

TANZANIA / JUDGMENT

## 20171027 TZHC Dar es Salaam

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TZHCDECIDED  
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IN THE HIGH COURT OF TANZANIA AT DAR ES SALAM DISTRICT  
REGISTRY · AT DAR ES SALAAM CIVIL CASE NO. 109 OF 2014 MRISHO ISMAIL  
MWASA ..... PLAINTIFF VERSUS · BASHI RI ISSA MURASHANI ..... 1 sr  
DEFENDANT INTERNATIONAL COMMERCIAL BANK . ..... 2N° DEFENDANT MURASHANI  
INVESTMENT COMPANY LIMITED . . . . . JRD DEFENDANT Date of last Order: 22/9/2017 Date  
of Judgment: 27 /10/17

## JUDGMENT

TEEMBA, J. The Plaintiff sued all the defendants jointly and severally for an order of reimbursement of Tanzanian Shilling One Hundred Million {Tshs. 100,000,000/=) which he alleges that it was fraudulently withdrawn from a joint account No.00002/01601448/00 1n the name of MURASHANI INVESTMENT COMPANY LIMITED opened and operated by I the second defendant. Other prayers in the Plaint are an order of suspension of · interest in respect of the Tsh. 100,000,000/= that was illegally withdrawn from the account; payment of specific damages amounting to Tshs, 20,000,000/=; ·and costs· of this suit. 1 / ' i \ ' ' r ' ' Upon service of the copy of the plaint, the second defendant filed her Written Statement of Defence denying the Plaintiff's claims. The second defendant also filed a Counter-claim against five defendants namely, Murashani Investment Company Limited (1 st defendant); Bashir Issa Mrashani (2 nd defendant); Mrisho Ismail Mwasa (3rd defendant); Shamira Ismail Hassan (4 th defendant), and Anati Bashir Mwasa (5 th defendant). In her Counter-claim the second defendant is claiming for the following reliefs:

- (i) Payment of the Principal sum plus interest outstanding and due Tshs 294,064,932.68. (ii) Interest on item (i) at the rate of 24% per annum until judgment or sooner payment. (iii) Interest at the court rate post judgment on the decretal sum 1n respect of the defendant's Counter- claim. (iv) Costs of and incidental to this suit; and
- (v) Such further orders or reliefs this court deems just, equitable and convenient. The matter was heard in the presence of the Plaintiff Mrisho Ismail Mwasa and International Commercial Bank 2 (Tanzania) Limited only because the rest did not enter appearance. Thus, the trial proceeded exparte against them. In his testimony, Mrisho Ismail Mwasa (PW 1) stated that he was looking for a loan but he needed someone to assist him. That, one Yono @ Yuda Mkombozi introduced him to Bashiri Issa Mrashani (1st defendant) who had a shop

business at Magomeni. The plaintiff met the first defendant and discussed on the plan to get the loan. According to the Plaintiff, the first defendant invited the plaintiff to his company, the third defendant. The Plaintiff was offered a position of a co-director in the said company. The first defendant was the one who made follow up to BRELA in changing the directors of the Company. The plaintiff only produced his photo when asked by the first defendant. Later on he signed the papers from BRELA which were brought to him by the first defendant. The Plaintiff said he was also shown the bank statement for Murashani Investment Company Ltd and was satisfied that the accounts of the company were satisfactory. Then, they applied for an overdraft from the second defendant and they successfully got Tshs 220,000,000/=. Each director got Tshs 100m/= from 3 the account and Tshs 20 million was left in the account. The overdraft attracted 24% interest per annum. The Plaintiff's property was used as a security to obtain the facility. The plaintiff signed all the bank papers and he alleged that the Specimen Signature Card Exh. P2 was signed to indicate "Two to sign" for any withdrawing transaction. It is the plaintiff's evidence that he was depositing money in the account in a way to service the overdraft facility but one day he received a phone call from the bank informing him that the account had no money to satisfy the monthly deductions. Upon follow up he noticed that the money he was depositing in the account was illegally withdrawn by the first defendant. He complains that while he was keeping the cheque book, the first defendant was permitted to draw money using cheque leafs from the bank's counter. Second, he alleges that the genuine Specimen Signature Card was for "Two to Sign" but the second defendant was enabled to draw money from the account without a second signatory. The plaintiff brought two more witnesses from the Police Forces who investigated the allegations of forged finger print of the plaintiff on the Specimen Signature Card. E.4261 Detective SSgt Chuchi, PW2, investigated and 4 interrogated the bank officers on the matter and later took the Specimen thumb prints to the Forensic Bureau. E. 5137 detective Sgt Hassan Nassoro Juma {PW3} received the Specimen for comparison as an expert of finger prints. The results of their investigation was Exh. P.2, a Forensic Report. The report indicates that the Thumb print on the Specimen Signature Card {Exh P2} is different from the thumb print obtained by PW2 from the plaintiff. On the other side, the second defendant had two witnesses namely, Theresia Jeremiah and Benard Kilomo as DW1 and DW2 respectively. They denied the plaintiff's claims and maintained that the Specimen Signature Card was for "Any to sign" meaning any of the two Directors could sign and withdraw money from the account in dispute. The defence tendered several exhibits to support the counter-claim. The exhibits include: the Offer {secured Overdraft facility AA No.2012/184 of 1st August 2012 {Exh.D1}; Memorandum of Acceptance dated 6th August 2012 for the amount of Tsh 220 million for a term of 12 months with an interest of 24% per annum {Exh.D.2} and the Guarantee {Joint and Severally dated 6th August 2012 with three photos (Exh.D.3). Other exhibits were Personal Guarantees signed on 5 6/8/2012 (Exh.D.4); The bank Statement for the third defendant (Exh.D5) indicating an outstanding balance of Tshs 359,695,829.59 as on 22/8/2017 when the defence witnesses testified. Exh.D6 was a letter written to the Chief Executive Officer of the second defendant by the plaintiff to accept the liability to pay the outstanding balance and deal with the first defendant without involving the bank. The

