

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**COMMERCIAL CASE NO. 26 OF 2020**

**REGENCY PARK HOTEL LIMITED.....PLAINTIFF**

**Vs**

**FIRST NATIONAL BANK TANZANIA LIMITED.....DEFENDANT**

**RULING**

**B.K.PHILLIP,J**

This ruling is in respect of points of preliminary objection to wit;

- i) That this Honourable has no jurisdiction to reconsider and/or change the clauses of the Deed of Settlement which were freely agreed upon by the parties and already adjudicated upon by this Court in Commercial Case No. 53 of 2018.*
- ii) The present case is improperly instituted and is an abuse of the court process.*

A brief background to this case is worth it in order to understand the gist of the above mentioned points of preliminary objections. In the year 2018, the defendant herein instituted Commercial Case No 53 of 2018 against the plaintiff claiming for a declaration that the plaintiff herein breached the terms of the overdraft facility which was granted to the plaintiff by the defendant and that the plaintiff be ordered to pay an outstanding overdraft amount to a tune of TZS 3,246,592,041.2. The case was settled amicably by a deed of settlement which the parties filed in court and a court decree was drawn thereof. The said Court decree reads as follows;

**"THIS COURT DOTH HEREBY ORDER THAT**

*The compromise of suit is recorded as a decree of the Court in pursuance of which the first Defendant is ordered to satisfy the decree as follows:*

- 1. Payment into the account of the Plaintiff a total amount of Tanzania shillings One Billion Seven Hundred and Seventy Five Million Only (TZS 1,775,000,000/=) (settlement amount) and US Dollar Seven Hundred and Eighty Thousand (USD 730,000/= (settlement amount).*
- 2. The Settlement amount shall be paid in Seventy Five (75) months starting from September, 2018 including three months moratorium for the principal payment.*
- 3. The Defendant shall be required to make monthly payment while serving its loans as follows;*
  - i. Pay the total amount of Tanzania Shilling Twenty Three Million Six Hundred Sixty Six Thousand Six Hundred and Sixty Seven only (TZS 23,666,667/=) for three months effective from September, 2018 on or before 30<sup>th</sup> day of each months.*
  - ii. Tanzanian Shillings Thirty Eight Million Five Hundred and Three Thousand and Seventeen Only (TZS 38,503,017/=) for Seventy Two (72) months on or before the 30<sup>th</sup> day of each month starting from December, 2018.*
  - iii. United States Dollars Six Thousand One Hundred and Seventy Five Only (USD 6,175/=) for three months effective from September 2018 on or before 30<sup>th</sup> day of each month.*
  - iv. The total of United States Dollar Fourteen Thousand Two Hundred and Fifty Four Only (USD 12,254/=) for Seventy Two (72) months on or before the 30<sup>th</sup> day of each months starting from December 2018.*
  - v. Payment of costs of suit amounting to TZS Ten Million Only."*

The plaintiff started to pay the decretal sum as per the court decree. He paid a sum of TZS 719,055,447 and USD 149,991.28 which was equivalent to TZS 1,064,035,391 at the exchange rate of TZS 2,300 per

US Dollar. In this case the plaintiff alleged that from the year 2014, when he was availed the loan, which was to a tune of TZS 3,150,000,000/=, he has made repayments of the said loan to a tune of TZS 3,536,805,496.45 against a loan amount of TZS 3,150,000,000/=. The plaintiff contends that despite all the amount he has so far paid to the defendant, the outstanding amount keeps on increasing. That following the economic crisis caused by Covid -19 pandemic, he requested the defendant to restructure repayment of his loan but in vain.

Moreover, the plaintiff alleged that in March 2020, he wrote a letter to the Director of Financial Sector Supervision of the Bank of Tanzania requesting for his intervention in this matter as regulator of the Banking sector. Thus, in this case the plaintiff prays for judgment and decree against the defendant as follows;

- (i) *That the Defendant be compelled to disclose to the Plaintiff the basis of the interest charges, penalties and costs and repayments made by the Plaintiff in respect of the credit facilities availed to the Plaintiff by the Defendant in line to the Consumer Protection laws and regulations currently in force in the country.*
- (ii) *That the Defendant be compelled to remove the name of the Plaintiff from the Credit Rating Bureau (CRD) that characterizes the Plaintiff as a bad debtor in the light of the repayments made so far.*
- (iii) *That the Defendant be compelled to consider the restructuring proposal submitted by the Plaintiff to the Defendant on 27<sup>th</sup> February 2020.*
- (iv) *Costs of the suit.*
- (v) *Any other relief that this Honourable Court shall deem fit and just to grant.*

Upon being served with the plaint the defendant's advocate, the learned advocate Joseph Kipeche, raised the points of preliminary objections mentioned in the first paragraph of this ruling. The plaintiff was represented by the learned Advocate Ibrahim Mbugha.

