IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 117 OF 2018.

THE ATTORNEY GENERAL..... PLAINTIFF

VERSUS

SOLOHAGA COMPANY LIMITED..... DEFENDANT

Date of last order :30/11/2021

Date of judgement: 15/12/2021

JUDGEMENT

MAGOIGA, J.

The plaintiff, **THE ATTORNEY GENERAL** by a plaint filed under summary procedure instituted the instant suit against the above-named defendant praying for judgement and decree in the following orders, namely:-

a. Payments of Tshs.458,417,500 (say Tanzania shillings Four Hundred Fifty-Eight Million Four Hundred and Seventeen Thousand Five Hundred);

b. Payment of general damages to the tune of TZS 200,000,000/= (say Tanzania Shillings Two Hundred Million only);

c. Interest of claim in prayer (a) above at the rate of 20% from due date of judgement and date of full satisfaction of the decree.

d. Costs of and incidental to this suit be paid by the defendant

e. Any other relief(s) that the honourable court may deem fit.

Upon being served with plaint, defendant successfully applied for and was granted leave to defend the suit. However, in her written statement of defence disputed the claimed amount on the ground that, loaned amount was Tshs 344,068,580.85 whereby Tshs.254,800,000/=has been paid and the remaining unpaid amount is Tshs 89,268,580.89 and eventually, defendant prayed that the instant suit be dismissed with costs.

The brief facts of this suit are imperative to be stated for better understanding the gist of this suit. According to the plaint, it is averred and not disputed by and the defendant that, on 26th March, 2014, UTT-PROJECT INFRASTRUCTURE DEVELOPMENT PLC (to be referred herein after as UTT-PID) and SOLOHAGA COMPANY LIMITED entered into loan agreement for the purpose financing the undertaking project of road opening of the surveyed plots at Msata /Masuguru village in Bagamoyo, Coastal region.

Further facts were that under that arrangement, in April, 2014 UTT-PID advanced the loan to SOLOHAGA COMPANY LIMITED, to the tune of TZS 344,068,580.85/= with conditions, among others, that the said loan was to be repaid within one month from the completion of road opening and construction. Furthermore, it is alleged that, defendant defaulted in repayment of the principal sum plus interest which act constitute an event of default under clause of 7.1 of the agreement. As means of debt settlement on 25th July, 2017 parties signed a Deed of Settlement, as per the terms and conditions contained therein. Among the terms of the Deed of Settlement, the defendant was to repay TZS. 500,000,000/= for eleven (11) instalments but despite good gesture stated above, the defendant was able to remit only Tshs 254,800,000.00, out of TZS 500,000.000/. As such the defendant failed, neglected and ignored to repay the remaining outstanding loan. It was against this background, the plaintiff instituted the instant suit claiming reliefs as contained in the plaint, hence, this judgement.

The plaintiff at all material has been enjoying the legal services of Mr. Edwin Joshua Webiro, learned State Attorney. On the other adversary part, defendant at all material time was enjoying the legal service Mr. Alex Mashamba Balomi, learned advocate.

Before hearing started, the following issues were framed, recorded and agreed between the parties for determination of this suit, namely:-

i. Whether the defendant company breached facility agreement dated 26th March, 2014 and tripartite agreement between UTT-Projects and Infrastructure Development PLC (UTT-PID) and SOLOHOGA Company Limited.

ii. Whether the defendant company breached terms and conditions of the deed of settlement between UTT- Projects and Infrastructure Development PLC (UTT-PID) and SOLOHOGA Company Limited dated 25th July, 2017.

iii. Whether the defendant company is indebted to the plaintiff to the tune of Tshs 369,148,919.10

iv. To what reliefs parties are entitled.

At the outset and before going into the testimonies of the parties, I would like to point out that on 24th December,2018 when defendant filed written statement of defence in particular, paragraph 2, of the defence made an admission that defendant is indebted to plaintiff to the tune of Tshs.89,268,580.89. Following that admission, counsel for plaintiff made an oral application under the provisions of Order XII Rule 4 of the Civil Procedure Code (Cap 33 R. E. 2019) praying for this

honourable court be pleased to grant and enter judgement on admission in favour of plaintiff to the extent of admission. The defendant did not object to the prayer. As such, the judgement on admission of TZS.89,268,580.89 was entered in favour of plaintiff.

