

TANZANIA / JUDGMENT

barcelona enterprises ltd vs nbca bank t ltd 2023 tzhccomd 388 17 october 2023

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IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA (COMMERCIAL DIVISION) AT PAR
ES SALAAM COMMERCIAL CASE NO. 125 OF 2022 BETWEEN BARCELONA ENTERPRISES
LIMITED..... PLAINTIFF VERSUS NCBA BANK TANZANIA
LIMITED..... DEFENDANT

JUDGEMENT

Date of last order:12.10.2023 Date ofJudgement:17.10.2023 AGATHO, J: The plaintiff, BARCELONA ENTERPRISES LIMITED is a limited liability company dully incorporated in Zanzibar carrying business in Zanzibar and mainland Tanzania while defendant is a public company engaged in the business of providing banking and financial services in accordance with the laws of the United Republic of Tanzania. By way of plaint the plaintiff instituted the instant suit against the above-named defendant, praying for judgment and decree for the following orders, namely: i

- i. A declaration that the defendant's acts of purporting to cancel the approved facility and or non-performance or refusal to perform her part of the obligation under the facility letter was wrong contrary to parties' agreement, legally unfair and detrimental to plaintiff's business. ii. A declaration that the defendant's pre-condition requiring closure of the plaintiff's existing bank accounts with the Peoples Bank of Zanzibar or other banks was illegal and unfair. iii. A declaration that the defendant breached its understanding and terms of facility letter dated /executed by the parties on 06th May,2021 and as consequence thereof the defendant is liable to the plaintiff for breach of contract; iv. The Defendant is liable to pay the plaintiff special damages amounting to TZS 908,000,000/=Plus USD Dollars 1,700 which comprises of value of immovable properties each value at TZS. 450,000,000, travel expenses to Dar es salaam and back to Zanzibar TZS. 1,000,000, valuation costs amounting to TZS.6,000,000 which was paid to valuer's expenses for preparation, certification and compilation of necessary document amounting to TZS. 1,000,000 and USD 170 being bank facility fee. 2
- v. The Defendant be ordered to pay the plaintiff general damages amounting to USD 500,000 or the amount the honourable court may deem just and fair to award. vi. Interest at the relevant contractual rate applicable to the said facility. vii. The defendant to pay interest on

the decretal amount at the court's rate from the date of judgement till full satisfaction of the decree by the defendant. viii. The defendant to pay costs of suit. Upon service, the defendant filed written statement of defence disputing the plaintiff claims on the ground that it is the plaintiff who frustrated the whole arrangement for failure to submit the original title over the landed property in the name of Adam Mohamed Saeed. The brief facts as to the genesis of this suit are imperative to be stated for better understanding of the core of the suit. It is on the record that defendant offered the plaintiff the credit facility to the tune of USD 150,000 and the plaintiff accepted the offer by signing the facility letter on ,7th May 2021. It was agreed among others that upon signing of the facility letter, the defendant was supposed to disburse the loan to the plaintiff as agreed. However, the defendant refused to disburse the loan 3 on the ground that there was no proper security from the plaintiff. It is against that background the plaintiff instituted this suit claiming for special damage suffered out of defendant's cancellation of the loan without good cause. When the matter was called for hearing, the plaintiff was in the legal services of Mr. Godson Nyange and Atlay Thawe, learned advocates. On the adversary part, the defendant was enjoying the legal services of Ms. Faiza Salah, learned advocate. Before hearing started, during final pre- trial conference, the following issues were framed, recorded and agreed between the parties for the determination of this suit, namely:

1. Whether there was credit facility agreement between the parties.
2. If issue no 1 is answered in affirmative, whether the parties performed their obligation under the facility agreement.
3. Whether the defendant's notice of cancellation of the facility agreement amounted to the breach.
4. If issue no 3 is answered in affirmative, whether the plaintiff suffered any damage.
5. To what reliefs are the parties entitled to. The plaintiff in an attempt to prove her case, paraded one witness, ADAM MOHAMED SAID (hereinafter referred to as "PW1"). PW1 under 4 oath and through his witness statement which was received by this court and adopted as his testimony in chief told the court that he is a managing director of the plaintiff who is testifying under the capacity as the director, hence conversant with the facts of this suit. PW1 went on telling the court that the plaintiff is a limited liability company incorporated in Zanzibar carrying among others business of importing, distribution and selling of various merchandise both in Zanzibar and the mainland. It was the testimony of PW1 that since the incorporation of the plaintiff, the People's Bank of Zanzibar was the only Bank for the plaintiff relied in their business transaction. PW1 went further telling the court that sometimes in February 2017 the branch manager of the defendant, one Majid approached PW1 inviting the plaintiff to open Bank account with the defendant. It was further testimony of PW1 that the invitation was accompanied with the defendant promise that, in case the plaintiff opened the bank account with defendant, the bank will approve a lucrative business loan facility which will be affordable and beneficial. It was PW1's testimony that following

that promise the plaintiff accepted the offer believing that it will strengthen the plaintiff financial status. And in the circumstance the plaintiff opened the business account with the defendant at Zanzibar branch in which PW1 was the signatory. 5 It was further testimony of PW1 that, on 6th May, 2021 the defendant and the plaintiff signed a facility agreement offered with reference No. NCBA/CORP/15094/72/2021/. PW1 tendered in evidence acceptance letter, guarantee agreement and Banking facility dated 06.5.2021 which were admitted in evidence and marked as exhibit Pl(a), exhibit Pl(b) and exhibit p(c). PW1 went on telling the court that, it was a common understanding between the parties that the landed property to wit; plot No 308 and 310 situated at Mbweni area in Zanzibar will be used as security. He added that among other terms of the facility agreement the plaintiff was required to close her bank account held in the People's Bank of Zanzibar Limited (PBZ) which the same on 7th May, 2021 it was closed. PW1 tendered in evidence the letter dated PBZ/CRD/2021/05/089 which was admitted and marked as exhibit P2. PW1 went on telling the court that after fulfilment of all the pre-conditions for disbursement the plaintiff was expecting to receive the fund immediately. It was PW1 testimony that following that expectation the plaintiff, proceeded to engage in business with international suppliers by placing orders on credit expecting to pay them by using the approved loan from the defendant. It was further testimony of PW1 that on 26th October, 2021 the defendant vide the letter 6 titled submission of Barua ya haki ya utumiaji wa Ardhi and sale deed, cancelled the facility agreement on ground that there was no proper security. According to PW1 the message conveyed by this letter was unfair since it did not provide an opportunity nor time for plaintiff to sufficiently appreciate the grounds and remedy of the alleged default. PW1 tendered in evidence letter titled" submission of Barua ya Haki ya utumiaji wa ardhi and sale deed which was admitted in evidence and marked as exhibit P5. PW1 contended further that, as means of saving plaintiff reputation and business relationship with the suppliers she had to sell her land below market price so as to liquidate the loan from international suppliers. PW1 tendered in evidence Mkataba wa Mauziano ya nyumba which were received and marked as exhibit p4. PW1 went on telling the court that despite of having physical meetings and several communications and demand notices, the defendant neglected to honour what was agreed. All efforts to make good the claim proved futile as the Defendant refused, failed and/or neglected to honour the terms of the agreement, hence occasioning loss to the Plaintiff, including loss of business opportunities. PW1 tendered demand note and reply to demand note which were admitted in evidence as exhibit P3a and P3b. PW1 further testimony was that as means of solving the 7 dispute, on 13th and 14th June, 2022 a meeting was held to resolve the dispute amicably between the parties, unfortunately, the defendant could not communicate back. On the above evidence PW1 prayed this court to grant the judgement. Under cross examination by Ms Salah advocate for defendant, PW1 told the court that according to clause 5.5 of exhibit Pl(a) the defendant agreed to avail the plaintiff credit facility upon fulfilment of the conditions. He elaborated that among other conditions was the plaintiff to issue documents of the company (debenture) and security documents. However, some of the documents were not sent to plaintiff including debenture. PW1 when pressed with questions admitted that the plaintiff did not send original