The hearing of the points of preliminary objection was done by way of written submissions. In his submission in support of the points of preliminary objection, Mr. Kipeche submitted that the dispute between the parties in this case is in respect of the repayment of the loan facility that was granted to the plaintiff in 2018. Mr. Kipeche contended that the dispute in respect of the aforesaid loan facility was amicably settled by the parties themselves vide a deed of settlement which was filed in court in Commercial case No. 53 of 2018, on 11<sup>th</sup> August 2018, in which the parties agreed to restructure the loan availed to the plaintiff into two loans of TZS. 1,775,000,000/= with interest at the rate of 16% per annum and USD 780,000/= with interests at the rate of 9.5% per annum. Both loan facilities were agreed to be repaid in 75 months effective from September 2018 at a monthly installment.

Citing the case of **Exim Bank (T) Limited Vs Agro Impex (T) and two others , Land Case Appeal No.29 of 2008** ( unreported), in which the court said that two matters have to be looked at when deciding whether or not the Court has jurisdiction, these are; *One, you look at the pleaded facts that may constitute a cause of action. Two, you look at the reliefs claimed and see as to whether the Court has power to grant them and whether they correlate with the cause of action*, Mr. Kipeche contended that this court is not vested with jurisdiction to entertain the case in hand, since the credit facility which this case emanates from and the matters alleged in the plaint were subject of the dispute between the parties herein in Commercial case No. 53 of 2018 which was marked as settled by this court pursuant to the deed of settlement filed by the parties in this Court and a court decree was drawn to that effect. Mr. Kipeche further contended that entertaining the case in hand will cause this court to issue

two different decrees in respect of the same parties and the same subject matter. He was of the view that this case has been improperly filed in this court and is an abuse of the court process.

Furthermore, Mr. Kipeche submitted that the reliefs sought by the plaintiff cannot be granted by this court as granting those reliefs will be tantamount to reconsidering the clauses of the deed of settlement which were freely agreed upon by the parties. This court has no powers to re-open the deed of settlement by ordering the defendant herein to disclose the basis of charging interests and order restructuring of the loan, contended Mr. Kipeche. To cement his argument Mr. Kipeche referred this court to the case of **Karrata Ernest D.O and others Vs The Attorney General Civil Appeal No 73 of 2014** (unreported) and the case of **Univeler Tanzania Ltd Vs Benedict Mkasa t/a Bema Enterprises , Civil Appeal No. 41 of 2009** (unreported) in which the court said the following;

*"Strictly speaking, under our laws, once parties have freely agreed on their contractual clause, it would not be open for the courts to change those clauses which parties have agreed between themselves. It was up to the concerned to renegotiate and freely rectify clause which parties find to be onerous. It is not the role of the courts to re-draft clauses in agreements but to enforce those clauses where parties are in dispute... No party would therefore be permitted to go outside the agreement for remedy"*

Moreover, Mr. Kipeche submitted that the plaintiff's prayer that the defendant should be compelled to remove the plaintiff's name from the list of bad debtors does not correlate with the facts alleged in the plaint. There is no single paragraph in the plaint that states that the defendant listed the plaintiff's name in the Credit Rating Bureau, contended Mr. Kipeche. Relying on the provisions of section 38 of the Civil Procedure Code, Cap 33 R.E 2019 ( Henceforth "the CPC"), Mr.Kipeche was of the

view that if the plaintiff is dissatisfied with the execution of the deed of settlement and the Court decree, then, he has to table his concern before the court executing the decree. He finally prayed that this case to be dismissed with costs.

In rebuttal, Mr. Mbugha submitted that the points of preliminary objection raised by Mr. Kipeche are not pure points of law. This court cannot determine the validity of the defendant's assertions that this case is improperly instituted without examining the facts/issues in Commercial case No.53 of 2018 and the one alleged in this instant case, contended Mr. Mbugha. According to Mr. Mbugha, the matters to be determined in the points of preliminary objection are factual matters and not pure points of law. To cement his arguments he cited the case of **Mukisa Biscuits Manufacturing Co Ltd Vs West End Distributors Ltd ( 1969) E.A 696**. Mr. Mbugha also contended that in the instant case the plaintiff does not seek to reconsider and /or change the clauses in the deed of settlement which were freely agreed upon by the parties and already adjudicated upon by this Court in Commercial case No. 53 of 2018 as alleged by Mr. Kipeche, but the defendant questions the execution, discharge and /or satisfaction of the compromise decree.