The plaintiff in proof of her case, called one witness, Ms.TUZO MPILUKA (to be referred in these proceedings as **('PW1').** PW1 under oath and through his witness statement adopted in the proceedings as his testimony in chief told the court that, she is the head of legal services Unit of UTT Asset Management and investors services PLC the successor in tittle of UTT Projects and Infrastructure Development PLC, hence conversant with the fact of the case.

PW1 went on to tell the court that, she was employed by UTT- Projects and Infrastructure Development PLC which is now part of UTT Asset Management and investors Service PLC on 3rd February 2014, as head of legal unity and her responsibility, among others, is drafting and vetting of agreements. PW1 went on with her testimony that, on 26th March, 2014 the Government through UTT Project and Asset Management entered into contract with the defendant for financing road opening of the surveyed plots at Msata /Masuguru village –Bagamoyo district within Coastal region.

It was the testimony of PW1 that, in the course of performance of obligation, the plaintiff advanced loan to the defendant to the tune of TZS. 344,068,584.85 (say Three Hundred Forty -Four Million Sixty -Eight Thousand Five Hundred and Eighty -Four point eight five) for the purpose of undertaking road opening of the surveyed plots at Msata, Bagamoyo. PW1 testifying further told the court that, it was an agreement of the parties, among others, that the money advanced by UTT-PID to defendant together with its interest would be reimbursed to UTT-PID. According to PW1, but the defendant defaulted to pay principal sum plus interest to the tune of TZS.604,415,100, in the circumstance plaintiff issued demand notice for payment of the above amount.

PW1 went on to tell the court that, after issuance of the demand notice, the UTT-PID and defendant signed Deed of Settlement whereby it was agreed, among others, that defendant to make payment of TZS 500,000,000/= for eleven instalments from 30th May, 2017 to 30th March, 2018 and in case of default the accrued interest will be charged at the rate 15%. Unfortunately, defendant was able to pay only 254,800,000/=out of TZS 500,000,000/= as such the outstanding loan as to the date of institution of this suit stood at TZS. 245,200,000/= plus

interest of TZS. 213,217,500/= all making the total of TZS 458,417,500/=.

PW1 further testimony was that, on 29th September, 2021 this court entered judgment on admission to the tune of TZS 89,268,580,.89 therefore the remaining unpaid amount is TZS 369,148,191.10.

In proof of the case for the plaintiff tendered in evidence the following exhibits namely:-

i. Agreement between UTT-PID PLC and SOLOHAGA dated 26/3/2014 **as exhibit P1**
ii. Deed of settlement between UTT-PID PLC and SOLOHAGA dated 25/7/2021 **as exhibit P2**

Under cross- examination by Mr. Balomi, DW1 told the court that, UTT-PID is a company owned by the government and therefore Attorney General is a chief legal officer of the government, hence, has locus to sue on behalf of the government. PW1 when pressed with questions told the court that, UTT-PID has capacity to sue but when the case started there was government directive to stop its activities in the circumstance, Attorney General advised to be a party in the proceedings in which it was a right decision.

PW1 under cross examination told the court that, it is not true that there was an agreement for sharing profit but when shown exhibit p1 specifically at page 16 clause 10.0 recognised it and told the court that, clause 16 is about indemnity on each party on loss arising from negligence or wilful act or omission but not on the issue of loan. PW1 went on tell the court that, the issue here is not about indemnification but the issue here is about the debt and on that note the Deed of Settlement has all details as it took everything in the previously contract.

PW1 under further cross examination admitted to have received TZS. 250,000,00/=which was part of the outstanding debt of TZS 500,000,00/= which was attracting the interest of 15% for any default of payment of the instalment.

Mr. Webino, learned State Attorney had nothing to re-examine PW1.

This marked end of plaintiff case and the same was dully marked closed.

