IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL CASE NO. 16 OF 2019

RAD HOLDINGS LIMITED..... PLAINTIFF

VERSUS

MAJEMBE AUCTION MART LIMITED.....DEFENDANT

JUDGMENT

Date of last order: 21st June, 2022.

Date of Judgment: 22nd July, 2022.

E.E. KAKOLAKI, J.:

The plaintiff herein, Rad Holdings Limited, a Company incorporated in the British Virginia Islands, duly registered in Tanzania with Certificate of Compliance No. 39698, is suing the defendant, Majembe Auction Mart, for breach of contract praying for a range of reliefs. These are the declaration that, the Defendant has breached the deed of agreement executed on 08/11/2011 between them, an order for the Defendant to surrender to the plaintiff the plants, equipment and other good removed from the Plaintiff's property (suit properties) put under custody and control of the defendant. In alternative to the above, order for surrender of the suit properties, an order for the defendant to satisfy the decree of this Court in the Land Case No.109 of 2011 in favour of the Plaintiff in the sum of USD 236,040.00 and

Tshs.20,000,000.00 respectively. Other reliefs sought are interest on above alternative relief from 09/09/2016 to the date of judgment, decretal amount from the date of judgment to the date of final payment, costs and any other relief this court deem appropriate to grant.

What brought about the above prayers can simply be drawn from the plaintiff's plaint, and goes thus. On 08/11/2011 through her appointed agent, the plaintiff executed a deed of agreement with the defendant preceded by the letter from the plaintiff dated 08/09/2011 clarifying on some of the terms to be included in the said agreement. The agreement was for the removal of all plants and equipment belonging to MIG Industries Ltd stored in the plaintiff's property in Plot No.42 Mikocheni Light Industrial Area in Dar es salaam, store and keep them in her safe custody situated near the plaintiff's property under consideration of Tshs. 21,000,000/- to be paid in two instalments. The suit properties were to be removed from the plaintiff's property in execution of the decree of this Court in Land Case No. 109 of 2011 between the plaintiff against MIG Industries Ltd, so that could be later on collected by the said MIG Industries Ltd upon payment to the plaintiff the outstanding rent, storage costs, mesne profits and other costs or sold to cover the said costs. It was also their term of agreement that, the said plants

and equipment shall be insured by the defendant against risks of damage and theft during both removal process and storage period and safe custody of the defendant until they are collected by MIG Industries Ltd or lawfully sold. It appears the removal exercise of the said suit properties from the plaintiff's property went well and the same were kept under safe custody and control of the defendant as bailee until sometimes 2016 when the plaintiff sought to gain custody of the same, only to find the same were missing from the defendant's custody and that the defendant neglected, refused and or failed to explain of its whereabouts, hence this suit. It is therefore claimed by the plaintiff that, the defendant unlawfully disposed of and or, negligently caused the said Plants and equipment to be illegally and unlawfully damaged, lost and disposed of by person other the lawful owners or the plaintiff herself, hence the above stated reliefs.

The Plaintiff's claims were strenuously disputed by the defendant who averred in her Written Statement of Defendant that, she did not unlawfully disposed of or negligently caused the plant and equipment to be illegally damage, lost and or disposed of by another person as the same were forcefully and without notice taken by YONO Auction Mart when implementing eviction in respect of the order of the Resident Magistrate of

Kivukoni at Kinondoni in Civil Case No.225 of 2002. She therefore claimed not to be responsible for the plaintiff's claims as the said suit properties were forcefully removed from her custody, hence she never breached any term of their agreement. It is worth noting that, is her attempt to further that defence, the defendant sought leave of this court to bring the third party notice against YONO Auction Mart as 1st third party and MEMO Auctioneers and General brokers limited as 2nd third party. Being issued with a third party notice the 1st third party in her a Written Statement of Defence contested the defendant's claims while moving the Court to give directions as to her liabilities in pursuant to Order I Rule 18(1) of the Civil Procedure Code, [Cap. 33 R.E 2019] (the CPC). Upon smartly digging into the facts of this case, this Court found that defendant's claims against the 1st third party were establishing a new and independent cause of action not connected to this case, therefore unfit and unhealthy to be maintained in this suit. Henceforth the defendant's claims against the 3rd party were struck out.

