DAR ES SALAAM COMMERCIAL CASE No. 18 OF 2020 BETWEEN BANK OF BARODA (TANZANIA)
LIMITED..... PLAINTIFF VERSUS

1. NKT LIMITED..... FIRST DEFENDANT
2. DEOGRATIUS MICHAEL PISA..... SECOND DEFENDANT
3. AGREY FREDERICK MBUYA..... THIRD DEFENDANT
4. ALLY MOHAMMED KITULE..... FOURTH DEFENDANT
5. THABIT MOHAMED KITULE..... FIFTH DEFENDANT
6. AFRICA JUMANNE BWAMKUU..... SIXTH DEFENDANT
7. FATMA SAID ALI..... SEVENTH DEFENDANT

JUDGMENT

MR.UMA, J The Plaintiff filed this suit against the Defendants jointly and severally for payment of a loan debt of Tanzania shillings 865,453,487/26; interest at 19% per annum from 30th January, 2020 until Judgment, interest at court's rate post-judgment and upon failure by the Defendants to satisfy the Judgment and decree in this suit within 30 days from the date of judgment and decree for the sale of the 7th immovable property on Plot No. 86 Block i A2, Mikocheni Area, Kinondoni Municipality Dar Es Salaam, Title No. 35047 towards satisfaction of the said judgment and decree and costs of the suit. That the First, Second, Third, Fourth, Fifth, and Sixth Defendants be jointly and severally ordered to pay the costs of the suit. The plaintiff's suit against the defendant is based on a lender/borrower relationship. It is asserted for the plaintiff that by a Credit Facility Letter dated 20th April, 2015 the Plaintiff availed to the 1st Defendant a credit facility of TZS 850,000,000/=. The Credit Facility was secured by the following securities:-

- i. Debenture over the Assets of the First Defendant; ii. A legal Mortgage of over the Eight Defendants' immovable property on Plot 86 Block A2 Mikocheni Area, Kinondoni Municipality, Dar Es Salaam with Title No. 35047 and; iii. Personal Guarantees of the second, third, fourth, sixth and seventh Defendants. In support of the suit the plaintiff averred that the 1st defendant on the 20th April 2015 borrowed TZS 850,000,000/ at an agreed interest rate of 19% per annum repayable within a period of 36 months. The 1st defendant failed to repay the money borrowed and at the time of filing the action the principal amount together with interest accrued was a total of Tanzania shillings 865,453,487.26. On 27th November 2019 the Plaintiff served upon the 7th Defendant Statutory Notice under Section 127 of the Land Act and also served all 2 other Defendants with a Demand Notice requiring them to make full payment of the amount due and outstanding under the facility. The first Defendant filed a Written Statement of defence in which it admitted to have been availed with a credit facility of TZS 850,000,000/= by the Plaintiff. It also admitted to have defaulted but stated that its default was not intentional. It attributed it to the refusal by the National Services to have the land near its borders to be developed on security

reasons.

Like the 1st Defendant the second Defendant filed a written statement of Defence in which he admitted that the Plaintiff availed to the 1st Defendant a term loan of TZS 850,000,000.00. He disputed the allegation that the 1st Defendant intentionally defaulted its obligations under the facility. The 3rd, 4th, 5th, 6th, and 7th Defendant filed similarly worded Written Statements of Defence. They all stated that the first Defendant didn't default intentionally. The plaintiff is represented by Counsel Stanslaus Ishengoma of Kesaria and Company Advocates while the defendant are represented by Counsel Emanuel Daniel. Five issues were framed for determination. The issues are:

1. Whether or not the Defendants defaulted their repayment obligations under the loan agreement;
2. Whether or not there were frustration of the contract as between the Plaintiff and the 1st Defendant; 3
3. Whether or not following the 1st Defendant's letter dated 27th December, the Plaintiff agreed to restructure the loan agreement;
4. What (if any) are the Defendants liabilities under the Credit Facility letter and;
5. To what reliefs are the parties entitled. From the pleadings, evidence and submissions of the parties the Plaintiff is a bank which is a licensed moneylender. The facts are that on the 20th April 2015 the first defendant borrowed from the plaintiff Tanzania shillings 850,000,000/= at an agreed interest rate of 19% per annum. The loan was repayable within in monthly installments within a period of 36 months. On this loan the first defendant committed the 7th defendant's (Fatma Said Ali) certificate of title comprised in block A2, Plot No. 86 situated at Mikocheni Area, Kinondoni Municipality, in Dar E Salaam City as security. A legal