documents, debenture of the company and all securities were in the name of Ali Mohamed Saeed and not in the name of PW1. He added that Barua ya hakiya utumiaji wa ardhiarxd sale deed are different documents. PW1 when asked to read exhibit p6 particularly paragraph 8 read it that hairuhusiwi kuigawa au kuiuza haki hii kwa yeyote. Under re-examination by Mr. Nyange, advocate for plaintiff, PW1 told the court that, the facility letter did not mention name of a party from whom the document should come. PW1 when pressed with more 8 questions told the court that it is the sale deed that proves ownership. That marked the plaintiff's case. The defendant was defended by one witness Mr. Ladslaus Majura (to be referred herein in these proceedings 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 officer of the defendant. Hence, conversant with the facts of case. It was DW1 testimony that the plaintiff was a customer of the defendant as such on 12th March, 2021 the plaintiff requested for loan facility to the tune of USD 150,000.00 as working capital. On the same day the defendant on 6th May, 2021 accepted the plaintiff's request subject to terms and conditions set out in the facility letter. It was further testimony of DW1 that among other terms which were to be fulfilled was creation of first ranking charge over the landed property contained on plot No 308 and 320 Mbweni area Zanzibar in the name of Adam Mohamed Saeed together with original title debenture for aggregate amount of USD 187,500.00 over assets of the borrower, personal guarantee and directors indemnity for USD 187,000.00 executed by Adam Mohamed Said and Said Mohamed Said, Affidavit of title and Affidavit of names between Adam Mohamed Said and Adam Mohamed Saeed. Further testimony was that one of the conditional 9 precedents was set out under clause 5 of the facility that prior to granting the facility the defendant will receive all security documents and confirm each to be satisfactory. As such upon inspection plaintiff's securities some of security documents were insufficient for want of original title on plot No 308 and 310 registered in the name of Adam Mohamed Saeed. It was further testimony of DW1 that upon cancellation on 11st June, 2021 letter from the commissioner for lands informing the bank that he is not aware if there is a certificate of title issued on plot No 308 and 310. DW1 tendered in evidence the letter dated 11.6.2021 which was admitted as exhibit DI. It was DW1's further testimony that, since there was no proper security, there was no contract formed between the parties because the plaintiff failed to fulfil the conditions. Testifying on cancellation of the loan facility, DW1 told the court that the Defendant wrote a letter informing the plaintiff on cancellation of the facility for want of perfection. On the above testimony DW1 beseeched the court to dismiss the suit with costs. Under cross examination by Mr. Nyange, the plaintiff's advocate, DW1 told the court that there was pre negotiation before issuance of the credit facility. DW1 when asked on what is facility letter replied that facility letter is issued upon customer application for loan and what is approved is not facility letter but rather the credit facility. DW1 admitted that the facility was approved but was cancelled for lack of original titles. DW1 when pressed into further questions admitted that one of the requirements was the closure of PBZ account and the same was closed. Under re-examination by Ms. Salah, advocate for the defendant DW1 told the court that the facility letter required plaintiff to provide original certificate so as to create mortgage over