Before the hearing could take off, the following issues were framed for determination of parties' dispute by this court:

1. Whether the defendant breached the agreement by unlawfully disposing of and or negligently causing the properties put under its

custody by the plaintiff to be illegally and unlawfully damaged, lost and or disposed of.

2. If the 1st issue is in affirmatively, whether the plaintiff suffered any loss.
3. What reliefs are the parties entitled to.

It also to be noted that before hearing could start Mr.Kirita advocate sought a leave of this court to amend the plaint particularly the stated amount in paragraph (c) of the plaintiff's prayers as the same are extracts from the decree in Land Case No.109 of 2011 whereby the same altered to read USD 236,640.00 in lieu of USD 83,520.00 and Tshs.20,000,000.00 instead of Tshs.28,070,000.00. The prayer was made and granted under Order VI Rule 17 of the CPC.

Both parties agreed and sought leave of the Court to proceed with hearing of the case by filing witness statement under Order VIII Rule 22 of the CPC as amended by GN. No. 260 of 2021, whereby each party paraded one witness whose witness statements were filed on 15th March,2022 and 19th April, 2022 respectively. Mr. Deogratius Lyimo Kirita, learned advocate appeared for the Plaintiff while the defendant fended by Mr. Methodius Tarimo, learned advocate.

In a bid to prove her case, the plaintiff called one Muzaffer Essajee (PW1) the retired general manager of the plaintiff who worked with her from the year 2010-2016 and whose statement was admitted by this Court to form part of PW1's evidence in chief. This witness told he Court that, he knows MIG Industries Ltd as in 2010 approached the Plaintiff with the offer to lease the plaintiff's property for rent of USD 13,920.00 per month from 01st May, 2010, for installation of the plants and machines for juice production, in which the offer was accepted and allowed to take immediately possession without even executing a lease agreement. Knowing that they had no signed agreement the said MIG Industries Ltd defaulted payment of rent and resisted vacant possession the result of which was for the plaintiff to execute the deed of agreement with the defendant to forceful remove her plants and equipments from the suit property. The said agreement was tendered as exhibit PE3 preceded by one letter by the plaintiff to defendant exhibit PE1 of 09/09/2011 and exhibit PE2 the letter issued on 08/11/2011 clarifying the terms of agreement (exh. P3) which was signed on the same date. PW1 went on stating that, the defendant was instructed to remove all the plants and industrial machines of MIG Industries Ltd from the plaintiff's property and store them in the defendant's safe custody. And that she accepted the

agreed terms and conditions and paid her the agreed fees and costs in two instalments as exhibited in exhibit PE4 collectively. He said, it was agreed further that, the defendant shall store the removed properties in secure place and insure them against risks including fire and burglary pending payment of mesne profit by MIG Industries Ltd as well as costs or pending further instructions from the plaintiff. It was in his testimony that, on 11th November,2011, the defendant evicted MIG from the property and took all the suit properties to her custody at the yard which was near their property and prepared the inventory sheet of plants, machines and other equipment removed, the document which was admitted as Exhibit PE5. Apart from the inventory sheet, he testified she also wrote a letter to the plaintiff dated 18th November,2011 confirming that all the properties removed were kept under her yard, well protected and secured. The letter was admitted as Exhibit PE6.