second defendant reiterated the reliefs prayed for in the Counter claim. At the commencement of trial the court framed the following issues: ( 1) Whether the withdrawal of the complained amount by the first defendant was done following the proper procedures laid down by the bank.

- (2) Whether the Specimen Card for mandate of money withdrawal was genuine.
- (3) Whether the second defendant had done any due diligence before releasing the loan facility to the third defendant. 6
- (4) Whether there were elements of fraud and conspiracy on the part of the first and second defendants to the withdrawal of Tshs 100 million.
- (5) Whether the principal officers of the second defendant negligently led to the inability of the Plaintiff to reimburse the loan facility in its full amount.
- (6) What reliefs are the parties entitled to. I prefer to start with the second issue before I go back to the first one. The second issue is whether the Specimen Card for mandate of withdrawal was genuine. This is the centre of this dispute. Whereas the plaintiff alleges that it is not, the second defendant maintains that the document is genuine. The plaintiff's learned advocate submitted that the first defendant used a forged mandate Card to withdraw Tshs 100 million in the Company's account. His claim is based on the disputed thumb print alleged to be of the plaintiff. It is evidence that the plaintiff reported the incident to Police that the money was illegally withdrawn using a forged Mandate Card. · The Police Officers, PW2 and PW3 investigated and the report of the forensic officer (PW3) 7 'I " ,,, ' I I j u r ..:, indicates that the thumb print on the Specimen card does not resemble the samples taken for comparison. This report is not free from challenges. The defendant's advocate submitted that the samples allegedly taken from the plaintiff were not verified or witnessed by any other person to prove that they are from the plaintiff. In the Cross examination, the witness (PW3) admitted that he only received the samples in an envelope but he was not the one who obtained the samples from the plaintiff. The Police officer (PW2) testified that in his investigation he only got the Specimen Signature Card which indicated "Any to Sign" and there was no "Two to sign". The Mandate Card, exhibit P2, has the photos of the two directors plus their names, Signatures and thumb prints. Nothing else is disputed except the thumb print. The Police investigation is silent in terms of the plaintiff's signature on the same document. If the Signature is not challenged, it goes without saying that it is a genuine one signed by the Plaintiff. So, in the absence of any other Signature Card or tangible evidence to disprove the one found in the bank it is difficult to hold that Exh P2 is not a genuine document. Section 110(1) of the Tanzania Evidence Act, (Cap 6 RE 2002) requires the person who alleges on the 8 existence of any fact to prove it. The defendant's advocate referred this Court to the decision of the Court of Appeal in the case of Francis Itegeje Vs Kampuni ya Kusindika Mbegu za mafuta Ltd (1997) T.L.R 148 where it held "It is elementary in matters of procedure that he who makes an allegation has the burden of proving it" As pointed out earlier, there is no sufficient proof by the plaintiff that the account opened was for "Two to

sign" and /or such card ever existed in the bank for the same account. The second issue is connected to the third issue which is based on fraud and conspiracy. Indeed, there is no piece of evidence to connect the bank Officials to any conspiracy with the first defendant. The Plaintiff claimed that he was the custodian of the cheque book but again there is no evidence to prove that. If at all he has the cheque book, it remains an internal arrangements within the company (although it was not proved) on how to operate the account and that arrangement does not prove any conspiracy or fraud transaction between the first defendant and the bank. 9 There is no record to show that the first defendant was allowed to draw money using another cheque book or leafs from different cheque books. This was an allegation but no evidence was given by the prosecution. Even by assuming there is evidence that the first defendant was given cheque leafs at the counter, and the procedure is allowed by the bank, the plaintiff will still be subjected to provide proof that the transaction was illegal. No such evidence came forward. Forgery and conspiracy are criminal allegations. Such allegations require the plaintiff to provide a higher standard of proof than in normal civil cases where a mere standard of probability is required. See; Omari Yusufu Vs Rahma Abdulkar

