**IN THE HIGH COURT OF TANZANIA**

**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CIVIL CASE NO. 8 OF 2019**

**ANGELICA NGONYANI.....PLAINTIFF**

**Versus**

**PMM ESTATES (2001) LTD.....DEFENDANT**

**JUDGMENT**

Date of Last order: 16/06/2022

Date of judgment: 29/07/2022

## E.E.KAKOLAKI,J.:

The plaintiff herein angelica Ngonyani a natural person t/a **Kindi Mining** sues the defendant, the juridical person for breach of contract for Hiring of Excavator CAT 330 (the machine). It is averred in her plaint that, having engaged in minerals extraction business (feldspar) from Manga-Tanga, sometimes on 11 September,2017, executed the contract with the defendant for hire of Excavator CAT 330 (the machine) for extraction of minerals from her mining site for 26 days, at the consideration of Tshs. 13,000,000/ plus transportation costs of Tshs. 4,000,000/- to and from the site. That, it was their terms of agreement that, the said machine would be delivered at the mining site by the defendant within seven (7) days from the date of payment of hiring price, in which Tshs. 15,000,000/- was paid being hiring price of

Tshs. 13 million plus half transportation cost of Tshs. 2 million. And that the plaintiff would be responsible for paying the machine operator Tshs. 30,000/- per day for all those 26 days.

It is the plaintiff's contention that having performed her obligation to the contract, the defendant delayed to deliver the machine in time, the machine which was delivered on 08/11/2017 instead of 19/10/2017 and in contravention of specified and agreed machine as she delivered Excavator CAT 320 which was not in order instead of well performing Excavator CAT 330. The plaintiff further claimed that, acting on the said contract with the defendant she entered into two other contracts for hire of mining sifter (chekeche) and motor vehicle make Tipper with Registration No. T882 BCD under consideration of Tshs. 20 Million and Tshs. 9 Million respectively, to facilitate her honour the contract she had executed with **TWYFORD (Tanzania) Ceramics Co. Ltd**, for supply of 6000 tons of feldspar minerals under consideration of Tshs.50,000/= per ton to be supplied within 30 days counting from 15th day of October, 2017. Following supply of non performing machine the plaintiff claims the defendant breached their contract, the breach which resulted into cancelled of contract with **TWYFORD (Tanzania) Ceramics Co. Ltd** leading into loss of Tshs. 300,000,000/=. It

is for the foregoing the plaintiff instituted this suit claiming the following reliefs against the defendant:

a) Declaration that the defendant breached the contract signed with the plaintiff;
b) the defendant be ordered to pay the Plaintiff Tanzania Shillings Three Hundred and forty five million Eight Hundred and Ten thousand (Tshs.345,810,000/=) being special damages;
c) The defendant be ordered to pay plaintiff general damages as may be assessed by the court;
d) The defendant be ordered to pay Plaintiff interest of 21% per annum in (a) above from the date of the filing of the suit to the date of judgment;
e) The defendant be ordered to pay Plaintiff interest of 7% per annum in(a) above from the date of the judgment to the date of full satisfaction of the decree;
f) An order that the defendant pay costs;
g) any other relief(s) as the Honourable court may deem just to grant.

On the other hand, in her defence the defendant denied the allegation by the plaintiff for breach of contract stating that the hired excavator machine was for operations at Morogoro and not Tanga Region. That, the supplied machine was in good order and worked for 14 days before it was rejected by the plaintiff and removed from the site. And further that, it is the plaintiff who misdirected the defendant as to the site of operation and specific

excavator to be supplied as the contracted excavator was supposed to go work at Kibati Morogoro and not Tanga as alleged.

In resolving parties dispute the following issued were agreed and framed by the Court:

1) Whether there was a breach of contract.
2) To what relief(s) if any parties are entitled to.

