

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

CIVIL CASE NO. 45 OF 2022

FEGO LIMITED PLAINTIFF

VERSUS

MR. KUKU FARMERS LIMITED DEFENDANT

JUDGMENT

22nd August, 2023

KISANYA, J.:

The plaintiff and the defendant are limited liability companies incorporated under the laws of Tanzania. The plaintiff is claiming that the defendant is in breach of the terms of three contracts agreed upon by the duo. As a result, the plaintiff is praying for judgment and decree against the defendant in the following terms:-

- i) For orders that the Defendant has breached the contracts for financing poultry farm.*
- ii) For orders that the Defendant to pay the Plaintiff the sum of TZS 34,000,000/= (say One Hundred and Ninety-Two Million only) being the amount deposited by the Plaintiff to the Defendant's account.*

- iii) For orders that the Defendant to pay the Plaintiff TZS 192,000,000/= (say One Hundred and Ninety-Two Million only) being special damages for occasioning loss through breach of contracts.*
- iv) For order requiring the Defendant to pay the Plaintiff general damages in the sum of TZS 50,000,000/= (say fifty million) being compensation for loss suffered by the Plaintiff, disturbance and associated injury caused on the Plaintiff by the Defendant's omissions and illegal act.*
- v) For payment of interest at court rate of 7% from the date of delivery of judgment until date of full payment.*
- vi) Costs of the case.*
- vii) Any and further reliefs the Hon. Court shall deem just and fit to grant.*

The background facts to this suit as gathered from the pleadings is as follows: Between November, 2019 and mid-March, 2020, the plaintiff and the defendant entered into three contracts in which the plaintiff financed the defendant's poultry farm project. The first contract was entered on 29th November, 2019. The sum involved in this contract was TZS 14,000,000/= which was deposited in the defendant's bank account No. 0150444196500, maintained at CRBD Bank Ltd. It was agreed upon that, at the end of the

contract on 29th March, 2020, the plaintiff would earn profit of 100% of the said amount.

The second contract was executed on 13th January, 2020 and was expected to come to an end on 13th May, 2020. Basing on that contract, the plaintiff deposited TZS 8,400,000/= into the defendant's bank account No. 0150444196500, maintained at CRBD Bank Ltd. She expected to earn a profit of 90% of the amount invested in the defendant's poultry farm project, at the end of contract.

The third contract was concluded on 13th March, 2020. This time, the plaintiff deposited the sum of TZS 14,000,000 into the defendant's account No. 0150481394800 held at CRDB Bank to finance the defendant's poultry project. The plaintiff states that parties agreed that the contract would come to an end on 13th July, 2020.

In view of the terms of the said contracts, the plaintiff asserts that she was expecting to make a profit of 192,000,000/= from the date of each contract to the filing of this suit. She has come to this Court claiming that the defendant has refused to honour her contractual obligation of paying the profit or even refunding the financed amount of TZS 36,400,000/=.

The defendant filed a written statement of defence (WSD) in which she vehemently denies the plaintiff's claims. The defendant avers, among others, that the contracts, if any, were illegal *ab initio*, and thus, incapable of being discharged or enforced. Her assertion is based on the fact that, in the course of executing the contracts, one of her directors was charged and convicted of offences conducting pyramid scheme and accepting deposit from the general public without licence.

During the final pre-trial conference, four issues were agreed to by the parties for determination of this matter. The said issues were adopted and recorded by this Court as follows: -

- 1. Whether the contracts entered by the plaintiff and the defendants are valid.*
- 2. If the first issue is answered in the affirmative, whether the defendant breached the contracts.*
- 3. Whether the plaintiff suffered damages and to what extent.*
- 4. To what reliefs are the parties entitled to.*

At the hearing of this matter, the plaintiff was represented by Mr. Fredrick Massawe Augusti, learned advocate, whilst the defendant had the legal services of Mr. Norbert Mlwale, also learned counsel.

The plaintiff paraded one witness namely, Ms. Bumi Fred Mwaisaka (PW1) who happened to be her director. To supplement her testimony which was adduced by way of witness statement, PW1 tendered the following documents; agreements between Mr. Kuku Limited and Fego Limited, dated 5th July, 2019, 6th November, 2019, 13th January, 2020 13th March, 2020 and 29th November (Exhibits P1, P2, P3 and P4 collectively); two receipts dated 7th February, 2020 (Exhibit P5 collectively) and a demand notice dated 14th February, 2022 (Exhibit P6).

