

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL CASE NO. 241 OF 2019

S AND Y WOOD PRODUCT COMPANY LIMITED..... PLAINTIFF
VERSUS

GJB AGENCY LTD..... DEFENDANT

EX-PARTE JUDGMENT

Date of last order: 03/06/2022

Date of Judgment: 10/06/2022

E.E. KAKOLAKI J.

This is an ex-parte Judgment in which, the plaintiff *S and Y wood products Company Limited*, by way of plaint instituted the instant suit against the above-named defendant, *GJB Agency Ltd*, praying for Judgment and decree on the following;

- (a) Payment of Tsh. 424,350,000/-
- (b) Interest in the decretal sum at court rate from the date of judgment at current commercial banks leading rate of 25%
- (c) Interest at the decretal sum at court rate from the date of Judgment till payment in full.
- (d) General damages.

(e) Cost of the suit.

(f) Any other orders and reliefs this Honorable court may deem fit to grant.

Briefly the plaintiff herein is a private company trading in wood products inside and outside the country. As per the plaint on 28th March 2018, she entered into contract with the defendant for supply of 3543 pieces of Marine Boards valued at Tsh. 152,349,000. Following execution of that contract, the plaintiff successfully delivered the goods to the defendant as agreed, and the defendant paid an advance of Tsh. 83,349,000/- thereby leaving the total amount of Tshs. 69,000,000/- unpaid, in which she promised to pay in three months' time before 9th May 2018, as thereafter one percent interest (1%) of the unpaid up amount would be charged per day as compensation. It appears despite various demands, reminders and promises to pay, the defendant failed to perform his obligation as agreed hence this suit by the plaintiff claiming for payment of the outstanding balance of Tshs. 69,000,000/- plus interest to the tune of Tshs. 355,350,000/- and other reliefs as alluded to above.

Upon being served with the plaint, the defendant did not find it important to enter her Defence, but rather on 24/03/2020 admitted the claimed and

unpaid up principal amount of Tshs. 69,000,000/- in which judgment on admission was entered against her. As no written statement of defence was filed by the defendant challenging the claimed interest, and considering the the plaintiff counsel's prayer this Court on 11/06/2020 ordered the plaintiff to prove the said interest and other reliefs ex-parte.

The plaintiff at all material time has been enjoying the legal services of Mr. Innocent Mwelelwa, learned advocate and in her bid to prove her claims presented before the Court one witness, Mr. Titus Lephy Gembe, (PW1) and tendered one exhibit, a contract (exhibit PE1). PW1 the assistant manager to the Plaintiff CompaNy duly employed since 2014 told this court that, the defendant was one of their customers whom the plaintiff supplied plywood worthy 152,449,000 after executing a sales agreement with her on 28/03/2018(exhibit PE1). He testified that, out of the contractual amount the defendant paid on 83,349,000/- thus remained with the outstanding balance of Tshs. 69,000,000/- in which among other terms it was agreed that the same would be paid before 9th May, 2018, failure of which would attract interest of 1% of the unpaid amount every day. PW1 went to inform the Court that, up to March 2021 the plaintiff managed to settle the outstanding principal amount of Tshs. 69,000,000/- except the claimed interest of 1% of

the outstanding amount to the tune of Tshs. 355,350,000/- in which the defendant without justifiable reasons failed, neglected and ignored to pay as per the agreed contract. It was PW1's prayer that, this court be pleased to order the defendant to pay the plaintiff the claimed interest as per the contract. That marks the end of the plaintiff's case.

It is worth noting at this juncture that, this being a civil suit the standard of proof is on the balance of probabilities, where the court has to satisfy itself basing on the adduced evidence that *occurrence of the event was more likely than not*. See the cases of **Re Minor** (1996) AC 563 and **Mathias Erasto Manga Vs. M/S Simon Group (T) Limited**, Civil Appeal No. 43 of 2013 (CAT-unreported). And that under sections 110(1) and (2) and 111 of the Evidence Act, [Cap. 06 R.E 2019] he who alleges must prove that a certain fact exists, in which in this matter the onus of proof lies on the plaintiff. The Court of Appeal in the case of **Abdul Karim Haji Vs. Raymond Nchimbi Alois and Another**, Civil Appeal No. 99 of 2004 (CAT-unreported) had the following to say on the onus of proof:

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

Having gone through the pleadings, testimony of PW1 and the contract (exhibit PE1), I have no flick of doubt that, the relationship between the parties was regulated by the said agreement/contact. It is also uncontroverted fact that the defendant managed to pay the principal contractual amount of Tshs. 152,349,000/- which last instalment was paid in March 2021 as the remaining disputed amount is the claimed interest of Tshs. 355,350,000/-. Now that being the position the only issues which this court is called to determine are, two. One, whether defendant breached the terms of the contract for payment of interest of 1% of the due amount and second, what reliefs are parties entitled to.

