

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 105 OF 2016

EAST AFRICA CABLES LIMITED.....PLAINTIFF

VERSUS

KAYUWA GDK ENTERPRISES LIMITED.....DEFENDANT

JUDGMENT

B.K. PHILLIP, J.

The plaintiff herein is a limited liability Company engaged in manufacturing and supply of electrical cables, conductors and other electrical apparatus. The defendant is a Limited Company engaged in general trade. This case arises from a business transaction between the plaintiff and the defendant whereby the plaintiff used to supply to the defendant electric cables. It is alleged in the plaint that the electric cables were supplied to the defendant on credit. Payments for the supplied electric cables were supposed to be done on the agreed time frame. It is the plaintiff's case that most of the time the defendant failed to pay the purchase price as agreed, consequently by 31st December 2014, the defendant's debt had accumulated to a tune of TZS. 277,992,864/=. The plaintiff claims that the defendant's failure to settle the outstanding debt, despite several demands from the plaintiff, has caused unnecessary operational hardships, inconvenience and damages to the plaintiff. The plaintiff in this case prays for judgment and decree against the defendant as follows;

- (a) Judgment on Admission and Decree against the defendant be entered for the sum of Tanzanian Shillings Two Hundred Seventy Million Nine Hundred Ninety Two Thousand, Eight Hundred and Sixty Four (TZS. 277,992,864/=).

- (b) That the Defendant pay the plaintiff interest on the principle amount in prayers (a) and (b) herein above at Commercial rate (30%) from the due dates till judgment.
- (c) That the Defendant pays the Plaintiff interest on the principle amount in paragraph (a) herein above at Courts rate, 9%, from the date of judgment till date decree is satisfied in full.
- (d) The defendant be condemned to pay general damages as assessed by this Honourable Court.
- (e) The defendants be condemned to pay punitive damages as assessed by this Honourable Court.
- (f) Costs of this suit be provided for.
- (g) Any other and further relief(s) the court may deem fit.

In its written statement of defence the defendant admits that it has been engaging into business with the plaintiff and alleged that all legitimate and verified claims were settled, thus denied the plaintiff's claims in their entirety. Furthermore, the defendant alleged that the plaintiff failed to delivery to the defendant verified and audited deliveries. That no reconciliation of sold electric goods and the payments done by the defendant have been provided to the defendant. In addition to the above, the defendant alleged that the plaintiff interfered with the defendant's business at Kariakoo by taking the defendant's valuable whole sale clients who were recruited by the defendant and terminated the defendant's sole distributorship arrangement along Kariakoo, and since then to date the plaintiff is using without payment the defendant's bill boards at Karikaoo area.

The following issues for determination by the court were drawn by my sister Hon Mansoor, J, the precedessor judge;

- (i) Whether the plaintiff delivered the electric cables to the defendant worth TZS 277,992,864/=
- (ii) Whether the defendant acknowledged liability, if any

- (iii) Whether the plaintiff has suffered any loss or damage
- (iv) To what reliefs are the parties entitled to.

At the hearing of this case, Advocate Inviolata Wangoma appeared for the plaintiff while the learned Advocate Dickson Mtogosewa appeared for the defendant. The plaintiff brought one witness namely, Hamad Suleiman Mohamed, While the defendant failed to bring in court its sole witness despite being given opportunity to do so. On 31st October when this case was called for defence hearing, the defendant's advocate informed this court that the defendant's witness was sick, thus he prayed for an adjournment and the same was granted. The case was called again for defence hearing on 4th December 2018 and the defendant's witness did not show up in court. The Defendant's advocate prayed for adjournment again and in the alternative he prayed the defendant's witness statement be admitted under the provisions of Rule 56 (2) (3) of the High Court Commercial Division Rules, 2012. (Henceforth 'the Rules'). I declined to grant all of the prayers made by the defendant's advocate as there were no sufficient reasons adduced to grant them. Consequently, I struck out the witness statement of the sole witness for the defence pursuant to rule 56 (2) of the Rules.

Now, back to the testimony of the plaintiff's witness (PW1). This witness is the plaintiff's National Sales and Marketing Manager. In his testimony in chief, he testified that he is involved in the day to day operations of the plaintiff including sales and marketing of electric cables for agents/clients at Kariakoo market, the defendant being one of them. That on 30th December the defendant's director on Gerald Mamboleo signed a document titled 'confirmation of Balance' in which he confirmed that the defendant is indebted to the Plaintiff to the tune of TZS. 277,992,864/= . Furthermore, PW1 testified that on 27th January 2015, the defendant's managing Director voluntarily signed a document acknowledging that the defendant owes the plaintiff the said sum of TZS. 277,992,864/= and made a promise to clear the debt upon improvement of the business.

PW1 tendered in court the following documents; a letter from the plaintiff, titled confirmation of balances as at 31st December 2014, dated 26th January 2015 which was admitted as exhibit P1, a demand letter from RM Attorneys addressed to the Chairman/CEO Kayuwa GDK Enterprises, dated 1st September, 2015, titled "Demand for a sum of TZS. 277,992,864/= being price for electric cables supplied to you by East Africa Cables (Tanzania) Limited" which was admitted as Exhibit P 2, a document titled "East Africa Cables (Tanzania) Limited, extract from the Minutes of the Board of Directors of the Meeting held on 10th December 2015", which was admitted as Exhibit P3, two delivery notes and two tax invoices which were admitted collectively as Exhibit P4, and nine invoices and four delivery notes which were admitted collectively as Exhibit P5.