PW1 went on stating that, there was a case in this Court between the plaintiff and MIG Industries Ltd which finality judgment and decree was granted in favour of the Plaintiff for MIG to pay her; USD 13,920.00 per month plus VAT from 01/05/2010 to the date of removal and Tshs.20,000,000.00 being removal/eviction expenses, storage charge from 11/11/2011 to the date of removal of the same by MIG, Costs and interest. That, seeking to execute

the decree of that judgment sought to attach the suit properties placed under defendant's custody as MIG did not have any property in Tanzania. That, on trying to reach the defendant on 04th March,2018 and January 2019 at his registered office where the suit properties were kept neither her nor suit properties found there but finally was found at her new office at Kijitonyama near Mabatini Police station Kinondoni, Dar es salaam. He said when asked about the suit properties the defendant said, the same had been taken by Yono Auction Mart in execution of decree passed against the defendant by the Resident Magistrate's Court of Kisutu. That, she has never explained to the plaintiff the circumstances under which the suit properties disappeared or taken until when this suit was filed and the defence entered by the defendant. According to PW1, the Magistrate Court eviction order against the defendant from the ware house where the suit properties were stored, did not cover MIG properties, thus the defendant was duty bound to secure the properties and move them to a secure place. To him the defendant acts and omission to allow the third party to remove the suit properties from her custody and dispose them amounts to breach of the contract between the plaintiff and the defendant. And further that since there is no proof that the same were taken by YONO Auction Mart he said, the defendant took

advantage of the execution to sale them and benefit from the proceeds thereof. This witness ended by praying the Court to grant the prayed reliefs.

Being cross examined by the defendant's advocate, PW1 admitted that, he was not aware that the agreement had expired as provided under clause 8 that, the suit properties were to be collected by MIG or legally disposed of within the period of 3 months from the date of their removal. He further admitted to have not visited the place to see whether the plant and equipment were removed and that he doesn't know even the value of each item removed and stored by the defendant. He finally stated that the plaintiff will be happy if the removed plant and equipment will be handed to her.

When re-examined, PW1 stated that, as per paragraph 7 of exhibit PE3 the defendant was supposed to be paid 1% of the value of the plant and equipment upon sale, the amount which is yet paid as the said properties were not sold. On whether the plaintiff had any clue of the eviction and removal of the properties entrusted to the defendant he said, before filing this case they never received any information from the defendant on whether the same were forceful collected /removed by the 3rd party.

On the other side Dixon Kitima (DW1) the then sales and marketing executive but currently one of the defendant's director admitted existence of the deed of agreement (exh. PE3) with the plaintiff and its terms stating that the defendant performed her obligations under it. He said, in the course of performing the contract the defendant prepared an inventory sheet of properties removed from the plaintiff's suit property (exh. PE5) but without value as there was no arrangement for the plaintiff to identify them and disclose their value. DW1 contended the same were not new and were removed from 2000 Industries Ltd and stored at their yard before were taken by Yono auction Mart in execution of the decree in Civil case No.225 of 2002 in which the defendant filed an application No.56 of 2015 to resist it but Yono used excessive force and went on to evict and collect properties of various clients without notice. He testified that, in resisting such forceful eviction the defendant complained to Jaji Kiongozi of the High Court vide a letter exhibit DE1, as auctioneers' leader and that, they are still waiting for the answer. DW1 went on to state that, apart from the fact that the claimed properties were old, the same were depreciating by 25% per year hence their storage for five years had turned the depreciation value to zero.

DW1 concluded by advancing his prayers to this court pleasing it to find that; what happened in relation to the suit properties does not amount to breach of the deed of agreement, that the market value of suit properties was not known to any of the parties, that the depreciation value of the said suit properties has already depreciated to zero value over five years as were just stored; that the defendant cannot satisfy the decree of the court in land case No.109 of 2011 which was in favour of the plaintiff herein because defendant was not part to that case and the claimed plants and equipment were not subject in dispute of that case ;each party to bear his own costs and other reliefs as may deem appropriate to grant.