On the other side, Mr. Tariq Seif Machibya (DW1), director of the defendant's company was the sole witness who testified for the defence. He produced six exhibits related to Economic Case No. 6 of 2020 of the Resident Magistrate's Court of Dar es Salaam at Kisutu in which DW1 was an accused person. These are charge sheet (Exhibit D1), proceedings (Exhibit D2), Plea Bargaining Agreement (Exhibit D3), facts of the case (Exhibit D4), Court's Order (Exhibit D5) and Consent of the Director of Public Prosecutions (Exhibit D6).

After the trial, the learned counsel filed written closing submissions. I do not intend to reproduce the evidence given by each side and the

submissions from the learned counsel for both parties. I will consider the same in the course of deliberating the issues framed for determination of this matter.

First for consideration is the issue whether, the contracts entered by the plaintiff and defendant are valid. A rightly submitted by Mr. Augusti, section 2 of the Law of Contract Act, Cap. 345, R.E. 2019 (the LCA) defines a contract as an agreement enforceable by the law. Further to this, the essential elements of a valid contract are provided under section 10 of the LCA which was also relied upon by Mr. Augusti. The said provision reads:

"All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void:"

It is gleaned from the above cited provision that, for a contract to be valid and legally enforceable, there must be: free consent of the parties; capacity to contract; lawful consideration; and lawful object or purpose. In addition, the contract must not expressly declared to be void. The said elements must co-exist. If any of the element is missing, the agreement or contract in question is not valid and thus, not legally enforceable.

In their respective evidence, PW1 and DW1 were at one that parties herein entered into three contracts dated 29th November, 2019, 13th January, 2020 and 13th March 2020 (Exhibits P1, P2 and P3). PW1 testified that both parties entered into the said contracts without duress and coercion. It was also her testimony which was not disputed by the defendant that, the plaintiff paid the defendant a sum of TZS 36,400,000/= for purpose of financing poultry farm which was being conducted by the defendant. Therefore, Mr. Augusti urged this Court to consider that the contracts were neither invalidated nor declared invalid. Relying on the provisions of section 110(1) of the Evidence Act and the case of **Paulina Samson Ndawavya vs Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017, he submitted that the defendant had not proved the first issue.

On the adversary side, the defendant through DW1 and Mr. Mlwale contends that the contracts were void. In that regard, I agree with Mr. Augusti that the burden to prove that the contracts were not valid lies on the defendant. In his evidence, DW1's stated that, in the course of executing the contract, he, as one of the directors of the defendant was arrested in August 2020 and arraigned before the Resident Magistrate's Court of Dar es Salaam at Kisutu for offences of conducting and managing pyramid scheme

and accepting deposit from the general public without licence. Referring to the charge sheet (Exhibit D1), DW1 testified that the defendant's act of collecting funds from the plaintiff for purposes of running the poultry farming project in consideration of interest in return is also a criminal offence known as conducting and managing pyramid scheme, while the act of accepting deposit from the plaintiff without a license is a criminal offence. It was his further evidence that, he was convicted of two offences after entering into a plea bargaining with the Director of Public Prosecutions and that the monies deposited by the plaintiff and other depositors were forfeited by the Government as depicted in Exhibits D2 and D5.

In the light of the said evidence, the defendant's contention that the contracts were not valid is based on the ground that the consideration or objects of the contracts was unlawful. Generally, the consideration or object of a contract is lawful unless any of the following factors set forth under section 23(1) of the LCA is established. The said section reads:

"The consideration or object of an agreement is lawful, unless-

(a) it is forbidden by law;

(b) it is of such a nature that, if permitted, it would defeat the provisions of any law;

(c) it is fraudulent;
(d) it involves or implies injury to the person or property of another; or
(e) the court regards it as immoral or opposed to public policy.”(Emphasize added)

Flowing from the above provision, it is apparent that consideration or object of a contract is unlawful, among others, where it is forbidden by law or if permitted, would contravene the provisions of any law.

In the instant case, it is not disputed that the defendant collected finances from the plaintiff for purposes running the poultry farming project and issue a profit of 90% and 100% of the collected finances within four months. Further to this, when cross- examined, PW1 admitted that the defendant’s project was known to her through different public advertisement. It is my considered view that, such evidence implies that the defendant was collecting finances or funds from the public and not the plaintiff only for purposes of managing her poultry farming project.

In that regard, I agree with Mr. Mlwale that, the defendant’s act of collecting finances from the plaintiff and other members of the public in consideration or expectation of huge profit than the collected finance or

money is prohibited by the law. Indeed, it gave rise to the offence of conducting and managing pyramid scheme, under section 171A(1) and (3) of the Penal Code, [Cap. 16 R.E 2002] [now R.E 2022], which was laid against the defendant's director (DW1). For clarity, I find it pertinent to reproduce the particulars of offence of the said charge as hereunder:

"Tariq Said Machibya, on divers dates between January 2018 and May, 2020 at various places within the City and Region of Dar es Salaam, did conduct and manage a pyramid Scheme to wit, collecting money from the public on promise that it will be invested in poultry farming project and individuals who invested the money would be entitled to receive the interest of 70% of the initial capital for the money invested for four months and 90% of the initial capital for money invested for six months, the sum of the money which given all commercial considerations is greater than the money or return on the investment of the money collected."