In defence, the defendant was defended by Ms. DEODAT MEXON SIWALE (to be referred in these proceedings as **('DW1').** DW1 under oath and through his witness statement adopted in the proceedings as his testimony in chief told the court that, he is a shareholder and Director of the defendant. DW1 went on to tell the court that, on 26th March, 2014 defendant executed an agreement with UTT-PID and

further executed a tripartite agreement and lastly executed a Deed of Settlement Agreement.

It was DW1 testimony that, the entire project was to be funded by UTT-PID at the cost of TZS. 688.137,161.79 and the said amount was to be advanced as a loan facility to the defendant company in two phases, 50% on handling over the earmarked site and 50% on completion of the road opening and construction. DW1, however, told the court that the amount advanced according to Deed of Settlement the executed loan was TZS 344,068,580.85 and the defendant has repaid TZS. 254,800,000/=as principal amount plus interest therefore the unpaid balance is TZS 89,268,580.89 and not TZS 458,417,500/= as claimed on plaint. In proof of what has been testified above, DW1 tendered in evidence minutes sheet dated 31st August, 2015 as **exhibit D1** and prayed that exhibit P1 and exhibit P2 be part of their defence in this case to prove that plaintiff is the one who breached tripartite agreement.

Under cross examination by Mr. Webiro, DW1 told the court that, plaintiff advanced the loan of TZS 344,068,580.85/= for defendants to undertake road opening of the survey plots at Msata, Bagamoyo. It was,

among others, that the terms of the agreement was that, the amount advanced together with interest would be repaid back to plaintiff.

DW1 when shown exhibit P2 recognized it and told the court he is the one who signed it and before signing the said exhibit P2 the outstanding principal sum plus interest was TZS 604,415,100/=. DW1 cross examined told the court that, after defendant failed to heed his obligations, defendant and plaintiff met, and agreed that deed of settlement be executed and the same was executed. DW1 when pressed with questions told the court that, it was agreed that defendant to pay TZS.500,000,000/=after reduction of interest.

DW1 when further pressed with more questions told the court that, it is true there was schedule for repayment of debt which was to end up on 30th May, 2018, however, was quick to point out that defendant was able to pay only TZS 254,800,000/= out of TZS 500,000,000/=. DW1 further admitted that the unpaid amount as per institution of this case remained to the tune of TZS. 245,200,000/= which was attracting the interest of 15%.

Mr. Balomi advocate, had nothing to re-examine DW1.

This marked the end of hearing defendant case and the same was dully marked closed.

allowed them to file the same not later that 3rd December, 2021.

I have had time to go through the rivaling submissions, and I truly commend them for their immense research and contribution which has enlightens this court much on this kind of dispute in issue. However, to avoid a long judgement, I will not repeat each and every thing argued but here and there will refer them and where I will not, it suffices to say all have been taken and considered on board. Nevertheless, Mr. Balomi in his final submissions raised and argued an objection to the maintainability of this suit. This is:- One, Non-joinder of parties and by failing to join UTT-PID and POSTA NA SIMU SACCOS LIMITED despite being a body corporate capable of being sued and sue renders the suit not tenable. According to Mr. Balomi, the Attorney General was just a necessary party whose presence is necessitated by law in the Government proceedings which alone is not enough to maintain this suit. The learned advocate pointed out that failure to join proper parties is serious defect, and, no effective decision can be made as the proper parties were not pleaded. To buttress his point, Mr. Balomi cited the case of HARI RAM Vs. CENTRAL GOVERNMENT (AIR 1941 LAH

120). But this being a foreign decision, the learned advocate for unknown reasons failed to attach it copy for this court's consideration.

I have carefully studied and considered the pleadings by parties and the relevant law, I am prepared to overrule this point. The reasons, I take this stance are abound. **One,** the point of misjoinder and non joinder was raised as an afterthought because the plaintiff at paragraph 1 of the plaint stated why he instituted this suit in his capacity and the defendant in his written statement of defence noted the same as not being disputed and in this he had this to say:

"the contents of paragraph 1 and 2 are noted ..."

