IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL CASE NO 57 OF 2020

SCANCOURIERS LIMITED..... PLAINTIFF

VERSUS

DHL TANZANIA LIMITED.....DEFENDANT

JUDGMENT

Date of last order: 14/09/2022

Date of Judgment: 28/10/2022

E.E. KAKOLAKI, J.

The Plaintiff Scancourier Limited by way of plaint instituted the instant suit against the above-named defendant praying for the judgment and decree on the following orders:

(a) A declaration that the defendant breached the contract.

(b) Payment of Tanzanian Shillings two hundred and twenty million Only (Tsh.220,000,000.00) by the defendant to the plaintiff.

(c) General damages.

(d) Court's interest of 12% from judgment till full payment.

(e) Costs of this suit.

(f) Any other reliefs this court deem just and equitable to grant.

Upon being served with the plaint, the defendant filed a Written Statement of Defence disputing plaintiff's claim while responding that, the plaintiff does not deserve any redress as against the defendant whether in law, contract or equity. On the above reasons the defendant argued this court to dismiss the suit with cost.

The brief facts giving rise to this suit deduced from the plaint are not complicated and can be simply stated as hereunder. The plaintiff who is the lawful owner and operator of a logistics companies and transportation center within various region in Tanzania, in the year 2009 entered into contract with the defendant, the courier company, where by the plaintiff was appointed as an independent contractor for the defendant for provisions of collection and delivery services in respect of defendant's customers and the collection of any payment due by such customers for and on behalf of the defendant. It is also in averment that, the plaintiff was appointed by the Defendant to act as its duly authorized service provider of transportation/line haul in respect of the territories defined as Morogoro, Iringa, Mbeya, Dodoma, Kilimanjaro, Rukwa, Ruvuma). Further to that agreement by an addendum dated 31st January 2011 extended the territory to include Singida region, for the terms and conditions stipulated in the 2009 agreement. The said agreement which

the plaintiff alleges had exclusivity clause was peacefully performed between the parties until sometimes in 2019, when the defendant is accused to have issued the plaintiff with a termination notice in respect of the said agreement and ceased all operations by the plaintiff despite the fact that the said notice referred to agency agreement and not the 2009 agreement. Subsequent to that it is asserted, in 2019 the defendant engaged other agencies for the like services in the same territories (Iringa, Morogoro, Dodoma and Mbeya) which engagements were all in violation of the contract as the said territories were exclusively in the domain of the plaintiffs under the indefinite contract which was to be terminated upon issue of three months' notice. The plaintiff alleges that, she suffered economic loss of profit, damages and /or interest arising out of that breach of contract to the tune of Tsh.220,000,000.00). Since defendant the failed to honour terms of contract, the plaintiff opted for a court action by passing Board resolution to initiate these proceedings for the loss sustained. It is due to that background the present suit is preferred by the plaintiff claiming for the reliefs as alluded to above.

In this case, plaintiff enjoyed the legal services of Ms. Raya Nasir and Mr. Ally Ismail, while the adversary party, hired the legal services Mr. Lubango Shiduki and Kavola Semu, both learned counsels. Before hearing could start,

with involvement of parties counsels the following issues were framed by the Court for determination of parties' dispute:

(1) Whether the memorandum of agreement was lawful terminated.

(2) If the first issue is answered in affirmative, whether the plaintiff suffered loss in respect of the said termination.

(3) What reliefs are the parties entitled to.

To prove her case, plaintiff called one witness Ms. Ebtisam Bobsaith, the principal officer and acting Director of Scan courier Ltd, who testified as PW1 and relied on a number of exhibit totaling eight (8). Like the plaintiff, the defendant on her side summoned one witness Mr. Stanslaus Mokiwa Joseph, the Country Commercial Manager of DHL (DW1) and tendered no any exhibit instead relied on the plaintiff's exhibit in her attempt to dismantle plaintiff's case. The plaintiff through PW1 informed the Court that her company is incorporated in accordance with the law dully authorized to provide services of transportation and carrying of goods from one place to another within Tanzania including Dar es salaam. She tendered several documents including Tin, VAT, VAT and TCRA certificates in proving that fact. (Exhibit PE1 collectively). She said, the plaintiff's relationship with defendant based on contractual relationship of the 2009 memorandum of agreement between