the land. DW1 when pressed with questions denied that exhibit (c) is not a guarantee it is an acceptance of terms and conditions by guarantor. That marked the end of hearing defence case and the same was marked closed. The learned advocates for parties prayed to exercise their rights under rule 66(1) of this Court Procedural Rules to file final closing submissions and the same was granted. And the final closing submissions were duly filed. I have, as well, taken into account these closing submissions. I am indeed, grateful to the learned counsel' submissions and their industrious contribution in the course of hearing of this case. It worth noting that in this suit all parties herein are in agreement that their primary relationship was premised on Exhibit pl (facility agreement) which they themselves voluntarily signed. What divides the parties, however, is whether each of them adhered and honoured the terms 11 governing their contractual relations. Reading from the pleadings and their testimonies in chief, both parties trade allegations of breach of the underlaying commitments forming the bed-rock of their contractual relationship. That being in mind, is high time to answer the issues now. The first issue was couched thus, whether there was a credit facility agreement between the parties. This issue will not consume much court's time because it is not disputed by either party that parties executed the facility agreement as it exhibited by the contents of exhibit Pl (a) read together with exhibit Pl (b), dully executed by the parties. It was the exhibit that was admitted without objection and was intended to be used by both parties. On that note the first issue is answered in affirmative that there was facility agreement between the parties. The next issue was if issue no 1 is answered in affirmative whether the parties performed their obligation under the facility letter. The learned counsel for plaintiff submitted that the plaintiff fulfilled her obligation by providing sale deed which is equivalent to certificate of title in Mainland and it is acceptable in Zanzibar. He added that it is the defendant who failed to fulfil her obligation for failure to prepare and process the security documents for disbursement of the loan. In rebuttal the learned counsel for the defendant, admitted that defendant did not disburse the loan as 12 agreed in the facility agreement because the plaintiff did not fulfil pre disbursement condition as required under Section B and C of the facility agreement (exhibit pl). In order to find out whether there was any such failure on the part of the defendant or the plaintiff, one should take into consideration the obligations imposed to each party and find out if at all, there was any failure without any justifiable or lawful excuse. It is worth noting that the obligation to be performed were listed in exhibit Pl particularly clause (a) under Section C. I beg to quote in verbatim the pre disbursement condition as stipulated under clause (a); SECTION C; conditions for disbursement

- a. First ranking Legal Charge in favour of the Bank over Plot No 308 & 310, Mbweni Area Zanzibar in the name of Adam Mohammed Saeed to be registered for full market value together with the original title.
- b. First ranking All Asset Debenture for an aggregate amount of USD 187,500.00 (United States Dollars One Hundred Eighty-Seven Thousand, Five Hundred Only) over all the assets of the Borrower.

- c. Personal Guarantees and Indemnities for Directors/ Shareholders for USD 187,500.00(United States Dollars One Hundred Eighty-Seven Thousand, Five Hundred Only) executed by Adam Mohamed Said and Said Mohamed Said. 13 It suffices to say that, the above-mentioned terms were notorious key terms relevant to this dispute and from the above terms, no doubt that both learned advocates for parties are at no issue that, these were the terms. But they lock horns on their applicability to this suit. Guided by the above terms and in my plain interpretation of the above terms, it is undisputed fact that the plaintiff was required to provide the defendant with the original title in the name of Adam Mohamed Saeed. However, the plaintiff presented a sale deed (exhibit p7) and Barua ya Hakiya utumiaji wa Ardhi (exhibit p6). The contents of clause(a) Section C of exhibit PI are loud and clear that plaintiff was to provide a first ranking legal charge in favour of the Bank over Plot No 308 & 310, Mbweni Area Zanzibar in the name of Adam Mohammed Saeed to be registered for full market value together with the original title. If this is what parties agreed upon, the question this court asked itself is why the plaintiff submitted sales deed and Barua ya hakiya utumiaji wa ArdhiP. The plaintiff could not explain this, save only for contention that those documents are equivalent to certificate of title. In my humble view, these documents are not equivalent to certificate of title. As such the plaintiff was in breach of the agreement for failure to submit the document required. It is trite law that a failure by any of the parties to an agreement (contract) to honour any of their agreed terms or 14 conditions constitutes a departure from that agreement/contract and it amounts to outright breach of that contract. The law under Section 37 (1) of the Law of Contract Act [Cap 345 R.E. 2019] states that law does not allow excuses for non-performance of contractual obligation in absence of fraud or misrepresentation. In addition to that and basing on plaintiff contention that the plaintiff fulfilled her obligation by submitting the sale deed and Barua ya haki ya utumiaji wa ardhi, next question is, was there an amendment to clause
- (a) of exhibit PI? The answer is emphatically No! Because no evidence has been tendered to show that this clause was amended and sales deed and Barua ya hakiya utumiaji wa Ardhi were added in the list of security documents. Therefore, since there was no amendment of the facility agreement, the absence of original title in the name of Adam Mohamed Saeed renders the whole arrangements incomplete for want of original title over the property in the name of Adam Mohamed Saeed. As a matter of principle, the obligation to honour what was agreed by the parties to a contract is fundamental. It constates what is called sanctity of contract. In the case of *Simon Kichele Chacha v Aveline M. Ki I a we*, Civil Appeal No. 160 of 2018 CAT held that: 15 "Parties are bound by the agreement they have freely entered into, and this is a cardinal principle of the law of contract that there should be a sanctity of the contract." Again in *Abualy Alibhai Azizi v Bhatia Brothers* [2000] T.L.R. 288 it was held that: " The principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no fraud (actual or constructive) or misrepresentation and no principle of public policy prohibiting enforcement." That is the interpretation of section 37(1) of the Law of Contract Act. Guided by that legal stand on the principle of sanctity of contract, it is obvious that, once parties have freely agreed on their