mortgage was executed between the parties and was registered. The loan was also secured by a debenture of assets of the 1st Defendant and personal guarantees of the second, third, fourth, fifth, sixth and seventh Defendants. On the other hand all defendants agreed that the first defendant procured loan from the plaintiff on the 20th April 2015 for which the seventh defendant pledged the security of her title deed described above. The said loan was not duly paid back. The controversy from the plaintiff's suit relates to the allegation by the Defendant that the agreement was frustrated. 4 The defendants in their defence contended that sometimes at the closing stage of the Land Development activities over which the loan was taken, the Commanding Officer of the National Service, at Oljoro camp stopped the whole exercise citing security reasons as the "Imani Estate" a farm under development was closer to the boundaries of the National camp which is an army regiment. That was in April 2016. In November 2017 Imani Estate (on behalf of the 1st Defendant?), and the National Service Oljoro camp signed a Memorandum of Understanding for swapping of Imani Estate owned farm with the Government allocated farm land owned by the National Service. The Plaintiff's bank was notified of those occurrences in December, 2017 and the 1st Defendant requested for restructuring of the loan. It is the Defendant's contention that the request was honoured by the Plaintiff as a result of which the 1st Defendant started to repay the loan. Counsel for the Plaintiff submitted that from the evidence on record before this court, the Defendant had an obligation to pay the outstanding amount together with interests and ensuing charges which was Tshs 865,453,487.26 at the time of filing the suit which it willfully refused to pay as had been agreed causing the Plaintiff to incur costs which she would otherwise has not incurred had the Defendant performed part of its bargain. It is also apparent that from the evidence submitted before court by the Plaintiff that despite rescheduling of the payment schedule the 1st Defendant still failed to repay the loan as agreed and as per loan terms and conditions. During cross examination of DW1 it came out very clearly 5 that the Defendant didn't repay the loan as required. In his own words DW1 stated thus:- " The loan has not been repaid to the fullest. There is an outstanding balance. We have hopes that we will be able to repay the outstanding balance and that why we are asking for leniency" This answers the first issue which asked whether the Defendants defaulted in their repayment obligations in the affirmative. That is to say the Defendant did default in their obligation to repay the loan as per loan facility agreement. The major contention however is whether the contract was frustrated. This constitutes the second issue in this case. This is a question of fact that has to be considered from the evidence. However corollary to that question of fact is another important question of whether the frustration caused by a third party does impact a contract. As stated above, this is the second issue agreed to by the parties and its resolution is crucial in determining the rest of the issues. Frustration of a contract refers to a particular way in which contractual obligations can be discharged. Black's Law Dictionary 7th Edition by Bryan A. Garner at page 679 defines the term frustration as: "The prevention or hindering of the attainment of a goal such as contractual performance" 6 The said author states further that:- "Where the entire performance of contract becomes substantially impossible without any fault on either side, the contract is prima facie disioved by the doctrine of frustration" Thus, from the above

