

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

**AT DAR ES SALAAM**

**CIVIL APPEAL NO. 210 OF 2020**

*(arising from the judgment and ddecree of the district court of kinondoni in  
civil case no. 159 of 2018)*

**LEN'S GROUP (T) LIMITED .....APPELLANT**

**VERSUS**

**UNILIVER TEA (TANZANIA) LIMITED ..... RESPONDENT**

*Date of last order: 01/03/2022*

*Date of Judgement: 12/08/2022*

**JUDGMENT**

**MGONYA, J.**

The Appellant herein filed this Appeal after dissatisfied with the Judgment and Decree of the District Court of Kinondoni at Kinondoni, in **Civil Case No. 159 of 2018** delivered on 10<sup>th</sup> day of August, 2020.

Briefly, the parties herein entered into an Agreement for importation of **6 Suzuki** carry by the Appellant, for the consideration of **US Dollars 30,900**. The Respondent had paid the Appellant the total amount to the tune of **USD 30,900** in two installments for the purchase of the said six vehicles. The Appellant failed to honour the Agreement within agreed time **of 50 days** as

alleged by the Respondent herein. The Respondent sued the Appellant in trial court for breach of contract and it was decided against the Appellant. Hence, this appeal on the following grounds:-

- 1. The trial Magistrate erred in law and facts by failing to interpret the binding terms and conditions contained in the respondent's quotation and misdirected himself on the date of the commencement of the contract between the Appellant and the Respondent shifting all the burden on the Appellant for breach of contract;***
- 2. The trial Magistrate erred in law, facts and practice involved in International trade inclusive importation procedures when he held that the Appellant herein delayed to issue an invoice for the payment of the 2<sup>nd</sup> instalment by the Respondent herein thus resulting into accumulation of storage charges hence breach by the Appellant of the terms of contract;***
- 3. The learned Magistrate, erred both in law and fact when ordering the Appellant to pay the total value of four undelivered vehicles to the tune of United States Dollars 20,600 equivalent to Tshs 46,856,600/- to the Respondent despite him having acknowledged as a***

***fact that all the vehicles were paid for as per the quotation by the Appellant and were imported as per the Respondent's Local Purchase order, F.OB & F.C.I.F at the Dar es salaam Port; where delivery having been executed timely;***

***4. The trial Magistrate erred both in law and facts and misdirected himself in holding that the vehicles were not delivered despite having acknowledged the importation thereof and the information by the Appellant who notified the Respondent of the delivery and possible accumulation of storage charge in time which storage charge was not forming part of the Local purchase Order and the Quotation by the Appellant; and***

***5. The learned Trial Magistrate erred both in law and fact and failed make proper analysis of the evidence on record and therefore gave a bias judgment based on this only framed issue that was very indicative of the line of judgment expected.***

From the above grounds of appeal, the Appellant prayed the court to quash the Judgment and Decree of the Trial Court in their

entirety and to declare the Respondent responsible for his own cause of the loss suffered.

At the hearing of this appeal, the Appellant enjoyed the legal services from **Mr. Godfrey Ukonga** learned advocate and the Defendant represented by **Lilian Mujunangoma** learned Advocate.

The Appellant's counsel submitting on the **first ground of appeal** he was of the view that trial court failed to interpret the binding terms and conditions contained in the Respondent's Local Purchase Order as **Exhibit P2** and the Appellant's quotation as **Exhibit P1** on the date of commencement of the contract. The Appellant referred the evidence from the record that the trial court confirmed importation of vehicles were within the **50 days** agreed under **F.O.B, C & F and C.I.F** at Port of Dar es Salaam.

Further, the Appellant's counsel averred that the said contract was commenced on the **23<sup>rd</sup> September 2016** when the invoice was issued and confirmed by the Respondent and the same honored on the **30<sup>th</sup> September 2016** for the first installment, and for the last installment, invoice was issued on **14<sup>th</sup> November 2016** and was honored on **5<sup>th</sup> December 2016** by the Respondent. It is the Appellant's concerns that they performed

their part of the contract absolutely, hence the trial court misdirected itself to shift all the burden on the Appellant for breach of contract.

On the **second ground of appeal**, the Appellant's counsel submitted that the nature of the contract involved the practice of International Trade where the procedures under **F.O.B, C & F and C.I.F.**, the payment made by the Respondent was for specific use as contained in the Proforma invoice which did not include the storage, rise in tax and duties. It is the Appellant's view that the trial court was wrong to hold the Appellant delayed to issue an invoice for the payment of the 2<sup>nd</sup> instalment on **14<sup>th</sup> November 2016** to the Respondent. It was further averred that, the accumulation of storage charges were not caused by the Appellant rather the increase in Government tax plus further delay of the Respondent, where the Respondent honored the invoice on **5<sup>th</sup> December** the **21** days later.