the defendant and the company known as Scandinavians Express Services Ltd, which later changed its operation name to Scan coach Ltd of 2010 and finally into ScanCourier in 2011, in which all three directors, service rates and bills charged remained. The said agreement and letters for change of names were tendered as exhibits PE2 collectively. Apart from the 2009 agreement for transportation of goods from DHL office to the service points in the Regions, in 2012 parties entered into Agency Agreement for the plaintiff to render operations/ services including calling customers for collection of their sent goods, delivery of goods at destination points if any indicated and other agencies services. All these services in PW1's testimony were known as handling services, while the operations for transportation were called transportation services and even the bill and EFD receipts issued for the two services rendered were different. 12 copies tax invoices, three bundle monthly summary for pick up and shipment delivery were tendered as exhibit PE4 to prove that fact. According to her, all the operations went well under same contract of 2009 up to 2019. She testified that, in 2014 and 2019 there was an increase of transportation rates that was acknowledged by the DHL (T) Limited Management and relied on email conversations between Scan courier and DHL (T) Ltd which were admitted as Exhibit PE3.

PW1 informed the Court that, the dispute in this court was in relation to line haul/transportation agreement in which the defendant breached without notice and in violation of the terms of agreement. She stated, since 2009, plaintiff was the sole Courier Service provider under transportation agreement of 2009 as she had exclusive advantage over years in the territories mentioned in 2009 agreement which are Morogoro, Iringa, Mbeya, Dodoma, Kilimanjaro, Rukwa, Ruvuma regions and later on through the agreement of 2011 Singida region as proved the tendered exhibit PE5. According to PW1 payments for the services rendered were done monthly, in which the company was receiving minimum earnings of Tsh.12.5 per territory under the transportation or line haul agreement, hence a total of more than 900 million per year for seven (7) territories they used to render services depending on the seasons. To prove that fact, she tendered sample of copies of tax invoices showing that earnings together with bank details as Exhibit PE6.

As regard to the reason for suing the defendant PW1 testified was due to abrupt cessation of the business by the defendant to plaintiff for which no notice of termination was ever issued to her to-date, the default which led her to suffer a loss of minimum of Tsh.220 million since the plaintiff had

work forces in place (officers), incurred operation costs and had to pay government taxes. She elaborated, defendant cessation of business operations breached the 2009 contract which was a life time contract with exclusivity term to provision of services by the plaintiff only, but to the contrary in 2019, the defendant stopped using their services and engaged other transport providers without termination notice of three months as provided in their contract, instead engaged services of Mwananchi communication Ltd and other courier service providers. She elaborated, the breach was noted when the plaintiff saw their competitors collecting bags and goods from DHL for transportation but wanted to use plaintiff's agency services at delivery points in the regions which was denied. She clarified that, the only termination notice received was with regard to agency services agreement which is the additional agreement and not the main contract. To exhibit that fact the notice of termination was tendered and received exhibit PE 7.

PW1 went on informing the Court that, the plaintiff decided to claim for Tsh. 220 million based on the invoices of 2019 only as she could have claimed annual income of Tsh.900 million, which according to her would be greedy for not based on genuine claims. On the plaintiff's authorization to institute

that suit she tendered the board resolution exhibit PE 8. She eventually prayed the court to pronounce that, DHL has breached the 2009 contract and order her to pay Tsh. 220 million due to the loss incurred, damages and costs that the court deem fit to grant including legal costs incurred.

When subjected to cross examination by Mr. Shiduki on the exclusivity clause in the agreement, PW1 stressed that, the same is stated at clause 2.4 of the contract, and further elaborated in clause 1.2.4.9. When referred to Clause 1.2.4.4, she insisted the same mentions about single source provider and not other providers. To confirm that stance she said, there is an email from operational manager Mr. Dan Macau pleading them not to stop the operation as they were the only service provider. When pressed to the question on whether she had proof that defendant was trading with Mwananchi communication, she said, there is a Tax invoice from Mwananchi proving so though she did not tender it in court. When asked whether they suffered the calimed loss she said, plaintiff suffered loss to the tune of Tsh. 220 Million as according to clause 10.1 of 2009 agreement, Tsh.12.5 million were the payment and fees rates per territory, the amount which if multiplied by three months' in which the notice of termination was to be issued times seven (7) territories the loss reaches to 262 Million, but as a matter of sincerity the

plaintiff decided to claim Tshs. 220 million only. When asked whether she tendered any document to prove that the workforce, operational costs, tax and other government revenue could not be paid as a result of breach of contract, she said none was tendered. That marked the end of the plaintiff's case.