(1987) T.L.R. 169. The plaintiff's counsel submitted that the elements of fraud and conspiracy between the first and second defendant exist. He cited the case of Alfi East Africa Limited Vs. Themis Industries & Distributors Agency Limited [1984] TLR

256. I am settled that the case cited is distinguishable because while in Alfi's case there was an agreement between employees which ended up as a conspiracy to defraud Alfi, in the present case there is no such proof of any 10 Conspiracy between the first defendant and employees of the second defendant. The third issue fails and the same is hereby dismissed. Having dismissed the second and third issues, I am also settled that the first issue has no legs to stand on. I say so because the procedure on how to operate a bank account of a Company is guided by the signatories as agreed in the Specimen Signature/Mandate Card. The bank, (second defendant,) has no complaint that the procedures were violated in any transaction related to the account in dispute. In the absence of any mandate Card for "Two to Sign" when withdrawing money in the account, then the withdrawals were done under the laid down procedures but possibly without the plaintiff's knowledge. The fourth issue is whether the second defendant had done any due diligence before releasing the overdraft facility. Mr Mdope, the learned advocate for the plaintiff submitted that the second defendant did not discharge her duty in ascertaining that there was a company registered in the name of the third defendant. He added that the bank 11 'y J, 1 ( I , " r ( / / l did not confirm the directors of the third defendant in the , p;\_\_\_\_-re'gistry of BR ELA. He argued that by conducting due diligence, the second defendant would have known that .0 \there were some acts of deception by the first defendant . The issue of due diligence did not affect the second defendant because there were personal guarantors and security to the overdraft. In addition, prior to the arrangement to apply for an overdraft the third defendant had an account in the same bank. This was stated by the plaintiff who confirmed to have seen the bank statement before accepting to be one of its directors. It is my considered view that the

Plaintiff highly contributed to the negligence, if any. He was made to believe that the documentation in BRELA was amended/changed to include his name as a director to the third defendant. Yet there is no proof that there was such a move. This was his responsibility and he should not shift the liability to the second defendant. After all, the record is silent on the changes, if any, to the documents submitted to BRELA. No evidence was adduced in respect of this area. 12 I, / J I now proceed to consider the issue whether the second defendant's officers are liable for the inability of the plaintiff to reimburse the loan facility. The argument submitted by plaintiff's advocate is that the failure to pay back/service the overdraft was associated by the conspiracy to forge the mandate Card which enabled the first defendant to draw money without the plaintiff's knowledge. The issues of conspiracy and forgery were earlier discussed in this judgment and were dismissed. Likewise, this one is also dismissed. On the contrary, it is a fact that the overdraft facility obtained by the defendant was jointly and severally guaranteed by Bashiri Issa Murashani; Shamir Ismail Hassani; Anat Bashiri Mwasa and Mrisho Ismail Mwasa as per exhibit D.3 and has not been discharged. Moreover, the plaintiff guaranteed the overdraft by his property at Mikocheni. On the basis that both parties concede that the overdraft facility was for one year and it has not been repaid, the plaintiff is still liable to repay the second defendant. The last issue is on reliefs the parties are entitled to. First, there is no dispute that the third defendant successfully obtained an overdraft of Tshs. 220million and -the Co- directors signed the agreement and accepted the terms for 13 . ' the overdraft. Second, the plaintiff and three others jointly and severally guaranteed the overdraft facility. Third, the plaintiff offered his property as a security to the overdraft facility. Fourth, the amount was deposited in the account of the third defendant and the directors including the plaintiff withdrew the money. Fifth, the repayment schedule was not adhered to as today there is a huge amount of money yet to be repaid including the interest of 24% per annum. With these undisputed facts, the second defendant is entitled to recover the outstanding balance to be calculated until the date of this Judgment. In addition, the bank is granted costs of this suit. I have also taken into consideration that the plaintiff was conned by his co-director, the first defendant. This fact is reflected in the bank transactions related to the account in dispute. Exhibit P.1 is a collection of deposit slips showing that the plaintiff was smoothly servicing part of the overdraft as agreed with the first defendant. Had the latter fulfilled his obligation, the present suit would not have arisen. Therefore, it is my considered view that the plaintiff deserves a relief in terms of a grace period to repay the overdraft facility. Under the circumstances surrounding this dispute, it is fair to order a 14 ,,,, rescheduling period of payment within three years from the date of this judgment. Failure to discharge the overdraft within the given period of three years, the second defendant shall be entitled to execute the mortgage. According to evidence, the amount in dispute, Tshs 100 million was withdrawn by the first defendant without knowledge or consent of the plaintiff. As I have ordered the plaintiff to discharge the overdraft facility, then he also deserves a refund from the first defendant. Thus, the first defendant is ordered to pay the Plaintiff a refund of Tshs 100million plus bank interest of 24% chargeable by the bank. It is so decided. R~ JUDGE 27/10/2017 Court: The Judgement is delivered in. the presence of Mr. Stanslaus lshengoma,

learned advocate for the second defendant and also holding brief for Mr Mdope, learned advocate for the Plaintiff. Right of appeal is open. R~ JUDGE 27/10/2017 15

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