IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB REGISTRY)

AT DAR ES SALAAM

CIVIL CASE NO. 206 OF 2019

MOHAMED ENTERPRISES (TANZANIA) LIMITED .....PLAINTIFF

VERSUS

MEERAMS OVERSEAS PVT LIMITED .....DEFENDANT

JUDGMENT

Date of Last Order: 27/7/2022

Date of Judgment: 15/8/2022

MASABO, J.:-

The plaintiff is suing the defendant over a verbal business contract for sale of green moong beans. It is alleged that, by this agreement, the plaintiff undertook to supply the defendant 120 metric tons of green moong beans worth USD 106,200 (USD 885 per metric ton). In performance of the contract, the plaintiff collected the beans, made all arrangement for shipment and shipped the consignment to India. The defendant dd not honour his promise. He declined to pay the consideration price and did not turn up to collect the consignment from the port. Later on, after long discussions and consultations, the plaintiff agreed to reduce the price to USD 76,2000 (being a reduction of USD 250 from the original per metric ton). Still, the defendant failed to honour his promise. To avoid further loss and demurrage charges which were piling up, the plaintiff sold the beans to a third party at far reduced price of USD 48,000 (Tshs 400 per metric ton). He also paid demurrage charges which has scaled to USD 35,617.50. His claims

in this suit are for the difference in the price, the demurrage charges paid and interests.

Hearing of the suit proceeded *ex parte* the defendant after the attempts to procure her attendance turned futile. The plaintiff, represented by Ms. Catherine Solomon, learned counsel called two witnesses. The first witness, PW1, was Ritesh Darji, a manager for crops and commodities for the plaintiff. The second was Preethi Herikumar, an export manager for the plaintiff who testified as PW2. Further to the oral testimonies of these two witnesses, several documents were produced and admitted as exhibits.

The following four issues have to be answered. **One,** whether the parties had an agreement. **Two,** whether the defendant breached the agreement. **Three**, did the defendant suffer any damage as result of the breach of agreement and **four** to what remedies are the parties entitled to. In prelude to these issues to which I will turn shortly, it is a cardinal principle of law that the burden of proof lies on the person alleging existence of any fact . The principle is set out under section 110 and 111 of the Law of Evidence Act [Cap.6 R.E. 2002]. As the matter is a civil suit, the standard of proof expected is proof on the balance of probabilities which simply implies that the Court will accept evidence which is more credible and probable (see **Al-Karim Shamshudin Habib v Equity Bank Tanzania Limited & Viovena Company Limited** Commercial Case No. 60 of 2016 (unreported).

Starting with the first question, our law recognises oral agreements as enforceable contract, provide that: it is made out of free consent of the parties; the parties making it have the capacity to contract; it is for a lawful consideration and with a lawful object. Section 10 of the Law of Contract Act, Cap 435 RE 2019, categorically state that:

> 10. All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.
>
> Provided that, nothing herein contained shall affect any law in force, and not hereby expressly repealed or disapplied, by which any contract is required to be made
> in writing or in electronic form or in the presence of witnesses, or any law relating to the registration of documents

The oral agreement at the centre of the controversy between the parties herein is for sale of goods. Thus, apart from the provision above, it is subject to the Sale of Goods Act, Cap 214 RE 2002, which defines the sale of goods as follows:

> (1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price, and there may be a contract of sale between one part owner and another.

Proving the terms of an oral contract is a pure question of facts most often established through the oral testimony of the parties and the persons who were present during the formation of the agreement. The conduct of the

parties prior and after the formation of the agreement is also relevant in stablishing the existence of the agreement.

In the present case, PW1 testified that the parties had an oral agreement for sale of green moong beans. Being on the supply side, the plaintiff covenanted to supply a total of 120 tons at a price of USD 885 per metric ton. He testified further that, the parties agreed that, before the shipment of the beans to India the defendant must send the plaintiff an import permit from the Government of India, a requirement which was duly complied with. The defendant processed the permits and having obtained them he sent them to the plaintiff electronically. Upon receipt of the import permit which was admitted in court as Exhibit P1, the plaintiff issued an invoice containing the agreed consideration price. He subsequently furnished the defendant with all the documents necessary for shipment of the green moong beans to India including the Bill of Lading; certificate of origin, certificate of fumigation, phytosanitary certificate and packing list (Exhibit P2 collectively and P12 collectively).

In my considered view, this evidence sufficiently infers the existence of the oral agreement asserted. Further inference is from PW2's testimony and the subsequent correspondences between the parties as evidenced through exhibit P3 by which the defendant representative, one Ramesh, requested a discount of the price and email dated 2nd June 2016 and 13th July 2016 by which the same Ramesh complained about the quality of the moong (see exhibits P13 and 14 collectively). On the strength of this evidence, I entertain

no doubt that the oral agreement was existent. Accordingly, the first issue is answered affirmatively.