At the hearing the learned advocate Alphonce Peter Kubaga appeared for the plaintiff whereas the defendant was represented by the learned advocate Dennis Malamba. Both parties paraded three witnesses and the plaintiff relied on six documentary exhibits while the defendant tendered no exhibit.

In determining the parties' rights, this Court will be guided by the established principles in proving civil cases as well as consideration of pleadings, adduced evidence and final submissions by both parties. It is a well-established principle of law under section 110 and 111 of Evidence Act, [Cap. 6 R.E 2019] that, he who alleges existence of a certain fact must prove its existence and that the onus of so proving lies on the party who would fail if no evidence at all is given on either side. Equally it is the principle of law under section 3(2)(b) of the Evidence Act (supra), that existence of certain fact is to be proved on preponderance of probability meaning should be on

the balance of probabilities. See also the cases of **Abdul Karim Haji Vs. Raymond Nchimbi Alois and Another**, Civil Appeal No. 99 of 2004, **Paulina Samson Ndawavya Vs. Theresia Thomasi Madaha**, Civil Appeal No. 53 of 2017 and **Berelia Karangirangi Vs. Asteria Nyalwambwa,** Civil Appeal No. 237 of 2017 (All CAT-unreported) In **Berelia Karangirangi** (supra) when considering the onus of proof and the standard to be applied in civil matter the Court of Appeal had the following to say:

> *We think it is pertinent to state the principle governing proof of cases in civil suits. The general rule is that, he who alleges must prove….it is similar that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on the balance of probabilities."*

In this matter the plaintiff alleged breach of the contract executed between her and the defendant and that out of that breach she suffered damages as expressed in the reliefs sought. So the onus of so proving on the required standard lies on her. Before going further in this judgment, I am not intending to reproduce that evidence in whole as adduced by witnesses from both parties rather I will be referring to it in the course of determination of the issues as some of the facts are not in dispute after each party's

presentation of her evidence. Gleaned from the pleadings and evidence presented by both parties it is doubtless to the Court that parties are at one on the existence of a contract between them (both oral and written exhibit P2) for the supply and delivery to the site of Manga-Tanga excavator make CAT 330, on the agreed consideration of Tsh. 13,000,000/- and transportation costs, though the supplied one was CAT 320. And that, it was their terms the supplied machine will be in good order to work for 8 hours in a day and for 26 days, with the machine operator's allowance of Tshs. 30,000/- per day paid by the plaintiff. It is also uncontroverted fact that, consideration of Tshs. 15 million, being Tshs. 13 million hire price and Tshs. 2 million for transportation was paid to the defendant by the plaintiff as there is proof of payment receipt exhibit P1. What remains in dispute is whether the said contract was breached and whether the plaintiff suffered damages as claimed, the dispute which the two framed issues seek to resolve.

To start with the first issue as to *whether there was a breach of contract*, it was Ms. Angelca Watter Ngonyani (PW1) evidence that, owning feldspar mines at Kibati Morogoro and Tanga- Manga had an agreement to supply 6000 tons of feldspar minerals to **TWYFORD (Tanzania) Ceramics Co. Ltd** for Tshs. 50,000/- per ton making a total of contractual amount of Tshs.

300,000,000/=, the materials which were to be supplied in 30 days from 15/10/2017 to 15/11/2017. In performing her obligation under that contract on 10/10/2017, she entered into oral agreement with the defendant followed by the written one (exh. P2) for hire of the excavator (machine) make CAT 330 for 26 days which was to be delivered at her mining site within 7 days from the date of payment of hire price. She averred the consideration of Tshs. 13,000,000/- plus Tshs. 2 million for transportation of the machine to the site all totalling Tshs. 15 million was paid to the defendant's account on 12/10/2017. CRDB pay in slip (exh. P1) exhibits the payment. According to her, in contravention of the terms of contract the machine was not delivered within 7 days after payment of consideration instead the same arrived at the mining site on 14/11/2017 and started working on 15/11/2017. And that it could not work longer as it lasted for two hours only before it broke and the same was never replaced despite of several defects reports made to the defendant. She further stated at the site the machine operator was paid his daily allowance for 14 days Tshs. 210,000/- as indicated in the log sheet (exh.P5) which was tendered by PW2. This witness lamented that she sustained loss as she had hired the sifter for Tshs. 20 million and one motor vehicle make Tipper for Tshs. 9 million, exhibits P3 and P4 respectively, to