In defence, DW1 did not dispute existence of the 2009 agreement with plaintiff as service provider in the designated Regions. When referred to exhibit PE2, the contract DW1 said, it was an open contract with automatic renewal after every two years. He interpreted clause 1.2.4.9 of the said contract to mean that the same does not show any exclusivity as DHL could do business with any other courier company. Concerning clause 2.4 at page 12 of the agreement he said, the same means DHL had appointed the service provider to operate on the designated areas only, with the intention of limiting the service provider from operating outside the designated regions but did not mean to restrict DHL from operating with other Courier Service providers. Concerning clause 3.1 of the agreement at Page 14 he said, the same refers to indefinite contract unless terminated by notice in terms of clause 3.2 and 3.3 which termination notice he said was never issued hence the agreement is still valid.

When referred to Exhibit PE7, he said the same is the notice of termination of agency agremment between DHL and Bobsaith Logistics Company who was the DHL service agent, and clarified that, the same never affected the 2009 agreement between the two parties. As to why the defendant ceased plaintiff's operation DW1 testified that, since the outbreak of COVID 19 pandemic defendants' business went down and affected the defendant's business operations, thus to remedy the situation, defendant opted to do more of herself on the inland services by using their own motor cycles and vehicles. He said, for that reason there was no enough goods or consignment to pass to Scancourier as their service provider, but their 2009 agreement is still in existence to-date.

When referred to clause 10.1.1 of the agreement at page 31 of 2009 contract, he said the same meant that, the service provider shall be paid Tshs.12.5 million each month for the services rendered under the contract and not otherwise. He went on testifying that, since 2019 there is no any business services rendered by the plaintiff entitling him to any payment due to the facts that, no goods for transportation were given to her due to fall of business on the defendant's part.

When referred again to the 2009 agreement by Mr. Shiduki, DW1 maintained that, there is no clause in the said contract giving to the plaintiff exclusive right of providing services for the defendant but she would only be supplied with goods depending on the availability. He then denied the fact that defendant breached the contract of 2009 as before suing, the plaintiff never inquired from the defendant as to why the supply of goods had gone down. According to him, in their contract there is no single clause imposing to the defendant the duty to supply the plaintiff goods of specific volumes or amount in term, or to inform them of the fall of business. He rested defendant's case by informing the Court that, this case is premature as the contract is still valid thus, he prayed for its dismissal with costs.

When subjected to cross examination by Ms. Nasir and referred to paragraph 8 of the WSD on defendant's response to the issue of notice, DW1 said, if there is any notice issued in respect of 2009, it is wrong. When referred to the contract he said, the term automatic renewal is not indicated anywhere in the contract, he maintained that, the defendant was not committed to trade with the plaintiff only. He elaborated further that, since 2009 up to 2016 they used other vendor, such as Be courier, Mwananchi Communications, air Tanzania, Advanced Courier and others though he does

not remember the regions they covered as were rendering services basing on the prevailing requirements. When subjected to question as to whether he tendered any document proving that DHL traded with other vendors he admitted to have tendered none. When further questioned as to whether the defendant committed any transaction to the plaintiff to justify existence of 2009 agreement admitted that, no goods were ever supplied after the termination notice of 2019. He elaborated, under clause 2.1 of the agreement the supply of goods to vendors depend on the requirement and availability of customers. When referred to clause 1.2.4.9 of the agreement on the definition of shipment, he said the same means, goods which are collected by the two parties on behalf of the customers. He testified that, the defendant never informed plaintiff of their business status when allegedly went down. When referred to paragraph 10 of the WSD, DW1 said, he never tendered any evidence concerning breach of the contract by the plaintiff that resulted into termination of the contract as stated in paragraph 10 of the WSD. When asked about the meaning of "as and when required" in the independent contract, DW1 said the same means that, the contractor can assign the service provider any duty of supply or collection of goods at any time. He told the court that, he does not know whether the plaintiff had

employees as in collection of goods from the defendant's storage the plaintiff used to send cars or motor cycles with her staff. This was the end of the defence case.