contractual clauses, it would not be open for either party to unilaterally change those clauses to suit its position. What the plaintiff is doing here is asking the court to accept that the Sale deed and Barua ya Hakiya utumiaji wa ardhi was among other security documents. The defendant has explained to the court that one of the reasons why she did not disburse the funds was the plaintiff's failure to submit the required documents like the original title. This fact was not disputed by the plaintiff. And a careful perusal of clause

- (a) of Exhibit pl shows that the plaintiff was required to submit original 16 title among other documents. In the suit at hand, all parties herein are in agreement that, their primary relationship was premised on Exh.Pl which they themselves voluntarily signed and it was admitted without objection as such this court cannot change or add a clause which was not agreed upon between the parties at first. In my view this court could have the room to interfere with clause (a) I of exhibit Pl f at all there was an amendment or an allegation of fraud and other factors vitiating the consent of a party. Since there is no amendment of clause (a) of exhibit pl, and no allegation of fraud or misrepresentation, it is my humble conclusion that it is the plaintiff who frustrated the arrangement for want of required documents. The argument that the submission of sale deed was discussed during the preparation of the facility agreement is misleading and devoid of any merit. I am holding so because if at all it was discussed and agreed between the parties, it could have featured in the list of security documents. Therefore, submission of sales deed and Barua ya utumiaji wa haki ya Ardhi instead of original title over the property in the name of Adam Mohamed Saeed is a clear departure from the terms of the contract and a failure on performance of obligation. See Section 37 (1) of the Law of Contract Act [Cap 345 R.E. 2019]. 17 Moreso, on the argument that, the defendant failed to fulfil its obligation for failure to prepare and process the security document like mortgage deed and debenture instrument, I agree with the learned counsel for plaintiff that, the bank has an obligation to prepare the security documents upon satisfaction that the documents submitted are the same in form and substance to what they agreed int the facility agreement. It is undisputed fact that the document submitted to the defendant were not the ones required or listed under Section C clause(a) of the exhibit pl. Therefore, taking the uniqueness and nature of the facility agreement, the bank cannot prepare or process the security document which the form and substance of that documents does not tally with specification in the facility agreement. The document submitted were not contemplated and the same were not agreed in the facility agreement. It is worth mentioning that, the duty to prepare and process security documents by the bank arises only when the documents presented are the ones agreed in the facility agreement and on top of it, they must be genuine document and perfect in the eyes of the bank and the agreement itself. Therefore, the argument that the defendant frustrated the exercise for failure to prepare and process the document it's a mere blame from 18 the bar and it is hereby rejected because the document submitted were not the required ones. In addition to that the sales deed and Barua ya Hakiya utumiaji wa Ardhi which were submitted by the plaintiff to the defendant as security over the credit facility cannot be a good security. The contents of exhibits P6 shows that the holder of the Barua ya haki ya utumiaji wa Ardhi