Further, the Appellant's counsel submitted on the **third ground of appeal** that the trial court was misdirected in ordering the Appellant to pay the Respondent the total value of four 4 undelivered vehicles to the tune of **USD 20,600** despite having acknowledged that all vehicles were paid for as per the quotation and per the Respondent's Local Purchase Order, **F.O.B, C & F, C.**

**I. F** at the custom and Port of Dar es Salaam. Further that the nature of the said contract was to the effect that the moment goods were discharged from the shipping line and placed in the custody of the Port Authority or Custom Authority, the Appellant's liability remained with the clearance of the vehicles. It is the Appellant's concern that the money paid to him lately was able to clear only two vehicles, and the four vehicles remained were for the Respondent's duty due to the rise in tax, duties and storage.

On **fourth ground of appeal**, the Appellant's counsel submitting that the trial court misdirected to hold that the vehicles were not delivered despite having acknowledged their importation at Dar es Salaam Port. It was further submitted that, the Appellant had notified the Respondent of the delivery and possible accumulation of storage charge in time which was not forming part of the Local Purchase Order and the Quotation by the appellant. It is the Appellant's position that the delivery of the said agreement was governed by **F. O. B, C & F and C. I. F** contracts (**Exhibits P1 and P2**) the fact which was known to the parties that upon the goods having got off the shipping line, the Appellant will be exonerated from contracts' liability.

Lastly, the Appellant's counsel submitted on **fifth ground of appeal** that the trial court did not analyse the evidence on record

in respect of issuance of the 2<sup>nd</sup> proforma invoice. Further, the Appellant averred that the said invoices were issued in line with the terms and conditions of Quotation and the Local Purchase Order respectively (**Exhibits P1 and P2**) where the vehicles were to be imported under **F. O. B, C & F and C. I. F**. It is further the Appellant's concern that the said amount paid to the Appellant was only for the importation of the vehicles and payment of taxes pertaining at the time of creation of the contract. It is further submitted that averrement to have Appellant discharged her obligations, neither caused any delay to issue the second invoice to the Respondent upon considering the Local Purchase Order. Hence, the Respondent suffered loss in her own cause due to her delay in payment of second installment.

In submitting against the Appeal, the Respondent's counsel consolidated the **first up to fourth grounds of appeal** and stated that the trial court was correct to arrive at a just decision to deliver his judgment based on the testimonies and evidences tendered by both parties during hearing of the matter before the court.

Further stated that, from the trial court's record that first invoice from the Appellant was issued and served to the Respondent on **23<sup>rd</sup> September 2016** as per **Exhibit P3** and the

Respondent made payment to the Appellant on **29<sup>th</sup> September 2016** as per **Exhibit P4**. The second invoice was issued on **14<sup>th</sup> November 2016** and was paid by the Respondent on **5<sup>th</sup> December 2016** as final installment for her to furnish her duties in the Agreement as per **Exhibit P5** and kept waiting for the delivery of her six vehicles from the Appellant.

Moreover, the Respondent counsel's had the view that she discharged her obligations but the Appellant ended up in delivering only **two** vehicles out of **six** without any good cause contrary to the agreement and the law under **Section 37(1) of the Law of Contract Act, Cap. 345 [R.E 2019]**, which provides for the obligations of the parties to the contract. Further, the Respondent's counsel averred that failure of the Appellant discharging of the agreed terms attracted compensation to the Respondent.

In submitting on the **fifth ground of appeal**, the Respondent's counsel stated that the trial court analyzed the evidence on record properly and judgement delivered fairly. Further, that the trial court was considerate to analyze the evidences and testimonies of both parties based on the legal issues mutually framed by the parties before the court.



Hence, the Respondent prayed the court to uphold and confirm the trial court's Judgment and Decree and the instant Appeal be dismissed with costs for lack of merit.

In determining this Appeal, the crucial question at this juncture is whether the Appeal before the court has merit.

Basing on the **first ground of appeal**, I will start with the need of interpretation from binding terms and conditions contained in the Respondent's quotation and the date of commencement of the contract. Upon perusal of the trial court records, specific the Local Purchase Order (LPO) dated on **23<sup>rd</sup> September 2016** as **Exhibit P2** demonstrated that the Respondent confirmed the Appellant's Proforma Invoice **No. LG/0127/2016** originated from **Exhibit P1**. Both Exhibits **P1 and P2** contains part including **C. I. F.** (Costs, Insurance and Freight) and Customs Duty, Port Clearance Agency fee and **F. O. B, C & F and C. I. F.** terms. Further, the evidence on records also proved that the Respondent's Purchase Order to have terms that the payment should be in two equal installments as confirmation of **50%** with an Order and the other **50%** during clearing on port. Therefore, from the above observation, is suffice to say that the contract involved the practice of the International Trade and Procedure with their terms of references guiding the same.