Advancing to the 2nd issue, PW1 told the court that after sending the invoice, bill of lading and all other necessary documents to the defendant the consignment was shipped to India and arrived safely but the defendant refused to pay the purchase price and never collected the cargo from the port in pretext that the beans were of a poor quality (Exhibit P13). To clear the doubt, the plaintiff supplied the defendant with a certificate of quality containing results of quality test of the beans performed by SGS Tanzania Superintendence Co. Ltd before the shipment (Exhibit14) in which it was confirmed that the beans were of a good quality but she persistently declined to collect the cargo and to pay the dues. It is my considered view that, through this evidence, the plaintiff has ably established that she dutifully discharged her contractual obligation by shipping the consignment and supplying the defendant with all the shipment documents and invoices. Having discharged her obligation, it was the defendant's turn to discharge hers by collecting the consignment and paying the purchase price. Non-performance of these two obligations certainly constitutes a breach of the terms of the oral agreement freely entered by the parties. The second issue is answered positively.

The third and fourth issue concerns damage and reliefs. The specific question to be answered in these two issues whether the defendant suffered any damage as result of the breach of agreement and to what reliefs are the

parties entitled to. I will consolidate these two issues and answer them simultaneously. The plaintiff has claimed that he suffered a double loss from the defendant's omission to collect the cargo and pay the purchase price. Exemplifying the loss, she has asserted that she sold the consignment at a very low price and was forced to pay high demurrage charges. Thus, she claims a price difference of USD 58,200 and USD 35,617.50 as demurrage and detention charges. These claims are within the realm of specific damages. The law requires that they must be pleaded and strictly proved (see **M/S Universal Electronics and Hardware (T) Limited v Strabag International GmbH (Tanzania Branch)**, Civil Appeal No. 122 of 2017, CAT (unreported).

Starting with the price difference, through PW1's testimony and Exhibit P7 and P9, the plaintiff exemplified that, as the cargo remained uncollected for a long time, it attracted high demurrage charges. To void these charges, they found a new buyer in the name of Larji Hirji and Sons who bought the consignment at a price of USD 400 per metric ton making the total purchase price of USD 48,000 which is USD 58,200 less the purchase price agreed upon by the parties. When the new purchase price is compared with the original price agreed upon by the parties the difference claimed by the plaintiff becomes clearer as between USD 106,200 and USD 48,000 there is a difference of USD 58,200.

As for the demurrage charges, the plaintiff's claim in this aspect is for USD 35,617.50. Exhibits P8 and P10 which was produced in support of these

claims, contains an invoice showing that a sum of Indian Rupees 2064250 (USD 30356) had to be paid to Safmrine Shipping Line as demurrage and detention charges for the consignment for the period between 22nd May 2016 to 28th October 2016. Much as it may be true that the plaintiff paid demurrage charges and is entitled to be refunded, no proof other than PW1's was rendered in acknowledgment/certification of the payment. Needless to emphasize, the refund of demurrage charges paid is of such a nature that can be best proved through documentary evidence. The law requires that where the claims can best be proved by documentary evidence, it is incumbent that such document be produced. Propounding this principle in **Harith Said Brothers Company v. Martin Ngao** [1981] T.L.R. 327, this court held that:

> "Unlike general damages, special damages must be strictly proved. I cannot allow the claim for special damages on the basis of the defendant's bare assertion, when he could, if his claim was well founded easily corroborate his assertion with some documentary evidence .... The claim for special damages must be, and is dismissed.

Cementing this position in **M/S Universal Electronics and Hardware (T) Limited V Strabag International GmbH (Tanzania Branch),** Civil Appeal No. 122 Of 2017, the Court of Appeal stated that:

> We are satisfied that the appellant specially pleaded, but did not strictly prove, special damages. Like was the case in **Harith Said Brothers Company v. Martin Ngao** (supra), we cannot allow the claim for special damages on the basis of the appellant's bare assertion in the circumstances where she, if her claim was well founded,

easily corroborate his assertion with some documentary evidence.

On strength of these two authorities, I am fortified that, the absence of receipt in acknowledgment of the payment has rendered this claim obortive for want of proof.

In the foregoing of the above, judgment is entered against the defendant for payment of USD 58,200 being the difference between the contractual purchase price and the price paid by the new buyer. The defendant shall subsequently pay an accrued interest of 12% per annum from the date of filing of the suit to the date of judgment. In addition, an interest of 7% per annum shall be payable on the decretal amount from the date of judgment to the date of final settlement. Costs incidental to the suit shall be paid by the defendant.

DATED at **DAR ES SALAAM** this 15th day of August 2022.

X

Signed by: J.L.MASABO

J.L. MASABO
JUDGE