I agree with Mr. Augusti that the above charge was not preferred against the defendant. However, the learned counsel did not dispute that DW1 who was charged with the said offence is one of the directors of the defendant. In view of the principle of the corporate veil, the prosecution was enjoined to charge DW1 for the offences related to the defendant's business.

Be as it may, the defendant's act of collecting finances on the promise that she would invest the same in poultry farming project and issue a colossal profit at the rate of 100% and 90% within four months, amounted to the offence of conducting and managing pyramid scheme under the section 171A(1) and (2) of Penal Code (*supra*). It does not matter whether the defendant was not charged in her own name.

Apart from the offence of conducting and managing pyramid scheme, the defendant's director (DW1) was charged with another offence of accepting deposits from the general public without Licence. This offence was predicated under section 6(1) and (2) of the Banking and Financial Institutions Act, No. 5 of 2006 (the BFIA). The said provision prohibits any person from accepting deposits from the general public unless he holds a license issued by the Bank of Tanzania. The law further provides further that a person who contravenes the said provision is guilty of an offence.

Reverting to the instance case, the second count of the charge against the defendant's director had the following particulars of offences:

"TARIQ SAID MACHIBYA, on diverse dates between January, 2018 and May, 2020 at various places within the city and region of Dar es salaam, accepted deposits

amounting to Tanzania Shillings Seventeen Billion (TZS 17,000,000,000) from the Public without Licence."

Furthermore, the facts of the case (Exhibit D4) in support of the said offence against DW1 were as follows:

"... he invited the general public to invest, with the lowest indicated amount ...

the accused person, being the Director of the said Company has never registered Mr. Kuku Farmers Company Limited as a public limited company (PLC) allowed to subscribe share to the public in terms of the provisions of the Companies Act, 2002. Furthermore, prior to floating the shares for sale in general public accused person did not register his company, MR. Kuku Farmers Limited with the Capital Markets and Securities Authority as required by the Capital Markets and Securities Act, No. 5 of 1994.

Subsequently, numerous members of the general public took part in the said pyramid scheming. In the period spanning from January, 2018 to May, 2020, vide the said pyramid scheme, the accused persons received from the general members of public the sum of Seventeen Billion (TZS 17,000,000,000) from the Public without Licence...the accused person accepted the said deposits

from the members of the general public without a licence from Bank of Tanzania in terms of the provision of the Banking and Financial Institutions Act, 2006."

As stated earlier, PW1 testified that she knew the defendant vide different public advertisement. Thereafter, she met the defendant and started to deposit funds in the latter's bank account after entering the contacts. In other words, the plaintiff does not dispute that the defendant was inviting the general public to invest in or finance the poultry farm project. PW1 admitted further between 29th November, 2019 and 13th March 2020, the plaintiff deposited TZS 14,000,000/= and TZS 8,400,000/= in the defendant's bank account No. 0150444196500, while TZS 14,000,000/= was deposited in the defendant's account No. 0150481394800, both accounts held at CRDB Bank PLC. Despite the fact that the charge was against DW1, the facts (Exhibit D4) read in support of the charge shows the said count was related to the affairs of the defendant.

It is further depicted from the court's order (Exhibit D5) that TZS 4,889,445,534.54 and TZS 338,818,509.05 kept in the defendant's account No. 0150481394800 and 0150444196500, respectively, were forfeited to the Government as proceeds of crime and were transferred to Bank Account No.

9921169817 maintained at Bank of Tanzania in the name of the Director of Public prosecutions.

In the light of the above findings, I am satisfied that the consideration and objects of the contracts subject to this case were forbidden by law to wit, section 171A(1) and (2) of Penal Code (*supra*) and section 6(1) and (2) of the BFIA. Also, the consideration and object of the contracts at hand are in the nature that, if permitted, they would defeat the said provisions of the Penal Code and the BFIA. This is so when it is considered that, the defendant's director (DW1) was charged and convicted for contravening the said provisions. Consequently, it is my considered opinion that the contracts entered by the plaintiff and defendant were not valid and thus, illegal. The first issue is answered not in the affirmative.

The second issue should not detain me. It was to be addressed if the first issue is answered in the affirmative. As the first issue has been resolved not in affirmative, the issue whether the defendant breached the contracts does not arise. It is a settled position and I need not cite any authority that illegal contract cannot be breached or enforced.