Further, on the other part is to ascertain on when the clear date of the commencement of the contract between the parties. The evidence on trial court's records demonstrated that the Appellant had issued the Proforma Invoice as **Exhibit P1** on **12<sup>th</sup> September 2016** and the same confirmed by the Respondent on **23<sup>rd</sup> September 2016** with **Order No. 12239** as **Exhibit P2** paid on **30<sup>th</sup> September 2016** per **Exhibit P4** (Transaction Initiation Payment -Details Report). The final invoice was issued on **14<sup>th</sup> November 2016** by the Appellant and was paid on the **5<sup>th</sup> December 2016**. After the above confirmation of the order, then the Respondent paid on **29<sup>th</sup> September, 2016** as records depict but the same confirmed on **30<sup>th</sup> September, 2016** per **Exhibit P4** (Transaction Initial Payment Details Report). So it is evidence from the words of **Exhibit P2** that the confirmation on payment of **50%** with Order, meaning that the commencement of the contract would have been construed from the date of confirmation of Order but the Respondent had made the payment on **29<sup>th</sup> September 2016** of first invoice instead on **23<sup>rd</sup> September 2016**. From the above explanation and observation, it is my firm view that the Local Purchase Order **Exhibit P2** itself is not enough to shift the burden to the Appellant without confirmation of payment of the said invoice **Exhibit P4**.

In these circumstances, the counting of the date of commencement of the contract has to be considered after the first payment of invoice that confirm the said Order where, then the burden shifted to the Appellant who became bound with the terms of contract. The counting from **29<sup>th</sup> September, 2016 up to 14<sup>th</sup> November, 2016** when the Appellant issued second invoice is **46 days** of which the second invoice was issued within the time limitation of **50 days'** rule. Apart from the Appellant's second invoice, the Respondent paid the same on **5<sup>th</sup> December 2016** with the delay of **17** clear days after the contract would have been discharged on **19<sup>th</sup> November, 2016**. Therefore, buying the wisdom of this court and regarding the nature of the contract involving the international trade as demonstrated above the Appellant was not delayed in issuance of second invoice as decided by the trial court in the favour of Respondent. It is my firm view that the Appellant managed to prove the ground of Appeal under the test of balance of probabilities, to hold otherwise in these circumstances, would occasion injustice to the Appellant. Thus **this ground has merit.**

In determination of **second ground of appeal**, it is clearly as discussed in the **first ground of appeal** that the contract involved the practice of international trade which includes

importation procedures. It is the court's finding that the counting of **50 days** started after upon receipt of first invoice to importer hence the issuance of second invoice by the Appellant was within time requirement. The said accumulation of storage charges include rises in tax and duties resulted from Respondent delay on payments, this evidenced from **Exhibit P7** (Email of 22<sup>nd</sup> March, 2017) where the Respondent was agreed to pay extra charges accumulated due to her delay. It is the view of this court that the trial court erred to hold the Appellant herein delayed to issue second invoice for the payment of the 2<sup>nd</sup> instalment on **14<sup>th</sup> November 2016** to the Respondent. Hence, **the ground of appeal has merits.**

Regarding the **third and fourth grounds of appeal**, this court is of the view that the same answered affirmative considering the **first and second grounds of appeal**. It is evidence from the trial court that the Respondent acknowledged the payment for all cars as per the quotation and per the Respondent's Local Purchase Order, **F.O.B, C & F, C. I. F** at the custom and Port of Dar es Salaam. If were then payment made concerning the all six cars until to Dar es Salaam Port and the contract involving the procedure of International Trade; and the Respondent was aware on payment of storage and tax raised by the Government and still

delayed. Hence, I subscribe the Appellant further responsibility to have cleared only two cars with the reasons that the money paid was not enough to clear all six vehicles. **The third and fourth grounds of appeal are meritorious.**

Lastly, considering the **fifth ground of appeal** that concerns the analysis of the trial court evidence on record in respect of issuance of the 2<sup>nd</sup> proforma invoice. On this ground the invoices were issued in terms of the Local Purchase Order where the vehicles were to be imported under **F. O. B, C. & F and C. I. F.** That meant, the amount paid to the Appellant was only for importation costs of vehicles and payment of taxes pertaining at the time of creation of the contract. It is the observation of the court that the Appellant had discharged her obligations timely. The alleged delay was caused by the Respondent on payment of second invoice on **5<sup>th</sup> December, 2016** upon considering the Local Purchase Order. **This ground of appeal also has merit.**

From the above observations and clearly from the trial court records as **Exhibit P7** depicts that the Respondent agreed to pay extra charges accumulated from her delay of second invoice payment. The trial court to decide in favour of the Respondent who volunteered the loss herself as against the terms and conditions of

the contract. This is against the legal principle that said *volent fit non injuria* and afterthought to the Respondent.

In the event therefore and for reasons stated, **I allow the Appeal. The trial court Judgement and Decree are hereby set aside.**

It is so ordered.

Right of Appeal Explained.



A handwritten signature in blue ink, appearing to read "L. E. Mgonya", with a horizontal line extending to the right.

**L. E. MGONYA**

**JUDGE**

**12/08/2022**