In rejoinder, Mr. Kipeche submitted that if the plaintiff's case is all about questioning the execution, discharge and/or satisfaction of the compromise decree as submitted by Mr. Mbugha, then, the plaintiff cannot under the law file a separate suit, since, the provisions of section 38 of the Civil Procedure Code, Cap 33 ( "the CPC") provides that any dispute pertaining to execution of a court decree has to be determined by the executing Court not by filing a separate suit. Mr. Kipeche was of the view that the alleged complaint on the amount of money paid by the plaintiff in satisfaction of the Court decree has to be raised before the Hon judge who is handling the application for execution of the court decree in the said Commercial case No. 53 of 2018. He went on to submit that the case of **Mukisa Biscuits**( supra) cited by Mr. Mbugha is distinguishable from the

case in hand because the points of preliminary objection raised in this case are pure point of law. He insisted that the alleged facts constituting the cause of action in the case in hand are based on allegations/matters which were raised and adjudicated upon by this court in Commercial case No.53 of 2018.

In this case the plaint states explicitly that this case arises from the loan facility agreement between the parties herein and the dispute between the parties was amicably settled by the deed of settlement that was entered into by the parties herein and filed in court in settlement of Commercial case No. 53 of 2018, and eventually a court decree was drawn thereof. Both advocates concede to what I have just stated herein above. The plaint reveals that the plaintiff started to discharge his obligation under the deed of settlement by making some of payments as agreed.

Having critically analyzed the arguments raised by both learned Advocates, I am in agreement with Mr. Kipeche that if plaintiff's prayers in the plaint will be granted then there will be two different decrees in respect of the same parties and the same cause of action. One of the plaintiff's prayers in the plaint is that the defendant be compelled to consider the proposal for restructuring the loan submitted by the plaintiff to the defendant on 27<sup>th</sup> February 2020. Now, that if the defendant will be compelled to entertain the proposal for restructuring the loan, then at the end of day the existing decree will be rendered ineffective or technically vacated, which is not proper. It has to be noted that, the first article in the deed of settlement that was signed by the parties in settlement of Commercial Case No 53 of 2018 provided for restructuring of the loan. Now, an order compelling the defendant to consider the proposal for restructuring the loan submitted by the plaintiff to the defendant on 27<sup>th</sup> February 2020, will lead to preparation of another restructured repayment schedule different from the one stated in the court decree in Commercial Case No. 53 of 2018.

Not only that, the plaintiff's first prayer, that the Defendant be compelled to disclose to the Plaintiff the basis of the interest charges, penalties and costs and repayments made by the Plaintiff in respect of the credit facilities availed to the Plaintiff by the Defendant in line to the Consumer Protection Laws and Regulations currently in force in the country, in effect invites this court to re-open the deed of settlement made by the parties, which again is not proper. As correctly submitted by Mr. Kipeche, this court has no powers to interfere with the negotiations made by the parties freely and signed a deed of settlement.

I have considered Mr. Mbugha's argument that the plaintiff does not seek to reconsider and /or change the clauses of the deed of settlement which were freely agreed upon by the parties and already adjudicated upon by this Court in Commercial case No. 53 of 2018 as alleged by Mr. Kipeche, but the defendant questions the execution, discharge and /or satisfaction of the compromise decree, the issue here is; which is the correct way of questioning the execution, discharge and/satisfaction of the court decree? I am in agreement with Mr. kipeche that the correct procedure for questioning the execution of a court decree is provided under section 38 of the CPC which provides as follows;

*"38.-(1) All questions arising between the parties to the suit in which the decree was passed, or their representative, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit."*

According to the above quoted provision of the law, the plaintiff is supposed to raise his concern before the executing court and not to open a separate suit as he has done in the case in hand.

Also , it is the finding of this court that the points of preliminary objection raised by Mr. Kipeche are pure points of law as no evidence is required to prove that the cause of action in this case arises from loan facility



agreement and the same was the subject of the court's decision in Commercial case No. 53 of 2018 whereby the parties filed a deed of settlement and that a court decree was drawn thereof, since the plaint itself states so.

In the upshot, I hereby up hold the points of preliminary objection. Consequently this case is dismissed with costs.

Dated at Dar es Salaam this 17<sup>th</sup> day of July, 2020.



A handwritten signature in black ink, appearing to read "B.K. PHILLIP". The signature is written in a cursive style with a long horizontal stroke extending to the right.

**B.K. PHILLIP**

**JUDGE**