During cross examination PW1 testified that the plaintiff started doing business with the defendant about ten (10) years ago. That the plaintiff's claims are based on accumulation of unpaid charges for a long time since the defendant used to pay the plaintiff in installments. In addition to the above, while replying the questions posed by the defendant's Advocate during cross examination, PW1 said that Gerald Mamboleo is the owner and director of Kayuwa Enterprises Company Ltd.

Having analyzed the evidence adduced by the plaintiff, let me proceed with the determination of the issues.

The first issue is **Whether the plaintiff delivered electric cables to the defendant worth TZS 277,992,864/=**. In any business involving supply of goods, the delivery of the goods and values thereof can be proved by the delivery notes and corresponding invoices thereto. In this case Exhibit P4 and P5 (delivery notes and invoices) show that the total value of electric cables delivered to the defendant is TZS. 256,357,201.99. Therefore the answer to this issue is that the electric cables supplied to the

defendant were worth TZS. 256,357,201.99 not TZS. 277,992,874/= as claimed by the plaintiff.

The second issue is **whether the defendant acknowledged liability if any**. Relying on Exhibit P1, the plaintiff contended that the plaintiff did acknowledge that he is indebted to the plaintiff to the tune of TZS 277,992,874/=. Exhibit P1 is a letter from the plaintiff dated 26th January 2015 addressed to the defendant titled '*confirmation of balance(s) as at 31st December 2014*'. Through that letter the plaintiff requested the defendant to confirm the balance outstanding in their books which showed that the defendant was indebted to the plaintiff to the tune of TZS 277,992,874/= as at 31st December 2014, by either putting a tick on a box which indicated that the amount was agreed or a box showing that the amount was not agreed and sign there under. One Gerald Mamboleo put a tick in a box showing that the amount indicated in the letter was agreed and indicated his title as the director of the defendant's company as well as stamped the letter with a rubber stamp of the defendant's company. According to the testimony of PW1, Gerald Mamboleo is the director and owner of Kayuwa Enterprises (the defendant). Exhibit P1 was intended to be used for audit purposes as it indicated that the defendant's response to the letter as aforesaid was supposed to be sent direct to M/s Ernest and Young, the certified Public Accountants who were the plaintiff's Auditors.

Looking at Exhibit P1 I have no doubt that the defendant acknowledged liability, that is, he was indebted to the plaintiff to the tune of TZS. 277,992,864/= and since the letter clearly indicated that it was for audit purposes, to my understanding, it means that the letter showed explicitly how serious it was. By accepting the amount indicated in the letter as being as outstanding balance due, the defendant's director accepted the liability as far as the payment of the said outstanding liability is concerned.

Coming to the third issue that is **Whether the plaintiff has suffered any loss or damage.** Plaintiff prayed for payment of general damages and punitive damages, among others prayers however, I have noted that the plaintiff's witness have not given any testimony to the effect that the defendant suffered any loss or damages. In fact PW1 in his testimony in chief did not mention anything concerning either punitive/ general damages or loss. It has to be noted that a party to a suit is obliged to adduce evidence in court to prove/justify his/her claims. In the case of **National Insurance Corporation (T) limited and Another vrs China Civil Engineering Construction Corporation, Civil Appeal No 119 of 2004**, the Court of Appeal of Tanzania, while deliberating on a issue as to whether the interests awarded to the respondent was justifiable it had this to say;

"For the sake of arguments, assuming that the interest was pleaded as strenuously argued by Mr. Khamis, the next question that immediately falls for determination is whether or not it was proved that the prevailing commercial rate of interest was at 29% p.a. the decree issued by the trial court reads..

'The plaintiff is granted interest at current commercial rate from the date when the debt fell due till date of judgment.'

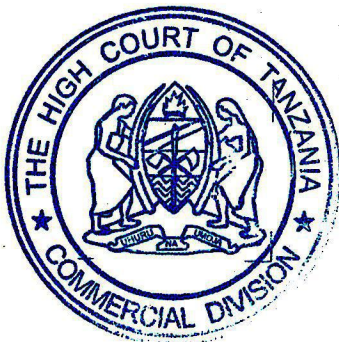
Having carefully examined the record afresh, we are of the respectful view that the evidence was unsatisfactory to prove that the prevailing commercial rate of interest was at 29% pa.a. The demand Note (Exh. P6) in itself was grossly insufficient to establish that fact".

On the strength of the above reasoning of the Court of Appeal , I am of a settled view that, likewise in the instant case the plaintiff was supposed show or at least explain how he/she suffered loss or damages and the justification for the same to enable the court to assess the damages as it deems fit. I am alive that general damages are not subject to specific

proof but, it is not enough to plead the damages or losses in the pleadings only, the same have to be reflected in the evidence.

As regards the last issue, that is, **to what reliefs are the parties entitled to**, from the foregoing, as I have said herein above, the documentary evidences admitted in court show that the value of electric Cables supplied to the defendant is TZS. 256,357,201.99 and there is no any evidence adduced by the defendants to contradict the above figure as the case has been heard ex parte. It is my settled opinion that the plaintiff is entitled to the payment of the sum of TZS. 256,357,201.99 as proved by the evidence and payment of interests on the decretal sum at a court rate of 7% from the date of judgment till the decree is satisfied in full. The defendant will bear the costs of this case. I decline to grant other reliefs sought for the reasons well explained herein above.

Dated at Dar Es Salaam this 20th day of 2019




B.K. PHILLIP
JUDGE