

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 52 OF 2019

ECOBANK TANZANIA LIMITED.....PLAINTIFF

Versus

DABENCO ENTERPRISES LIMITED.....1st DEFENDANT

MILEMBE INSURANCE COMPANY LIMITED.....2nd DEFENDANT

BENSON OUWOR SIMBA.....3rd DEFENDANT

JANESIANA G. SWAI.....4th DEFENDANT

Last Order: 18th Mar, 2020

Date of Judgment: 02nd Apr, 2020

DEFAULT JUDGMENT

FIKIRINI, J.

The plaintiff, Ecobank is a registered body corporate carrying out banking business, whilst the 1st defendant, Dabenco Enterprises Ltd, is a limited liability company incorporated under the Companies Act, 2002 with certificate of incorporation number 58060 and is engaged in construction business. Others are the 2nd defendant, Milembé Insurance Company Ltd, a limited liability company incorporated under the laws of Tanzania carrying out insurance business, and the

3rd and 4th defendants, Benson Ouwor Simba and Janesiana G. Swai, who are natural persons and shareholders cum directors of the 1st defendant.

The plaintiff is suing all the defendants jointly and severally under the guarantee bond to be reimbursed Tshs. 115,976,853.20 (Tanzania Shillings One Hundred Fifteen Million Nine Hundred Seventy-Six Thousand Eight Hundred Fifty –Three and Cents Twenty). It all started by the Muleba District Council awarding a construction contract to the 1st defendant. The contract which one of its terms and condition required the 1st defendant to have a guarantor who shall guarantee the company for the amount of money which it would want to be advanced for the contract obligations by the Muleba District Council.

At the 1st defendant's request the plaintiff guaranteed the advance payment of Tshs. 115,976,853.20 (Tanzania Shillings One Hundred Fifteen Million Nine Hundred Seventy-Six Thousand Eight Hundred Fifty –Three and Cents Twenty) by issuing the 1st defendant with "Credit Facility Letter" dated 03rd October, 2013 and guarantying to compensate the Muleba District Council, the amount advanced, if the 1st defendant defaulted performance of the construction contract awarded, through the advance payment guarantee dated 11th October, 2013 with reference number ETZ/BG/148/10-2013, to Muleba District Council. The credit facility letter awarded to the 1st defendant was secured by two securities: the 2nd defendant –

under performance bond and those by the 3rd and 4th defendants on personal guarantees, guarantying to compensate the plaintiff, in case the 1st defendant defaults in performing its obligation under the construction contract.

The 1st defendant defaulted performance on the construction contract, prompting the plaintiff to jointly and severally sue all the defendants.

Mr. Kamara learned counsel appearing for the plaintiff, on 18th June, 2019 informed the Court, that service of summons upon the defendants proved futile and asked Mr. Athumani Chama to swear an affidavit to that effect. In the meantime, he requested the Court to allow for substituted service, the request which was granted. On 10th September, 2019, Mr. Heriel Munisi who entered appearance on behalf of the plaintiff appraised the Court that the substituted service by way of publication had been effected. The Court was supplied with copy of Daily news dated 03rd July, 2019 and Mwananchi newspaper dated 09th August, 2019. After appearing in Court one more time on 29th October, 2019, on 24th February, 2020, Mr. Munisi asked for default judgment be entered in favour of the plaintiff and prayed the plaintiff be allowed to file Form No. 1 and an affidavit in proof of a claim and hence this default judgment.

Hope Liana, the Head Legal and Company Secretary of the Plaintiff, under Section 22(1) of the High Court (Commercial Division) Procedure Rules, 2012 as amended

by G.N No.107/2019, (the Rules), swore an affidavit in proof of the claim. From the affidavit it was deponed that the 1st defendant was contracted by the Muleba District Council to construct piped water network and associated appurtenances structures at Kangaza Village in Muleba District. The Muleba District Council advanced the 1st defendant the sum of Tzs. 115, 976, 853.20 (Tanzania Shillings One Hundred Fifteen Million Nine Hundred Seventy-Six Thousand Eight Hundred Fifty-Three and Cents Twenty) as initial costs to cover the 1st defendant's costs of mobilization in respect of the contracted works. Before the payment could be done Muleba District Council wanted a guarantee from the 1st defendant for the money to be advanced. The plaintiff and the 1st defendant entered into an agreement which made to plaintiff to issue a "Credit Facility Letter" on 03rd October, 2013, in favour of the 1st defendant-**Eco-1**. At the request of the 1st defendant the plaintiff on 11th October, 2013 issued an advance payment guarantee No. ETZ/BG/148/10-2013 in favour of Muleba District Council promising that it will reimburse the Muleba District Council the sum advanced in case the 1st Defendant fails to perform its obligation aligned to the advance paid - **Eco-2**.