Subjected under cross examined by Advocate Kirita DW1 admitted that, the removed suit properties were never been disposed of or taken by MIG industries. He said, the properties were taken by YONO Auction Mart Co. Ltd when evicted the defendant from their yard and added that, the eviction process took three days. He contended they could not protect the removed properties because Yono did not issue them with a notice of eviction. When asked whether that illegal eviction was reported anywhere he said, they reported to police but it did not serve anything because the eviction was supervised by the RPC. He conceded to the fact that, they did not make any

follow up of the properties as to where they were taken nor did they write to Principal Judge immediately, saying they were communicating him orally. When asked as to whether he knows where the claimed properties are and if they informed the plaintiff of the their alleged removal from the site, he confess to have no knowledge nor to have informed the plaintiff. When referred to the letter dated 13/6/2014 included in his statement DW1 disowned on silly reason that since all the files were removed from their office by YONO Auction Mart, the same cannot form part of his statement. That marked the end of both parties evidence, in which with leave of this court parties filed their final written submission which I find no need to reproduce them, as the same will considered in the course of determination of the framed issues.

I have taken considerable time to go through the pleadings, the evidence adduced by both parties as well as the final submissions by the parties in which I commend both counsels for assisting this Court to reach to a just decision. As alluded to above three issues were framed in which this Court is called to determine, as there is no dispute on existence of an agreement between parties (exh. PE3) executed on 08/11/2011 and that, plants and equipment belonging to MIG Industries Ltd were removed from the plaintiff's

property, kept and stored in defendant's safe custody before the same went missing allegedly taken from the defendant's site by one YONO Auction Mart Ltd. It is also uncontroverted fact that, the plaintiff discharged her duty for payment of Tshs. 21,000,000/- to the defendant as consideration for the work as exhibited in payment receipts exhibit DE4 collectively. It is further uncontested that, after the removal exercise was completed the defendant vide her letter exhibit PE6 reported back to the plaintiff that the plants and equipment removed were securely kept with security on alert 24 hours awaiting for collection by the owner upon payment of storage charges and other charges if any. What makes parties' lock horns is the issue as to whether the defendant breached contract or not, in which the plaintiff insists she did as a result she suffered loss while the defendant says she did not. Before I embark on determination of the said issues, I wish to state the principles under which the Court will be guided when discharging such duty. It is trite law that, as clearly provided under sections 110 and 111 of the Evidence Act, [Cap. 33 R.E 2019] that, he who alleges must prove and the onus of so proving lies on the party who would fail if no evidence at all were given on either side. The principle is more elaborate in a number of cases.

It was held in the case of **Abdul Karim Haji Vs. Raymond Nchimbi Alois and Another**, Civil Appeal No. 99 of 2004 (CAT-unreported) that:

> *"…it is an elementary principle that he who alleges is the one responsible to prove his allegations."*

As to the standard of proof in civil cases the law provides it is on a balance of probabilities as dictated under section 3(2)(b) of the Evidence Act, [Cap. 6 R.E 2019]. See also the case of **Anthony M. Masanga Vs. Penina (Mama Ngesi and Another** civil Appeal No 118 of 2014 CAT (unreported) and **Mathias Erasto Manga Vs. M/S Simon Group (T) Limited**, Civil Appeal No. 43 of 2013 (CAT-unreported). In the case of **Mathias Erasto Manga** (supra) the Court of Appeal while discussing on what amounts to proof on balance of probabilities in civil matter made reference to the case of **Re Minor** (1996) AC 563 where it was held that:

> *"The balance of probability standard means a court is satisfied an event occurred if the court considers that, on the evidence the occurrence of the event was more likely than not."*

In light of the above guidance in this matter since it is the plaintiff who claims breach of terms of agreement against the defendant the onus of so proving lies on her and she has to reach the standard set by the law. Having laid the

ground for determination of the issues I now move to consider all grounds as framed. I shall start with the first ground as to whether the defendant breached the agreement by unlawfully disposing of and or negligently causing the properties put under its custody by the plaintiff to be illegally and unlawfully damaged, lost and or disposed of. Mr. Kirita submitted that, exhibits PE3, PE5 and PE6 is sufficient evidence to prove that breach of contract by the defendant. Mr. Tarimo on the contrary view that, since the same were taken from the defendant by YONO Auction Mart while executing a lawful court order in which the defendant could not resist, then she should not be condemned to have breached the contract. And added that, it is the plaintiff who breached the contract for failure to collect them within three months as specified in paragraph 8 of exhibit PE3. It is learnt from the evidence of PW1 as well as the terms of agreement (exhibit PE3) in paragraphs 4 and 5 that, the defendant undertook and was duty bound to use all necessary care to make sure that plants and equipment are carefully removed without being damaged or stolen and that shall insure them against the risks of damage and theft at all time of its storage. Paragraph 4 of the agreement (exh.PE3) reads:

4. *That, MAJEMBE shall in the course of execution of the work the subject of this deed, use the necessary care and make sure that the plants and equipments are carefully removed without being damaged or stolen and that they shall also be kept in safe custody under the care of MAJEME at its yard until they are collected by MIG Industries or lawfully sold.*

And paragraph 5 of exhibit PE5 reads:

5. *That, MAJEMBE shall insure the plants and equipments to be removed against risks of damage and theft during the removal process as well as during the period of storage and safe custody at MAJEMBE YARD.*

Whether the defendant abided to the above clear terms is the question to be answered soon. When testifying under cross examination as to whether the said suit properties were collected by MIG Industries Ltd or lawful sold by the plaintiff, DW1 said none of them took place. And when questioned further as to whether the plaintiff was notified of such removal of its properties from the defendant's yard by the alleged YONO Auction Mart Ltd, he also confessed to have not passed such information. Further to that, DW1 confessed to the defendant's failure to resist removal of the suit properties from her yard. Since the defendant was duty bound to protect and secure

the suit properties placed under her custody but omitted to do, in my humble view such omission amounted to negligence and clear breach of duty of care as per the terms in paragraphs 4 and 5 of exhibit PE3 for making sure that the said suit properties are stored in safe custody before are collected by its owner or sold by the plaintiff. The assertion that she could not prevent YONO Action Mart Ltd from executing a lawful order with due respect to Mr. Tarimo, I find to be a lame excuse as her duty was to make sure that the said suit properties which no doubt were not subject of the said eviction order are removed and stored in another safe storage or inform the plaintiff and hand them back to her as she had prior notice to such eviction as evidenced in DW1's evidence in chief. I so view as there is even no evidence to the effect that the defendant took any legal measures against the said YONO Auction Mart Ltd for her unlawful act of removing the said suit properties from her yard to undisclosed area. To bless Mr. Tarimo's argument that, the act f YONO of taking away from the defendant's yard the said suit properties during execution of Court's order not related to them relieved her from discharging her duty of care and securing them from being lost, is tantamount to re-drafting the parties' agreed terms which is not the duty of this court but rather to enforce them. The Court of Appeal in the case of

Lulu Victor Kayombo Vs. Oceanic Bay Limited & another, Consolidated Civil Appeals No.22 & 155 of 2020 when deliberating on the duty of the Court to enforce parties agreement quoted with approval the case of **Unilever Tanzania Ltd Vs. Benedict Mkasa Bema Enterprises** ,Civil Application No.41 of 2009,where the Court had this to say;

> *"Strictly speaking, under our laws, once parties have freely agreed on their contractual clauses, it would not be open for the courts to change those clauses which the parties have agreed between themselves... It is not the role of the courts to re-draft clauses in agreements but to enforce those clauses where parties are in dispute."*

The wordings in the above quoted case are in clear and unambiguous terms that, once parties the contract is executed parties are legally bound by its terms, therefore in case of any dispute they should seek for court's interference towards enforcement of the said terms and not court's assistance to re-draft the agreed terms in accordance with their wishes.