After each part had closed its case, the learned advocates for the parties prayed for leave of the Court to file their final submissions the prayer which was granted and parties adhered to the filing schedule. I had time to read their final submissions in support of their respective stances. I truly commend them for their hardworking and insightful inputs that assisted me in composing this judgment. I am not intending to reproduce the same, but in the course of determining this suit, I will be referring to them.

Having narrated the evidence by the parties here in, and having gone through the final submission by the two legal minds, I will now endeavor to consider the three issues as framed. In so doing, I shall be guided by the principles governing civil cases thus, one, he who alleges has the duty to prove the allegations as encompassed in section 110(1) and (2), and 111 of the Evidence Act. Second, the party with legal burden also bears the evidential burden and the standard in each case is on a balance of probabilities as provided under section 3(2). See also the case of **Anthoni M. Masanga Vs. Penina (Mama Ngesi) and Another**, Civil Appeal No.

118 of 2014 (CAT-unreported) and **Henry Rimisho Mtenga Vs. Airtel Tanzania Limited**, Civil Appeal NO. 145 of 2020 (HC-unreported). With that knowledge in mind therefore, this court is to decide whether the burden of proof has been sufficiently discharged by the plaintiff herein.

Now before I start resolve parties center of controversy, I wish to point some of the facts which are not disputed. Firstly, it is not uncontroverted that the plaintiff and the defendant had contractual relationship in business, both transportation (Line haul) of 2009 and agency services of 2012. Secondly, parties are at one that, the termination notice exhibit PE 7, referred to the extended Agency Agreement dated 18th December, 2017 which had retained the terms and conditions of the Agency Agreement between DHL and Bobsaith Logistics Company dated 1st June 2012 and not the 2009 agreement. Having carried those facts in mind, I will now revert to consider the issues in in dispute.

Starting with the first issue as to Whether the memorandum of agreement was unlawful terminated. The plaintiff alleges that, since 2019, when defendant issued her with termination letter concerning another contract with Bobsaith Logistics, ceased to provide her with shipments as a service provider. according to Ms. Nasir such cessation constituted breach of the

2009 agreement by the defendant as she engaged services of Mwananchi Communication in contravention of the agreement which was giving the plaintiff exclusive domain of provision of service, meaning that, the defendant could not hire or engage another service provider without prior termination of the contract. On the other hand, Mr. Shiduki for the defendant resists such claim of breach of contract submitting that, the defendant never breached the contract as the same is still intact and that there is no any clause restricting the defendant from employing or using another service provider. To disentangle such parties' ambiguity this Court had to examine the contents of exhibit PE 2, 2009 contract, to see whether the same can shed light in the matter, while guided by the settled principle of law that, the intention of the parties to an agreement is derived from the words used in agreement. See the principle in the case of **Magezi & Another Vs. Ruparelia (2005) 2 E.A 156** quoted with Approval by the Court of Appeal in the case of **Exim Bank (Tanzania) Vs. Dascar Limited and Another,** Civil Appeal No 92 of 2009 (CAT) where the Court insisted on the need of intention of parties to be determined from the words used in the agreemen and said:

> *"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."*

After thorough perusal of Exhibit PE 2, especially clause 1.2.4.9 and clause 2.4, in which the plaintiff relies on to base her claim of exclusivity on provision of transportation services on behalf of the defendant, has not come out with any supportive materials to the plaintiff's assertion on exclusivity of transportation services provision nor does the contract prohibit the defendant from using another service provider. Rather, clause 1.2.4.9 is describing the term 'shipment' as items which were to be collected or delivered on behalf of the customer by DHL and /or by service provider on behalf of DHL, while clause 2.4 specifying the territories under which plaintiff is strictly authorized to operate as agent of the defendant. As rightly submitted by the defendant's counsel, plaintiff did not prove which specific clause or term in 2009 agreement that was violated by the defendant. That aside, there is no specific clause singled out by the plaintiff establishing that the defendant was obliged to assign specific threshold of shipment at a certain given time under the contract. In my profound view, if the contract