As part of the agreement in advancing payment guarantee the 1st defendant was required by the plaintiff to secure the guarantee it was offering by other guarantees, and one must be a creditable Insurance Company. The 1st defendant fulfilled the

requirement by securing the advance payment guarantee, by a performance bond issued by the 2nd defendant –the Milembe Insurance -**Eco-3**, and as well by personal guarantees of the 3rd and 4th defendants, who were Directors/Shareholders of the 1st defendant -**Eco-4**. All guaranteed that the Plaintiff will be compensated, the sum of Tshs. 115,976,853.20, plus other costs, in case the 1st defendant defaulted in the performance of the construction contract.

It was further deponed that the Muleba District Council advanced the 1st defendant with the sum of Tshs. 115,976,853.20 for mobilization purposes but the 1st defendant defaulted performance which compelled the Muleba District Council on the 24th March, 2014 to enforce the guarantee by issuing the demand note to the plaintiff for the remittance of the sum of Tshs. 115,976,853.20, within 14 days from the date of receipt of the demand letter to the District Executive Director via Account No. 32010002090, NMB Bank, Muleba Branch-**Eco-5**. This prompted the plaintiff to demand from the 2nd defendant under the performance bond for payment of Tzs. 115, 976,853.20, for the advanced payment guarantee offered to the 1st defendant, which the 2nd Defendant replied the plaintiff to grant the 1st defendant and Muleba District Council more time to resolve their differences that had allegedly arisen between the two, the opportunity which plaintiff refused. A copy of the 2nd Defendant's letter dated 23rd April, 2014 was availed as annexure –

Eco - 8. The plaintiff equally demanded for payment from the 3rd and 4th defendants, who in return declined to pay alleging that there was no any breach on construction contract as alleged by Muleba District Council-**Eco-11**. The plaintiff in compliance and as per the guaranteed issued in respect of the 1st defendant on 9th March, 2015 remitted the sum of Tzs. 115, 976, 853.20, into the Muleba District Council – **Eco-6**.

From the deponed affidavit in support of the claim, it was upon this Court to determine if the plaintiff has been able to prove its case on the balance of probabilities.

Default judgment like ordinary judgment can only be secured upon compliance to the procedure in place, which in this instance is filing of Form No. 1 as per Rule 22 (1) of the Rules. The plaintiff has complied to this requirement, as Form No. 1 was filed on 20th February, 2020. Subsequent to Form No. 1 is a detailed affidavit in support of the claim plus documents, which must fulfil the requirements as provided under the Tanzania Evidence Act, Cap. 6 R.E. 2002 (the Evidence Act). Under the Evidence Act, authenticity, relevance and admissibility, of documents despite the fact will not undergo arduous process in their admission, but will certainly carry the weight it deserves in analysis and evaluation of the evidence provided in support of the claim, of which this default judgment is sought.

Furthermore, rule of evidence requires that the one who alleges must prove. In the present case though the proof is one sided, yet on the balance of probabilities, the plaintiff has the duty and is obligated to provide evidence in proof of its claim.

In the present case as intimated earlier on the affidavit deposed by Liana the plaintiff's Principle Officer, amply disclosed and not controverted that the plaintiff issued a "Credit Facility Letter" dated 03rd October, 2013, at the 1st defendant's request, to guarantee the advance payment to be made by Muleba District Council of Tzs. 115, 976, 853.20 to the 1st defendant for performance of the construction contract, as reflected in **Eco-1**.

The "Credit Facility Letter" or **Eco-1** was issued on the condition that advance payment guarantee will only be effective once the advance payment proceeds are in the 1st defendant's account held at the plaintiff bank, particularly at their branch located at Quality Centre Branch, EcoBank Tanzania Limited. This is reflected in annexure **Eco-1**. Likewise, the "Credit Facility Letter" or **Eco-1**, was secured by the 2nd defendant "the Surety" under construction financing bond. The performance bond no. CBF10T2/21III, a copy annexed as **Eco- 3**, was with liability period of six (6) months from 07th October, 2013 to 07th April, 2014, as well, was secured by personal guarantees of the 3rd defendant - Benson Owuor Simba and 4th defendant Janesiana G. Swai, as exhibited in **Eco-4**. All these guarantees were in favour of

the Plaintiff binding upon the 1st defendant in case of failure to abide by the “Credit Facility Letter” agreement.

According to paragraph 9 of the deponed affidavit the 1st defendant failed to use the advanced payment received from the Muleba District Council to cover the costs as agreed in the construction contract. As the result on 25th March, 2014, the Muleba District Council enforced the guarantee that is **Eco-1**, and demanded for the remittance of Tzs. 115, 976, 853. 20 from the plaintiff within fourteen (14) days, as reflected in annexure **Eco-5**, an uncertified demand letter issued by Muleba Executive Director to the plaintiff. Honouring its obligation the plaintiff on 09th March, 2015 complied by remitting the demanded guaranteed amount into the Muleba District Council Account as indicated in annexure **Eco-6**, by transferring the money from the 1st defendant’s account number **0050015401285401** to the Muleba District Council account number **32010002090** at National Microfinance Bank Limited (NMB). The plaintiff then issued demand notices to the 2nd defendant for the performance bond to take effect and the 3rd and 4th defendants to as well pay the debt loan to Ecobank as per the guarantee agreements. Uncertified copies of annexures **Eco-7, 8, 9** and **11** were annexed in support.