In interpreting the said terms Court should also consider the intention of parties toward execution of such agreement or imposition of a disputed term. This position was adumbrated in the case of **Exim Bank (Tanzania)Limited Vs. Dascar Limited and another**, Civil Appeal No.92

of 2009 (CAT-unreported) the Court of Appeal quoted the decision of the Supreme Court of Uganda in **Magezi And Another Vs. Ruparelia** (2005) 2 E.A 156, which they found persuasive,where it was held that:

> *"The intention of the parties to an agreement was to be determined from the words used in the agreement. However, in resolving an ambiguity, the court could look at its commercial purpose, and the factual background against which it had been made".*

In this case as per paragraphs 4 and 5 above of the deed of agreement exhibit PE3, it was the intention and both parties' agreement that, the said suit properties belonging to MIG Industries Ltd be removed from the plaintiff's property and be kept under safe and secure custody of the defendant until when the same are collected by its lawful owner or lawful sold. As alluded to above the defendant failed to abide to such clear and unambiguous terms of the contract as a result the said suit properties got lost from her custody, the act which I am inclined to hold is a breach of the said contract. I so hold while discounting her contention that, the plaintiff also breached the contract for failure to collect her suit properties within three months of its removal and hence acted in contravention of the terms in paragraph 8 of the agreement exhibit PE3. It is in evidence of both PW1

and DW1 that, soon after expiry of three months of removal of the suit properties which were under defendant's custody there was no correspondences between the two as to whether the same is extended or not. It is trite law that, once the party who is duty bound to revisit, renew or terminate the term or whole agreement decides to remain mute the interpretation is that, the agreement or its term if any is to be renewed, revisited or terminated, remains in force until when stated otherwise. In this matter since the defendant did not inform the plaintiff of expiry of the time for keeping her properties in safe custody, then she automatically accepted to continue being bound by the terms of agreement. Under such circumstances, I hold she cannot free from the liability. In the end, I find the first issue to be answered in affirmative, the answer which gives the Court a lee way to consider the second issue.

As to the second issue whether the plaintiff suffered any loss, I think the same should not detain this Court much. I so view as it is stated by the plaintiff that, she wanted to attach and sell the suit properties which were placed under custody of the defendant in execution of the decree of this Court in Land Case No. 109 of 2011, the properties which DW1 confirmed to have no any clue or its whereabouts now, after the same being taken away

by YONO Auction Mart Ltd during execution of a lawful order, hence proof that the plaintiff must have suffered loss or damages. Now the only glaring question is to what extent is the said loss suffered, the same being specific damages. Indeed there is no answer to this query. It is the law that, specific damages must be pleaded and specifically proved as stated by jurists and in plethora of cases. Justice Yaw Appau, Justice of the Court of Appeal, in his Paper Presented at Induction course for newly appointed circuit judges at the Judicial Training Institute (Ghana), **Assessment of Damages**, *(www.jtighana.org)* at page 6 on proof of special or specific damages had the following to say and I quote:

> *"Unlike general damages, a claim for Special damages should be specifically pleaded, particularized and proved. I call them three P's."*

The Court of Appeal in the case of **Zuberi Augustino Vs. Anicet Mugabe**, (1992) TLR 137 at page 139, in express terms on proof of specific damages said:

> *"It is trite law, and we need not cite any authority, that special damages must be specifically pleaded and proved."*

Similar observations were echoed by the Court of Appeal in the case of **Peter Joseph Kilibika and Another Vs. Partic Aloyce Mlingi,** Civil Appeal No. 39 of 2009 (CAT-unreported) when cited with approval the holding of Lord Macnaughten in **Bolog Vs. Hutchson** (1950) A.C 515 at page 525 on special damages, that:

> *"… such as the law will not infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their character and, therefore,* ***they must be claimed specifically and proved strictly.***" (Emphasis supplied)

What is gleaned from the above cited cases is the principle that, once a claim of the specific item is made by the party, then the same must be specifically pleaded, particularized and proved, meaning three P's must exist. In this matter the plaintiff claims that loss of suit properties that were placed under defendant's custody as bailee for reward, suffered her loss. She however failed particularise and prove the extent of such damages or loss suffered. It is in PW1's evidence corroborated with that of DW1 that, during the removal exercise of the suit properties the same were listed in the inventory sheet exhibit PE5. It is however learnt from their further evidence that, neither the plaintiff nor the defendant happened to know or mention the value of the said properties leave alone the fact that the plaintiff could not

even identify their number, type and state they possessed when entering into agreement with the defendant on their removal. In view of that evidence I have no flicker of doubt that, the plaintiff failed to prove the extent of loss or damages suffered, though no doubt that she suffered some. The second issue is answered in affirmative that, the plaintiff must have suffered loss, though its extent is unknown.