The admitted contents of paragraph 1 were very clear and elaborative and contained the following:

"That the plaintiff is the Chief Legal Advisor of the Government and its institution and by virtue of her constitutional and legal duty has legal mandate to institute suit for and or represent the Government and its institutions in the court of law and Tribunals ..."

Going by the two paragraphs of which parties are bound by, I see no reasons to agree with Mr. Balomi's arguments and I consider his

submission on this point as technicality to avoid the liability rather than point of law as he wants this court to believe.

Two, be as it may still guided by Order I rule 9 of the Civil Procedure Code [Cap 33 R.E. 2019] I find the arguments by Mr. Balomi not tenable in this suit. The said provision provides as follows:

> **"Rule 9- No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."**

In this suit no dispute that the Attorney General is, a necessary party and the UTT-PID were 100% Government institutions which are in all respects represented by the Attorney General.

On the above reasons, with respect to Mr. Balomi's arguments that this suit in untenable for non-joinder far from convincing this court to hold otherwise are rejected on their face value. Having so hold, I now turn into the merits or otherwise of the suit.

Having gone through pleadings, testimonies of the witnesses and final closing submission of the parties, I noted some facts not in dispute and wish to point them out and narrow down non contentious issues. These

are; **One**, it is not disputed by the parties herein that, on 26th March, 2014 plaintiff and defendant executed an agreement for financing road of the survey plots at Msata Bagamoyo. **Two** it is not disputed that, the plaintiff advanced TZS 344,068,580.85/= to defendant which was to be repaid back within one month after completion of the project. **Three,** it is not disputed that after default, defendant and plaintiff entered into Deed of Settlement for payment of the debt in which defendant was to pay TZS. 500,000,000/= for eleven instalments from 30th May, 2017 up to 30th May, 2018. **Four** it is not in disputed that, in case of default in payment of instalment the outstanding balance will be attracting the interest of 15%.

On that note, the notable duty of this court now is to determine the merits and demerits of this suit by answering each issue as agreed and recorded, in the light of the evidence on record. However, it should be noted that in this suit plaintiff is claiming for payment of outstanding loan balance to the tune of TZS. 369,148,191.1 and consequential reliefs. On the other hand, defendant is disputing the amount of TZS 369,148,191.10. on ground that defendant has repaid the debt and the outstanding loan is TZS 89,268,580.89 and not TZS 369,148,191.1.

With the above contention, therefore it is imperative to determine issues against the evidence on record. The first issue was thus coached, '**Whether the defendant company breached facility agreement dated 26thMarch, 2014 and tripartite agreement between projects and infrastructure Development PLC (UTT-PID) and SOLOHOGA Company Limited.'** The learned counsel for plaintiff submitted that the plaintiff advanced loan of TZS.344,068,580.85 and defendant failed to repay the said amount .On the other hand learned counsel for the defendant in rebuttal argued that, it is plaintiff who breached the agreement together with tripartite agreement for failure to disburse the agreed amount and non-payment of 40% of the defendant share of revenue. This issue will not detain this court time much because it is not disputed that defendant defaulted in payment of the loan advanced. It is settled legal position that, a breach of contract occurs when one party in a binding agreement fails to perform its obligations and conditions according to the terms of the contract. The provisions of section 37 of the Law of Contract Act, [Cap 345 R.E 2019] underscore the point. For ease of reference, I produce it hereunder:

Section 37. "The parties to the contract must perform their respective promises, unless such performance is dispensed with or excused under

the provision of this act or by any other law.

(Emphasis mine)

Guided by the above legal stance, the next question to be asked by this court is: was there any such failure on the party of the defendant or plaintiff. In order to find out whether there was breach or failure to perform; one should take into consideration the terms of the contract and find out if at all, there was any failure to fulfill any of such terms without any justifiable or lawful excuse.

Back to our suit, carefully examination of the testimony of both parties, exhibit P1 and exhibit P2, it is clear the defendant breached the contract by failure to make good payments in installments as agreed. Therefore, issue number one is for the reasons stated above answered in the affirmative that the defendant breached loan agreement.