is Ali Mohamed Saeed and not Adam Mohamed Saeed. In terms of exhibit pl, even though this court could assume that Barua ya haki ya utumiaji wa Ardhi and sale deed are equivalent to original title as suggested by the learned counsel for plaintiff still it could not hold water that plaintiff fulfilled its obligation because the plaintiff as per facility agreement was to present the original title, specifically in the name of Adam Mohamed Saeed and not Ali Mohamed Saeed. There is a difference in terms of the names mentioned in the documents. Worse enough clause 8 of exhibit p6 does not allow the disposition of the said land. This alone was genuine reasons on the part of the defendant to refuse or cancel the disbursement of the credit facility because the bank cannot disburse the loan basing on the collateral handicapped on the disposition. It should be noted that, the purposes of securities in loan agreements is to protect and assure the lender that in 19 case of any default she will recover the money lent by disposing the security. The above noted observation is what brings comfort to lenders of money and, thus, gives confidence to banking business. Therefore, the prohibition under clause 8 of exhibit p6 - Barua ya haki ya utumiaji wa Ardhi makes it not a good security because it defeats the very purposes of the loan securities. Hence there is not any wrong done by the defendant. It should be noted that, the plaintiff and the defendant executed the facility agreement with their free will, clause 5.5.1 and 5.5 of exhibit pl (a) which allows the defendant to grant the plaintiff the credit facility upon fulfilments of all pre conditions depicted under Section C and B of the facility agreement (exhibit pl). Therefore, in terms of the above clauses the plaintiff was required to fulfil all the conditions, submission of original title. And the failure to submit the original title renders the arrangement incomplete and barren. The plaintiff was aware of the terms and the nature of the facility but for reasons known best to her opted to submit documents which were not agreed upon or list as security document. On the above note, it brings us to a conclusion that, the plaintiff allegations that, the defendant is the one who failed to fulfil the obligation is a bare allegation without any support because what the 20 defendant did was exercising the term and condition of the facility agreement the parties freely agreed upon. In the totality of the above reasons, the second issue must be and is hereby answered in the affirmative that, the plaintiff did not perform its obligation. She breached the terms of the contract. The next issue was whether the defendants notice of cancellation of facility agreement amounted to the breach. The learned counsel for plaintiff had nothing useful to submit on this issue save only for allegation that the communication was undated, its headings or captions is inappropriate, misleading and ambiguous. While the learned counsel for defendant submitted that the defendant terminated the contract basing under clause 17.1, 17 .2 of exhibit pl. Having carefully considered both the pleadings, the testimonies of the respective parties' witnesses and the facility agreement tendered in evidence in their totality it is my considered view that this issue was raised out of context because issuing the notice of cancellation cannot and it was not among terms of the facility agreement. It is worth noting that, in law, breach of contract occurs when one party in a binding agreement fails to perform its obligations and conditions according to the terms and conditions of the contract. On that 21 note defendant's notice of cancellation of facility agreement does not amount to the breach as such the third issue is answered in negative.

The fourth issue was that, if issue no 3 is answered in affirmative whether the plaintiff suffered any damage. This issue will not detain this court much, as would only have been relevant, if the third issue had been answered in affirmative. Having concluded and answered in the 3rd issue in negative it follows that plaintiff has not suffered any damages. This trickles down to the last issue that what reliefs parties are entitled. Based on findings drawn hereinabove, this suit fails for lacking merit. It is hereby dismissed with costs. It is so ordered. Date: 17/11/2023 Coram: Hon. UJ. Agatho J. For Plaintiffs: Atlay Thawe, Advocate For Defendant: Faiza Salah, Advocate. C/Clerk: Beatrice 22 Court: Judgment delivered today, this 17th November 2023 in the presence of Atlay Thawe, counsel for the Plaintiff, and Ms. Faiza Salah, advocate for the defendant. .AGATHO JUDGE 17/11/2023 23

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