Now as to what reliefs are the parties entitled to, Mr. Kirita for the plaintiff prayed the Court for grant of all reliefs as prayed in the plaint. Conversely, Mr. Tarimo resisted the prayers submitting that, the plaintiff is entitled to nothing as the suit properties at the time of institution of this case had attained zero value for depreciating at the rate of 25% per year counted from 2011. That aside he added that, the plaintiff shares a large part of blame for not even recognising her own properties leave alone the fact that the Company's existence itself (plaintiff) is also questionable. With due respect to Mr. Tarimo, I find all these allegations to be an afterthought. I so view as the same were never raised in the defendant's defence when filing the written statement of defence since parties are bound by their pleadings as it was held in the case of **Charles Richard Kombe t/a Building Vs.**

Evarani Mtungi and 2 Others, Civil Appeal No. 38 of 2012 (CAT-unreported) where the Court had this to say:

> *"It is cardinal principle of pleadings that the parties to the suit should always adhere to what is contained in their pleadings unless an amendment is permitted by the Court. The rationale behind this proposition is to bring the parties to an issue and not to take the other party by surprise. Since no amendment of pleadings was sought and granted the defence ought not to have been accorded any weight."*

Applying the principle set down in the above cited case to the facts of the present matter, it pertinent clear that if the defendant wanted to question the existence of the plaintiff whom she executed an agreement with and the issue of depreciation of the suit properties value which were not pleaded, ought to sought amendment to amend her WSD in which she failed to do. Since she failed to raise those assertions in her WSD raising them at this stage is to take the plaintiff by surprise as she will have no avenue to counter them. I therefore reject them.

Before pen off, I find it imperative to respond albeit so briefly on the plaintiff's alternative prayer that, should this Court fail to grant the second relief by ordering the defendant to surrender to the plaintiff the suit

properties then be pleased to order her to satisfy the decree of this Court in the Land Case No.109 of 2011 in favour of the Plaintiff in the sum of USD 236,040.00 and Tshs.20,000,000.00 respectively. With due respect this prayer is unaccommodated under the circumstances of this case for three reasons. One, the two cases are not one and the same and parties in the said Land Case No.109 of 2011 are different to the ones in the present case as parties in the said case were Plaintiff as decree holder and MIG as judgment debtor while in this case it is the plaintiff and the defendant who is not judgment debtor in that case. A decree originating from a separate case involving two different parties cannot be executed against either the same or different judgment debtor in another suit. Second, for the purposes of execution of the Court decree in the said Land Case No.109 of 2011 this is not an executing Court as the plaintiff ought to have brought an independent and separate application to that effect. Third, the value of suit properties in this matter is unknown therefore not easily recoverable in terms of monetary value unless the same is disclosed. Assuming the value is known which is not the case still I could hold, it is impracticable to execute such decree in Land Case No.109 of 2011 against the defendant herein, as I know

no law that allows such practice. In view of the above position I dismiss the alternative prayer by the plaintiff.

That said and done, judgment is hereby entered for the plaintiff on the following reliefs: -

1. The defendant breached the deed of agreement executed between her and the plaintiff on 08/11/2011.
2. The defendant is ordered to surrender to the plaintiff the suit properties which were under her custody as bailee for reward as listed in the inventory sheet.
3. The defendant shall pay the plaintiff costs of this case.

Order accordingly.

DATED at DAR ES SALAAM this 22nd day of July, 2022.

E. E. KAKOLAKI

JUDGE

22/07/2022.

The Judgment has been delivered at Dar es Salaam today 22nd day of July, 2022 in the presence of Mr. Idd Msangi advocate holding brief for advocate Deogratias Lyimo for the Plaintiff, Mr. Methodius Tarimo advovate for the Defendant and Mr. Asha Livanga, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI
JUDGE
22/07/2022.