The next issue was thus couched that, '**whether the defendant company breached terms and conditions of the deed of settlement between UTT projects and infrastructure Development PLC (UTT-PID) and SOLOHAGA Company Limited dated 25thJuly, 2017**.' The learned counsel for plaintiff submitted that, since defendant failed to service the loan as agreed then it's a clear breached of the contract. In rebuttal the learned advocate for defendant

submitted that, it is the plaintiff who breached the term and condition of the contract on ground that, exhibit P2 was subsequent sought agreement.

Having considered the rival arguments by both trained legal minds of the parties and having equally revisited the pleadings and testimonies especially the contents of exhibit P1 exhibit P2 and exhibit D1, I am of the considered view that, defendant breached terms and conditions of the Deed of Settlement. I am saying so on the following reasons; **one,** before the execution of exhibit P2 defendant was already in breach of clause 7.1 of the agreement thus as means of debt settlement exhibit P2 come into play so as to remedy the situation. Therefore, the assertion that, exhibit P2 was a subsequent sought agreement, is baseless and has no any factual and legal basis because after defendant defaulted to pay the loan as agreed in previously agreement, parties by mutual consent entered into another agreement so that defendant could repay the outstanding debt.

Now defendant at this juncture cannot dispute the legality of exhibit P2 because parties a bound by their agreement freely entered. This is because by mutual agreement parties signed the Deed of Settlement. It is a trite law that parties are bound by their agreement unless contrary

intention is shown. The said legal position was stated by the Court of Appeal of Tanzania in the case of **Simon Kichele Chacha Avelina M. Kilawe Civil Appeal No 160 of 2018 (unreported) in which the Court observed that**:-

> **"It is settled law that parties are bound by the agreement they freely entered into and this is the cardinal principle of the law of the contract, that is, there should be sanctity of the contract."**

It is a common knowledge that, this principle is reluctant to admit excuse for non-performance where there is no incapacity, no fraud or public policy prohibiting enforcement. It is my considered view that, the defendant is just making excuse for non-performance of their obligation which is not allowed under the principle of sanctity of the contract. The issue of failure to pay the installments as agreed is/was admitted by DW1 during cross examination when he stated that the amount paid was TZS. 254,800,000/= out of TZS 500,000,000/= as agreed in the Deed of Settlement, hence, bringing to one but conclusion that the defendants were in breach of the terms and conditions of the contract.

With the above reasons the court find that the defendant allegations that, exhibit P2 was sought agreement are bare allegations without any support because the parties by free consent signed Deed of Agreement.

Therefore, issue number two is for the reasons stated above answered in the affirmative that defendant company breached terms and conditions of the deed of settlement between UTT projects and infrastructure Development PLC (UTT-PID) and SOLOHO.GA Company Limited dated 25th July,2017.

The next third issue was couched thus **whether the defendant company is indebted to the plaintiff to the tune of Tshs 369,148,919.1,** this issue will not detain this court much, because DW1 admitted that, after the execution of Deed of Settlement, the defendant was able to repay only TZS. 254,800,000 out of 500,000,000/= the principal sum. The remaining Tshs. 245,200,000 plus interest to the tune of 213,217,500 minus TZS 89,268,580.89 the outstanding debt is now at Tshs. 369,148,919.10. That said and done, I associate myself with conclusion by Mr. Webiro that the third issue is must be and is hereby answered in affirmative that the defendant company is indebted to the plaintiff to the tune of Tshs. 369,148,919.10.

This takes me to the last issue that, **'what reliefs parties are entitled.'** The defendant prayed that this suit be dismissed with costs. But given the findings of this court in the three issues above, this suit cannot be dismissed. Instead I allow this suit in favour of the plaintiff of the following orders, namely:-

i. Payment of Tshs.369,148,919.10 to the plaintiff being amount due and remain unpaid, hence, constituting a breach of contract;

ii. Payment of general damages to the tune of Tshs.5,000,000/=;

iii. Interest of the claimed amount in item (1) above from the date of judgement till payment if full at the court's rate of 7% per annum;

iv. The plaintiff will have costs of this suit.

It is so ordered.

Dated at Dar es Salaam this 15th day of December, 2012.

S. M. MAGOIGA

JUDGE

15/12/2021