As for the third and fourth issues, this Court is called upon to determine whether the plaintiff suffered damages and reliefs to which parties are entitled. I have held in the first issue that the contracts relied upon by the plaintiff are illegal because their respective considerations or objects were unlawful. The general rule is to the effect that a suit for the recovery of any money paid or for compensation for anything done, under every agreement of which the object or consideration is unlawful, cannot be instituted in the court. This is pursuant to section 23(2) of the LCA which provides further for the exceptions to the general rule. The said section stipulates:

*"In each of cases referred to in subsection (1), the consideration or object of an agreement is said to be unlawful; and every agreement of which the object or consideration is unlawful is void and **no suit shall be brought for the recovery of any money paid or thing delivered, or for compensation for anything done, under any such agreement, unless-***

- (a) the court is satisfied that the plaintiff was ignorant of the illegality of the consideration or object of the agreement at the time he paid the money or delivered the thing sought to be recovered or did the thing in respect of which compensation is sought, and that the illegal consideration or object*

had not been effected at the time when the plaintiff became aware of the illegality and repudiated the agreement;

- (b) the court is satisfied that the consent of the plaintiff to the agreement was induced by fraud, misrepresentation, coercion or undue influence; or*
- (c) the agreement is declared to be illegal by any written law with the object of protecting a particular class of persons of which the plaintiff is one."*

In her evidence, PW1 did not state whether the contracts between the plaintiff and the defendant fall under any of the above exceptions. To the contrary, the plaintiff must be taken to have known the laws. She participated to commit the illegal acts. Considering further the contracts were illegal or void at their formation, the claim for the recovery of any money paid or for compensation arising thereto cannot stand. It is settled law that illegal or void contracts at their formation are unenforceable and that one cannot benefit from his own wrong. This stance was stated in the case of **Nathan Raghavji vs H.J. Vaitha and Another** (1965) 1 E.A. 452 referred to me by Mr. Mlelwa, where it was stated that:

"The plaintiff cannot seek relief on the ground of the illegality of his own contract."

Similar position was stated in case of **Grofin Africa Fund Ltd vs H.furniture and Electronics Ltd**, Commercial Cause No. 81 of 2017, HCT Commercial Division. In that case, this Court (Fikirini J, as she then was) arrived at a finding that the contract was illegal and void. The Court went on holding as follows on the reliefs sought by the plaintiffs:

"The answer is "no" because the contract was illegal and void. Therefore, no one can enjoy benefits from own wrongs. This is due to the fact that the time the parties entered into the loan agreement the plaintiff had no capacity, because she has failed to provide proof that she was registered as bank or financial institution capable of advancing loan and charge interest thereon."

I subscribe to the above position of law. Owing to the fact that the contracts were void and illegal for want of lawful consideration and object, the plaintiff cannot be paid TZS 192,000,000= and TZS 50,000,000/= prayed in the plaint as special damages and general damages (compensation for occasioning loss) respectively.

With regard to the relief of TZS 36,400,000/= being the amount of money which the plaintiff deposited in the defendant's accounts, I agree with Mr. Mlwale that the said sum of money was tainted property or

instrumentality of the offence of pyramid scheme which the defendant's director was charged. See also the case of **DPP vs Jackson Sifael Mtare and 3 Others**, Criminal Appeal No. 2 of 2018 (unreported) in which the Court of Appeal held:

*However, the 2012 amendment to the Anti-Money Laundering Act, No. 12 of 2006 by the Anti-Money Laundering (Amendment) Act, No. 1 of 2012, -the phrase "a-predicate offence" was made to include "fraud and other offences; murder; **pyramid and other similar schemes**; and piracy of goods "thus making the property which may be involved in such offences to qualify to be "**tainted property**" under section 3(1) of the PCA, that is, property which is an instrumentality of the offence."*

In our case, the fact that the money paid by the plaintiff is tainted property is supported by the fact that the money in which defendant's accounts deposited the same was forfeited to the Government. All the above considered, I am of the view that the plaintiff is not entitled to recover the money paid to the defendant and any relief claimed in the plaint.

For the reasons I have endeavoured to highlight, I hold that the plaintiff has failed to prove her case on the standard set by the law. I accordingly dismiss this suit for want of merit. Considering that both parties

played a role in the contracts which gave rise to this case, I find it not appropriate to make an order as to costs. Thus, each party shall bear its own costs.

Dated at this 22nd day August, 2023.



S.E. KISANYA
JUDGE
22/08/2023

Court: Judgment delivered through video conference this 22nd day of August, 2023 in the presence of Mr. Fredrick Massawe Augusti, learned advocate for the plaintiff and Mr. Hemed Kaniki, learned advocate for the defendant.

Right of appeal explained.



S.E. KISANYA
JUDGE
22/08/2023