support her operation and she had also to pay Tshs. 1,600,000/- to the geologist. She added as the agreement for the supply of feldspar to **TWYFORD (Tanzania) Ceramics Co. Ltd**, could not be honour the contract was terminated by the letter exhibit P6 duly tendered by PW3, hence sustained loss of income to the tune of Tshs. 300,000,000/-. In his submission Mr. Kubaja argued that, PW1's evidence is fully corroborated by evidence of Jumanne K. Salum (PW2), the machine operator who testified to the effect that the said machine operated only on 15/11/2017 for two hours before it got broke as he reported it to the defendant but the repair was made twice without success until when the operation was stopped. This witness confirmed that was paid allowance of Tshs. 30,000/- per day for 14 days from 08/11/2017 as exhibited in exhibit P5.

On the defendant's side vide DW1, her transport manager denied to have breached the contract when testified to the effect that, the supplied machine was in good condition and worked for several days under one Timoth Chipeta (DW2) before the operation was stopped by the plaintiff and machine moved to another sites, following two to three times defect reports made to him by the plaintiff, despite of efforts of sending an engineer to repair it. When under cross examination this witness confessed not to remember the days

in which the machine worked and disputed the assertion by the plaintiff that, the machine was operated by one Jumanne Kassim rather it was Timoth Chipeta (DW2) as Jumanne was tasked to transport it to site only and not to operate it. DW1's evidence was corroborated by DW2 confirming that, he is the one who operated the machine at the site and not Jumanne as the later only took the machine there. And that, he started operating the machine on 09/11/2017 until 12/11/2017 when he was stopped and was paid his allowance in cash. This same witness when cross examined gave contrary to his first version stated that, he operated the machine for 5 weeks but encountered four (4) breakdowns that led to stopping the operation for one or two days. When referred to the log sheet (exh.P5) DW2 said the signature there was not his and the operator's name was Jumanne. And on further cross examination he confessed to have not tendered his own log sheet to exhibit the days in which the machine worked. DW3 the company chief engineer on his side apart from confirming that the machine had no defect denied even to have known PW2 while insisting that, the defendant never breached the contract. From that evidence it is Mr. Malamba's submission that the plaintiff failed to prove that, the defendant breached the contract and invited this Court to so hold and dismiss the suit with costs.

I have chewed and analysed both parties' evidence in regard to the contested issue. It is the rule of evidence that, Court will sustain evidence of the party which is more credible than the other. This position of the law was made clear in the case of **Paulina Samson Ndawavya** (supra) when the Court of Appeal stated and I quote:

> *"It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence act, Cap. 6 [R.E 2002]. It is equally elementary that since the dispute was in civil case, the standard of proof was on a balance of probabilities which simply means that the Court will sustain such evidence which is more credible than the other…"*

Relying on the above cited authority, and subjecting the principle to the facts of this case on the the first issue, I am satisfied that plaintiff's evidence is heavier than that of the defendant. I so hold as the evidence of PW1 and PW2 on the days in which the machine operated out of the agreed 26 days in the parties' contract was not shaken by the defendant's evidence. Both PW1 and PW2 were consistent in their evidence that, the machine operated for two hours only in a single day on 15/11/2017 and that, it was PW2 who was operating it. PW2 confirmed that he was paid his allowance by cash though he was asked to sign the work log sheet (exh. P5) which I will