To start with the first issue, it was PW1's testimony that, in their contract had a term and condition that in the event the defendant defaults payment of the outstanding amount the plaintiff will be entitled to 1% interest of unpaid amount every day. A glance of an eye to the said exhibit PE1 has revealed that, that term is reflected under article V item 5.1 of their contract (Exhibit P1). The said article V item 5.1 of the contract reads and I quote:

5.1. Party A's liability for breach of contract:

Party A shall not overdue payment for any reason. If Party A fails to pay according to the contract, Party A shall pay party B overdue fines of overdue says' payment (from the date of 9th

May, 2018 listed in Article 3 at a rate of interest of 1% per day compensate and Party A shall also bare the damages cause to Party B due to overdue payment.

In his testimony, PW1 told this court that, the defendant defaulted to pay Tsh. 69,000,000 for 2 years, the amount which he paid after institution of this suit, then she was duty bound to pay the agreed interest for the stated period of time. It is known law that, parties are duty bound to perform their respective promises unless such promises are dispensed with or excused under the Contract Act or any other law. This well settled position of the law is provided under section 37 of the Contract Act, [Cap 345 R.E 2019]. That aside, it is also a principle of law of contract that, parties are bound by their agreement freely entered into and that there should be sanctity of contract. This sound principle of the law was stated in the case of **Abualy Alibhai Aziz Vs. Bhatia Brothers Ltd** [2000] TLR 288 at page 289, which case was cited with approval by the Court of Appeal in its recent decision in the case of **Simon Kichele Chacha Vs. Aveline M.Kilawe**, Civil Appeal No 160 of 2018. Citing the principle the Court stated that:

The principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud (actual or constructive) or

misrepresentation and no principle of public policy prohibiting enforcement.

Going by the facts of this case and basing on the testimony of PW1 and exhibit P1, the agreed period for the payment of the unpaid up contractual amount of Tshs. 69,000,000/- was before 9th May 2018. The defendant was therefore obliged to honour his promises within that period unless there was consent from the plaintiff for extension of the time, in which none existed. As the amount of Tsh.69,000,000/- was paid after institution of this suit, the fact which is not disputed, I hold it was outside the agreed period and therefore the defendant breached the contract. Thus the first issue is answered in affirmative.

Next for determination is the issue as to what reliefs are the parties entitled to. Plaintiff prayed judgment against defendant for payment of Tsh.355,350,000/- being the interest accrued from the outstanding debt of Tsh.69,000,000. It is a trite law that specific damage must be specifically pleaded and proved. This principle of law was also articulated in the case of **Masolele General Agencies Vs. African Inland Church Tanzania** [1994] TLR 192, where the Court of Appeal held that:

"Once a claim for a specific item is made, that claim must be strictly proved, else there would be no difference between a

specific claim and a general one; the Trial Judge rightly dismissed the claim for loss of profit because it was not proved.”

In the instant case the claimed interest of Tshs. 355,350,000/- was pleaded in paragraph 8 of the plaint. In proving the same PW1 stated that, the claimed amount accrued from the interest of 1% of the outstanding amount of Tshs. 69,000,000 for two years, meaning from 9th May 2018 to March 2021, when the last instalment was paid, without more. No calculation were made or tendered during his testimony to justify on how Tshs. 355,350,000/- was arrived at apart from claiming that it was reduced from two years interest. There is no doubt that, the claimed amount is on the higher side for attracting interest on each day instead of annual basis and that, the same ought to have been justified, but has not been justified to the court's satisfaction. I have however taken in to consideration the fact that, under principle of sanctity of contract as rightly stated in the cases of **Abualy Alibhai Aziz** (supra) and **Simon Kichele Chacha** (supra), parties are bound by the clear terms of their agreement. I have also put into consideration the fact that, the said interest claimed is uncontested as when given time to challenge it, the defendant found it not important file her written statement of defence, in contest. Since parties in exhibit PE1 agreed

to charge interest of 1% on the unpaid up amount of Tshs. 69,000,000/- on each day of default from 09/11/2018 and since the claimed interest of Tshs. Tsh.355,350,000/- is on higher for exceeding even the interest chargeable by the bank, I find it justifiable to award the interest to be calculated from the bank interest rates. In the end, I find the plaintiff has discharged her burden of prove to the required standard under civil cases that, the defendant breached the contract and therefore she is entitled to the interest of the unpaid up amount as indicated above.

That said, I enter Judgment in favour of the plaintiff on the following orders;

- (i) The defendant has to pay the plaintiff 18% annual interest out of Tsh.69,000,000/- reckoned from 9th May 2018 to March 2021, when the last instalment of the said Tshs. 69,000,000/- was paid.
- (ii) Costs of the suit.

It is so ordered

DATED at Dar es Salaam this 10th day of June, 2022.



E. E. KAKOLAKI

JUDGE

10/06/2022.

The Judgment has been delivered at Dar es Salaam today 17th day of June, 2022 in the absence of the Plaintiff and in the presence Ms. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI
JUDGE
10/06/2022