definitions a contract is frustrated where further performance becomes impossible due to unforeseen events or series or series of events taking place through no fault of the parties to the agreement. PW1 in his evidence in chief stated that the first Defendant managed to make partial payment of the loan but didn't clear the entire loan as a result of which the event of default as per agreement occurred. It was further evidence of PW1 that at the time of instituting this suit the loan that remained unpaid was T.shs 865,453,487.26. This was also confirmed by DW1 through cross examination. However, it was the evidence in chief of Jean Bosco Mugemana (DW1), that in the course of execution of the construction project for which the loan was secured, it was discovered the land is situated too close to a National Service (JKT) i.e. military land and therefore not safe for civilian settlements. The question is whether the fact that the 1st Defendant was stopped from developing the land by a military regiment constituted frustration of the loan agreement with the Plaintiff. 7 The Defendant's submission on this issue is that they failed to discharge their obligation under the agreement due to the delay in completion of the project which delay was caused by interference of a third party, the National Service Oljoro Camp. It has been submitted and proven that the second defendant did not sign the alleged loan agreement in respect of the third loan but the same was altered by the plaintiff to create a case for himself. PW2 testified in court that there existed a loan agreement in respect of the first and second loan and he undertook to avail the same to court at the next hearing date. He however failed to produce the document before court and instead changed his statement that the documents do not exist and were never executed. The conduct of PW2 is suspect and is of a person hiding the truth having earlier informed court that the loan agreement was part of the very important documents in relation to any loan transaction. I have carefully considered the issue of frustration. The entire issue can firstly be resolved on a question of fact as to whether the act of JKT was unforeseeable. Jean Bosco Mugemana (DW1), a principal officer of the first defendant stated in paragraph 9.0 of his witness statement thus: "... On the said land mentioned in paragraph 4.0, was and still is a land situated in an area too close to a National Service (JKT) lands (training site of Oljoro which makes the land mentioned in paragraph 4.0 sit at the Military area. The same was deemed not safe to have civilian settle on the area too close to military training area..... " From this piece of evidence the facts that the land which 1st Defendant had planned to develop was too close to the lands owned by a military regiment to wit JKT Oljoro were known to the parties and particularly the 1st Defendant right from the time it procured it from Advocate Duncan Joel Oola, apparently the liquidator of Imani Estate Ltd. It is common knowledge that military training areas are not safe for civilian settlements. Thus, the Defendant cannot be heard pleading frustration in this case because dispute with the military regiment (JKT Oljoro) over developing civilian settlement in the land could be foreseen. This finding answers the second issue in the negative. That is to say there was no frustration of the contract in this case. The third issue will not detain me much as it is admitted by the Plaintiff that the bank restructured the loan and the payment schedule. The fourth issue is about liabilities of the Defendants. I have carefully considered the evidence. The plaintiff has proved that the first defendant signed the loan agreement exhibit P1 and actually borrowed T.shs 850,000,000 from the Plaintiff's bank on 20th April 2015 on the

balance of probabilities. The loan was secured by the 7th Defendant who pledged her Property on Plot No.86 Block A2 Mikocheni area in Kinondoni Municipality Dar Es Salaam City. It was also secured by debentures over the assets of the first Defendant and personal guarantees of second, third, fourth, fifth, sixth and seventh Defendants who are also directors of the first Defendant. 9 Thus the second, third, fourth, fifth, sixth and seventh Defendants are being sued as guarantors. While the first Defendant is liable as the borrower, the remaining Defendants are liable as guarantors. They had a contract of guarantee with the Plaintiff. In Commercial Case No 108 of 2018 between International Commercial Bank (T) Ltd Versus Yussuf Mulla and Shahidi Mulla, this court Nangela J, held inter alia that: contract of guarantee is a contract to perform the promise or discharge the liability of a third person in the case of his default....." In the Civil Appeal No.92 of 2009 between Exim Bank Limited Versus Dascar Limited and Another the Court of Appeal held that:- "Once a guaranteed debt is due and the principal debtor has failed to pay it, it is the duty of the surety to pay it together with all the attendant consequences arising from the breach. In terms of Sections 80 and 92 of the Act, once a principal debtor defaults in the payment of the loan, the surety steps into or is placed into equal footing with that of the principal debtor. So unless the principal debtor sooner discharges the liability, the guarantor is as Hable as the principal debtor to the creditor and to the same extent under the terms of the overdraft facility" io 18/8/2021 Coram: Hon. A. R. Mruma, J. For the Plaintiff: Mr. Emmanuel Daniel for Mr. Stanslaus Ishengoma For the Defendant: Emmanuel Daniel for Defendants CC: Mwangoka Court: Judgment delivered in presence of Mr. Emmanuel Daniel Advocate for the Defendants who holds brief Ms. Stanslaus Ishengoma, Advocate for the Plaintiff who is absent, this 18th day of August 2021. A. R. Mruma JUDGE 18/8/2021 12

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CASE PAGE	https://chat.esheria.ai/case-law/tanzania/bank-of-baroda-tanzania-limited-LoanDefault-tzhccomd-2021--6a3ea52b3b1caa9129823fc5

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