consider its weight later on. Unlike PW1 and PW2's evidence, DW1 apart from alleging that the machine worked for some days when cross examined he failed to ascertain number of the days to disprove that the contract was breached. I also hold a view that DW1's evidence in regard to the machine operator that, it was DW2 and not PW2, is doubtful as his testimony was expected to be corroborated by DW2 himself. To the contrary, DW2 while under examination in chief testified to have worked or operated the machine for four (4) days only from 09/11/2017 up to 12/11/2017. And this same witness in his cross examination said he worked for all five (5) weeks meaning 25 days. No doubt DW2's evidence that he worked for all 25 days out of 26 days agreed again contradicted DW1's evidence who testified to the effect that, after some few days the machine was stopped by the plaintiff and moved to another sites. I am alive to the fact that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reason not believing a witness. See the cases of **Mustafa Ramadhani Kihiyo Vs. The Republic,**(2006) TLR 323 and **Aloyce Maridadi Vs. Republic**, Criminal Appeal No. 208 of 2016 (CAT-unreported). In this case since the evidence of DW1 and DW2 contradicted itself and since PW1 and PW2's evidence on the number of days in which the

machine worked is one out 26 days agreed, I find the plaintiff's evidence to be credible and therefore heavier than that of the defendant on that aspect of numbers of days in which the machine worked.

As regard to the complaint by the plaintiff that the supplied machine was contrary to the agreed one, I find it to be unproved for one good reason that, she was satisfied with the excavator CAT 320 instead of CAT 330 as when delivered she ought to have rejected it. And on the claim that the machine was delivered outside the agreed time of seven days from the date of payment of hire price and transportation, I also find the plaintiff has failed to prove it for want of evidence. I so find as the written agreement exhibit P2 does not contain that term. That notwithstanding, since the plaintiff has managed to prove that, the delivered machine had mechanical defects, and did work only for two hours on 15/11/2017 out of 26 agreed days and since it is evident that a report defects was made to the defendant as confessed by DW1 without any replacement of another machine, then I hold that the defendant breached the said contract. Hence the 1st issue is answered in affirmative.

I now move to the second issue on the *relief(s) if any, parties are entitled to.* It is the position of the law that, parties to contract must perform their

respective promises unless such performance is excused by the law. See section 37(1) of the Contract Act, [Cap 345 R.E 2019]. Failure of any party in the contract to perform his obligation(s) under the contract amounts to breach of contract. Under section 73(1) of the Contract Act, a party who suffers loss or damage out of breach of agreement is entitled to compensation. The said section 73(1) of Contract Act reads:

> *"73.-(1) Where a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it."*

In this case as ruled in the first issue it is the defendant who breached the contract, the breach which entitles the plaintiff compensation for the damages suffered. The damages claimed by the plaintiff is to the tune of Tsh. 345,810,000/= as specific damages and general damages to the assessment of this court, 21% interest per annum from filing of this case to the judgment date,7% per annum from judgment date to full satisfaction of the decree ,costs and other reliefs.

The law is very precise on the award of damages particularly special/specific damages. Unlike general damages which is awarded at the discretion of the Court, specific damages being special expenses incurred in monies or actually loss, must be specifically pleaded, particularised and strictly proved. These I call three P's. 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 observed on the need of the Court to satisfy itself of observance of three P's had this to say which I find very persuasive and adoptive in our jurisdiction:

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

On observance of the above conditions before the claim of specific damage is awarded to the party, this Court and the Court of Appeal in times without number insisted on the need of establishment of those conditions. See the cases of **Alfred Fundi Vs. Geled Mango & 2 others,** Civil Appeal No.49 of 2017**, Zuberi Augustino Vs. Anicet Mugabe**, (1992) TLR 137**, Peter Joseph Kilibika and Another Vs. Partic Aloyce Mlingi** and **Reliance**