had intended to prohibit the defendant from using another service provider or meant to entitle the plaintiff with exclusivity in provision of service as defendant's agent, it would have been clearly stated and conspicuously seen as the term of the contract setting out parties' intention under their agreement. Thus a finding that there was no breach of any term of contract by the defendant. Even when the court is to believe that there was such exclusivity clause which is not the case, still I would hold similar view as the plaintiff did not bring any proof that, the defendant used another service provider instead of continuing to provide the plaintiff with shipments for transportation.

In view of the above the plaintiff's allegation of breach of the 2009 agreement or its termination by the defendant lacks basis. As alluded to above, the standard of proof in civil case is on balance of probability which means that, the court will rely and believe the evidence with probability that an event occurred or the term existed, if the court considers that, on the evidence the occurrence of the event was more likely than not, then the burden is discharged. This was well illustrated in the case of **Miller Vs. Minister of Pension** (1937) 2All ER 372, the case which was quoted with approval by the Court of Appeal in the case of **Paulina Samson Ndawavya**

Vs. Theresia Thomass Madaha, Civil Appeal No 45 of 2017 (CAT-Unreported) where it was stated thus:

> *"If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to a determinate conclusion one way or the other, then the man must be given the benefit of the doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in a civil case. That degree is well settled.* ***It must carry a reasonable degree of probability****, but not so* ***high as required in a criminal case****. If the evidence is such that the tribunal can say - We think it* ***more probable*** *than not the burden is discharged, but, if the probabilities are equal, it is not…"*

Similalry the Court of Appeal in the case **Berelia Karangirangi Vs. Asteria Nyalwambwa,** Civil Appeal No.237 of 2017 (CAT-Unreported) on the principle governing proof of civil case cited with approval the case of **In Re B** [2008] UKHL 35, where Lord Hoffman stated that:

> *"If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a*

value of 0 is returned and the fact is treated as not having happened."

Guided with the principles in the above cited case, in this case since the burden of proving that the defendant breached the Court laid on the plaintiff's shoulders and since the plaintiff failed to prove to the Court's satisfaction that, there was such termination of 2009 contract or breach of its terms, it suffices to say that, the 2009 contract between the parties herein is still existing as the same was never terminated either lawful or unlawful. On the first issue, I therefore answer it in negative.

Next for consideration is the second issue as to whether plaintiff suffered damages. The claimed suffered damages in the instant case is 220 million based on the allegation that, the abrupt cessation of business by the defendant caused loss to the plaintiff. According to the plaintiff the claimed damages covers government taxes, operational costs, and government revenue for three months since the defendant failed to issue her with notice of termination of the contract. In his submission, the defendant is of the contrary view in that, as per the agreement, the plaintiff is entitled to payment when renders services. Since there was no service provided by the plaintiff to entitle him the claim said amount, there was no justification in her claims. I think this issue need not detain this Court since it is already

held in the first issue that, the contract was never terminated for want of proof of breach of contract. As there was no proof of breach of contract, this Court is satisfied that the plaintiff suffered no damages at all. Hence the issue is also answered in negative.

Lastly is the third issue as to what relief are the parties entitled to. As it is herein found that, the 1st and 2nd issues have not been proved by the plaintiff to the standard required by the law which is the balance of probabilities as stated in the case of **Anthoni M. Masanga (Supra)** there is no materials before the Court justifying grant of any relief claimed by the plaintiff. That being the position, the resultant consequence is to dismiss the suit in its entirety, which order I do hereby enter with costs.

It is so ordered.

Dated at Dar es Salaam this 28th day of October, 2022

E. E. KAKOLAKI

JUDGE

28/10/2022.

This Judgment has been delivered at Dar es Salaam today 28th day of October, 2022 in the presence of Ms. Mariam Saleh, advocate for the

Plaintiff, Mr. Method Nestory, advocate for the Defendant, and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI
JUDGE
28/10/2022.