Examining all the information and documents availed yet, this Court finds that the plaintiff has failed to prove its case. *One*, according to **Eco-1**, the 1st defendant was required to have an account at the plaintiff's Quality Centre Branch, and the advance payment paid by the Muleba District Council to the 1st defendant was supposed to be paid into this account. Close scrutiny of the annextures indicate that the 1st defendant had two accounts at the plaintiff's bank. These were **0050015401285401** as per **Eco-2** a letter from EcoBank addressed to Muleba District Council and **Eco-6**, a bank statement reflecting the transaction of Tzs. 115, 766,853.2 carried out on 09th March, 2015, as remittance in compliance to a demand notice by Muleba District Council- **Eco-5** and account **0051015401285401** referenced in annextures **Eco- 7** and **Eco-9**. From the deponed affidavit it was not disclosed if the two accounts are one and the same and if not then from which of the two accounts was the advance payment was to be transferred, as per the condition stipulated in **Eco-1**, so as to make **Eco-1** operation, that advance payment guarantees will only be effective once the advance payment proceeds are in the 1st defendant's account held at the plaintiff bank. This is provided under a note to Item 5-on Pricing. The Court was not appraised as to the existence of the two different accounts belonging to the 1st defendant and in which account particularly Muleba District Council transferred

into, the advance payment to be made after the 1st defendant has fulfilled its obligation of securing the required securities.

Since both accounts were with the plaintiff, it was therefore expected of the Plaintiff (ecobank) to furnish the Court with an explanation regarding the two accounts as well provide bank statements in respect of these accounts or one which was involved in transacting funding from Muleba District Council or any other information to show that there was compliance to **Eco-1**, as the transaction by Muleba District Council would have been reflected one way or the other. Failure to do so, the Court was unsure if the same was complied with and without any doubt that the 1st defendant received the advance payment as agreed.

Two, Muleba District Council issued the demand note for remittance dated 25th March, 2014, requiring the plaintiff's compliance within fourteen (14) days, as per **Eco-5**. The plaintiff complied by remitting the amount as per annexure **Eco-6**. The plaintiff's reaction is, however, questionable, as the payment made was without any proof from Muleba District Council that there was breach of the construction contract. According to **Eco-8** a letter dated 23rd April, 2014 from the 2nd defendant to the plaintiff, there were concerns which in my considered opinion would have needed clarification before any payment is effected.

Examination of **Eco-5**, clearly indicate there were concerns raised by Muleba District Council complaining on two things: *one*, that nothing had been done by the 1st defendant, and *two*, the advance payment made to the 1st defendant has been used for the purposes other than cost of mobilization. These are serious complaints upon which the construction contract is based. The record is silent on if there was follow up by the plaintiff nor further clarification from Muleba District Council. Despite that and without any additional information and supporting document proving there was actually a breach of contract, the plaintiff proceeded to act as exhibited by **Eco- 6**. I find the plaintiff action unreasonable, considering that the payment was made on 09th March, 2015, almost a year later after the demand notice issued by the Muleba District Council. There was ample time in between in which the plaintiff could have acted. This could have been by inquiring and finding out what exactly transpired. The information could have been secured from either Muleba District Council, 1st defendant, 2nd defendant who raised the concern or even the 3rd and 4th defendants who were directors/shareholders of the 1st defendant. I would have counted the plaintiff to have acted diligently, by so doing. Otherwise, I find it awkward to bless, the plaintiff's compliance to the payment of the guarantee pledged without further and careful consideration.

Three, it was equally important for the plaintiff to have a copy of the contract between Muleba District Council and the 1st defendant as stipulated under Item 10 (f) of **Eco-1**, as this would have guided the plaintiff along and especially after the receiving a demand notice from the Muleba District Council. No copy of the executed contract was annexed to the affidavit in proof of the claim deponed, for Court's own perusal. The plaintiff, has in my opinion not exhibited care and diligence in protecting its interest.

Four, in addition, the law requires that case be proved by preferably primary evidence including original documents when the exercise calls for that. This is pursuant to section 66 of the Evidence Act, and in the absence of the original a party can resort to use of secondary evidence, knowing that original documents can be destroyed, lost or just not available or not in possession of a party, while this is allowed but there has to be compliance to the section 67 and 68 of the Evidence Act.

All annexed documentary evidence, were uncertified photocopies, which did not comply with neither the requirements of section 66 nor 67 and 68 of the Evidence Act. The affidavit deponed never explained as to the whereabouts of the originals or why were the annexed documents not certified. Notwithstanding that fact, the Court examined the case and the documents, but it did so knowing that the

authenticity of such documents undoubtedly were questionable. This in itself would have sufficed to dispose of the claim as unproved, but did not opt for that, instead it has analyzed and evaluated the evidence as provided.

All these combined, I, find the plaintiff has failed to prove its case on the balance of probabilities the standard required in law. The suit is thus dismissed with no order as to costs as no defence was filed nor Court appearances made. It is so ordered.



A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke extending to the right.

P. S. FIKIRINI

JUDGE

02nd APRIL, 2020