**26 Insurance Company (T) Ltd and 2 Others Vs. Festo Mgomapayo**, Civil Appeal No. 23 of 2019 Civil Appeal No. 39 of 2009 (all CAT-unreported). In the case of **Zuberi Augustino** (supra) at page 139, although not comprehensively the Court of Appeal expressly said:

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

Similar observations were aired 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)

In the present case, the plaintiff in paragraphs 12 and 14 of her plaint, apart from pleading particularised the said claimed specific damages leading Tshs. 345,810,000/=. She averred the same includes loss Tshs 300,000,000/= for failure to supply Feldspar to **TWYFORD (Tanzania) Ceramics Co. Ltd**;

Tshs.15,000,000/= for hiring and transporting excavator CAT 330; Tshs.1,600,000/= paid to the Geologist for 40 days; Loss of Tshs. 210,000/= paid to operator for 7 days Tshs.20,000,000/= for hiring mining sifter and Tshs. 9,000,000/= for hiring Tipper. As the same is pleaded and particularise it was plaintiff's duty to prove it to the required standard the duty which this Court seek to examine in this second issue as the defence counsel Mr. Malamba, submitted that the plaintiff failed to prove it to the required standard.

To examine the said specific damage I find it pleasing to start first with the claim of Tshs. 300,000,000/= for loss of business resulted from the failure of defendant to perform the contract. In this claim as per Mr. Kubaja's submission, the plaintiff relies on exhibit P6, a letter from TWYFORD (Tanzania) Ceramic Ltd informing her of the intention to not further renew the contract until it is proved that the plaintiff has capacity to deliver the material basing on contract of September 2017 for supply of 6000 tons of feldspar from Manga Tanga for Tshs. 50,000/= per ton. With due respect to Mr. Kubaja a mere letter exhibit P6 is insufficient to prove loss alleged to have been incurred by the plaintiff for loss of business due to delay and supply of defective machine. I say so as the plaintiff failed to tender in Court

the said contract with TWYFORD (Tanzania) Ceramic Ltd nor did she exhibit to the court that the same was oral. In absence of such written contract the terms or facts as to when the supply was to be made to the client by the plaintiff and for how long so as to justify the amount of Tshs. 300,000,000/- in my opinion remain unestablished or proved. It follows therefore and I hold that the assertion that the said feldspar minerals was to be supplied to plaintiff's client in 30 days for Tshs.50,000/= per ton which if multiplied to 6000 tons makes a total of Tshs. 300,000,000/- is not proved on the balance of probabilities as required by the law.

Next for consideration is the claim for Tshs. 15,000,000/= as the payment for hire of the Excavator in which she paid Tshs.13,000,000/= as hire price and Tshs.2,000,000/= for transportation of the said excavator from Vingunguti Dar es salaam to Manga Tanga. I find this claim to be proved as there is evidence of PW1, PW3 and DW1 plus the pay in slip (Exhbit PE1) exhibiting the said.

As regard to claims of Tshs.9,000,000/= for hiring Motor Vehicle (Tipper) from Nassoro Hamis and Tshs.20,000,000/= for hiring sifter from Bruno P. Ndunguru as exhibited by the contracts in exhibits PE4 and PE3 respectvely, I find both to be unproved. It is true the plaintiff needed services of the said

Tipper and sifter. However she failed to lead any evidence proving that the hire prices were paid and the same delivered at the site so as to justify the loss incurred if any. In absence of any payment receipts, this Court is of the finding that tendering of agreements alone suffices not to strictly prove the claims hence the same are hereby rejected.

Next for determination is the claim of Tshs.1,600,000/= allegedly the cost incurred to pay the geologist for 40 days. I think this too need not detain this court. The same is rejected for want of proof as the plaintiff neither brought the said geologist to prove to the Court of the services rendered to the plaintiff if any and the payment made to him but she failed to so do.

Lastly is the claim for payment of Tshs. 210,000/=to the operator of the excavator for 7 days. Reliance was placed in exhibit P5 to prove the payment as PW2 and the payee exhibited to the Court his signature in the said exhibit. However under the same standard of proof, this court is not satisfied that this claim is strictly proved hence I reject it. I so do as there is doubt as to its authenticity, one, for not being signed by the payer. Secondly, while the exhibit seeks to justify the payment of seven (7) days the same indicates Pw2 was paid Tshs. 30,000/- for 15 days including even days in which he had not yet started the operation. For example the payment started on

08/11/2017 the day in which as per PW2's evidence he had started to move the machine from defendant's office site heading to Tanga. According to him he arrived at the site on the 14/11/2017 and the operation started on 15/11/2017. From that piece of evidence, it does not require a law degree to recognise that the document which the plaintiff seeks to rely on is not only unauthentic but also unreliable one. As alluded to this claim is also not proved.

To sum up the only established specific claim out of Tshs. 345,810,000/- is Tshs. 15,000,000/- only, the rest I hold is unproved and hereby dismissed. Apart from specific damages the plaintiff also prayed for general damages to the amount to be assessed by the court. It is the position of the law that general damages are such as the law will presume to be direct natural or probable consequence of the act complained of. For the same to be awarded the defendant's wrongdoing must therefore have been a cause, if not sole, a particularly significant cause of damage. See the cases of **Tanzania Saruji Corporation Vs. African Marble Company Ltd. [2004] TLR 155**. They are damages upon which the claimant has to provide to a certain extent of existence of the facts he claims to have happened to justify payment thereof. The Court of Appeal in the case of **Peter Joseph Kibilika Vs. Patric**

**Aloyce Mlingi,** Civil Appeal No. 39 of 2009 (CAT-unreported) when quoting the case of **Admiralty Commissioners Vs. SS Susqehanna** [1950] 1 ALL ER 392, had this to say:

> *"If the damage be general, then it must be averred that such damage has been suffered, but the quantification of such damage is a jury question."*

Also in the case of **Anthony Ngoo & Another Vs. Kitinda Maro**, Civil Appeal No. 25/2014 (CAT-unreported) it was stated that:

> *"general damages are those presumed to be direct or probable consequences of the act complained of. "*

In this case as the law provides the plaintiff never pleaded the amount she claims as general damage as she left it to for the court to assess. What made her claim this damage is a loss of business she allege to have suffered due to breach of contract by the defendant. I have taken into consideration the fact that the alleged loss of business was not proved by the plaintiff when considering the claim of Tshs. 300 above. However there is no dispute that the plaintiff mobilised herself at the site expecting to mine the said feldspar the mission which became abortive following defendant's act of supplying her with defective machine, hence suffered damages which I consider to be

general such as inconveniences and frustration of the project she had indulged. She therefore deserve to be awarded general damage which prayer I hereby grant.

Having said and done, Judgment is entered in favour of the plaintiff as follows:

1. It is declared that the defendant breached the contract between her and the plaintiff for supply and delivery of Excavator CAT 330 for 26 days.

2. The Defendant to pay the plaintiff Tshs. 15,000,000/- as hire price and transportation costs of Excavator CAT 330.

3. Defendant to pay the Plaintiff Tshs. 70,000,000/= as general damage

4. The awarded amount to be charged interest of 21% per annum from the date of filing the suit to the judgment date.

5. The defendant to pay interest of 7% of the awarded amount from the judgment date till full satisfaction of the decree.

6. The defendant to pay costs of the suit.

It is so ordered.

DATED at DAR ES SALAAM this 29th day of July 2022.

E. E. KAKOLAKI

**JUDGE**

29/07/2022.

The Judgment has been delivered at Dar es Salaam today 29th day of July, 2022 in the presence of the Ms. Miriam Moses, advocate for the Plaintiff, Mr. Alex Kaaya, advocate for the Respondent and Mr. Monica Msuya, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI

**JUDGE**

29/07/2022.