

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**CIVIL CASE NO. 34 OF 2019**

**ACTIVE TANZANIA ADVENTURES LTD.....PLAINTIFF**

**Vs**

**GODGIFT SLAA.....DEFENDANT**

**JUDGMENT**

*Date of last order: 17-12-2021*

*Date of judgment: 16-2-2022*

**B.K. PHILLIP, J**

The plaintiff's claims against the defendant a sum of Tanzanian Shillings Three Hundred and Seventy Five Million ( Tshs 375,000,000/=), being the costs for restoring his truck with Registration No. T969 BEM with its trailer T713 BEP and actual loss caused by the defendant for the period running from 11<sup>th</sup> August , 2016 to the time of filing this suit. It is alleged in the plaint that on the 11<sup>th</sup> of August 2016, while in Arusha the Plaintiff entered into an oral transportation contract with the defendant in which the defendant agreed to hire the plaintiff's truck with registration No.T969 BEM and its trailer with Registration No.T713 BEP, for transportation of the defendant's cargo forest produce ( hereinafter to be referred to as "Timbers") from Mbeya to Dar es Salaam at a cost of

Tshs 2,500,000/= .Also, it was agreed that the defendant would pay the plaintiff part of the agreed costs immediately after entering into the agreement and the remaining balance would be paid upon arrival of the cargo in Dar es Salaam. In execution of the said contract, the defendant's timbers were loaded in the plaintiff's vehicle aforesaid. However, on the same day, that is, the 11<sup>th</sup> of August 2016, the defendant informed the plaintiff that his truck with the defendant's cargo had been confiscated and withheld by TANAPA officials in Mbeya on what was claimed to be lack of valid required permit for transportation of forest produce. Moreover, the plaintiff alleged that the truck was confiscated while in the possession and control of the defendant. The plaintiff made efforts for the release of his truck but he was not successful. Thus, since 2016 up to the date of filing this case in Court the Plaintiff has never managed to regain possession of his truck. Consequently he has suffered substantial losses.

In this case the plaintiff prays for the following reliefs;

- i) The defendant be ordered to pay Tshs 379,500,000/= as specific damages

- ii) Payment of interests at the rate of 5% on the specific damage in item (i) herein above from August 2016 until final payment of the principle sum
- iii) General damages as may be assessed by this Honourable Court
- iv) Interest on the decretal sum at the Court rate of 12% p.a from the date of judgment to the date of full final payment.
- v) Costs of the suit
- vi) Any other relief which this Court may deem fit and just to grant.

On the other hand, in his defence the defendant made two different averments concerning the plaintiff's allegation on the transportation contract. In paragraphs 4 and 5 of the written statement of defence he denied to have entered into any transportation agreement with the defendant whereas in paragraph 8 he averred that he hired the plaintiff's vehicle, but he had no any control of the same. He made efforts for the release of the vehicle but he was not successful. He lodged complaints at the Tanzania Forestry Services Agency regarding the seizure of the vehicle and his cargo. Furthermore he averred as follows; That the plaintiff's vehicle was seized by TANAPA not on any fault committed by him since he had all documents for the transportation of

forest produce. At the time of seizure the vehicle was not in his control and /or possession. He has never been in his possession of that vehicle. The matter concerning the seizure of the Plaintiff's vehicle was determined by the Resident Magistrates Court of Mbeya and at the end of the day the court confirmed that he had valid permit for transportation of forestry produce and ordered the Plaintiff's principal officer Mr Mwanyika to be handed over the plaintiff's vehicle. He disputed all of the plaintiff's claims and prayed for the dismissal of this case.

At the final pre-trial Conference the following issues were framed for determination by the Court;

- i) Whether there was a contract between the parties for transportation of forest produce.
- ii) Whether there was breach of the contract above stated.
- iii) Whether the Plaintiff's truck was seized by TANAPA officials while under the control of the defendant
- iv) To what reliefs are the parties entitled to.

At the hearing the learned advocate Elibariki Maeda appeared for the plaintiff whereas the defendant was represented by the learned advocate Lebulu Osujaki and Abel Ottaru.

The plaintiff had two witnesses whereas the defendant was the only witness for the defence case.

Starting with the first issue, that is **Whether there was a contract between the parties for transportation of forest produce**, the plaintiff's principal officer, Mr Thomas Disii Mwanyika, (PW1) testified that he is the shareholder and director of the plaintiff's Company. The plaintiff deals with tourism and transportation business. The Plaintiff owns vehicles which are normally used in the transportation business in and outside the country. On 10<sup>th</sup> of August 2016, one of the plaintiff's vehicle to wit; A horse with registration No.T.969 BEM and Trailer No.T.713 BEP, was off loading goods in Chunya, the plaintiff's agent Ms. Lucy Komanya informed him that there was a client ( the defendant herein ) who was in need of vehicle for transportation of his forest produce (logs) from Chunya to Dar es Salaam. He talked with the defendant on the phone and agreed that defendant shall hire the plaintiff's vehicle for transportation of his forest produce ( Logs) at the price of Tshs 2,500,000/= . Part of the said costs was agreed to be paid in Chunya and the remaining amount would be paid in Dar es Salam.

After obtaining the permit for transportation of the logs, the same were loaded into the plaintiff's vehicle. They started the journey to Dar es

Salaam. When they reached at Mafweko area, they were stopped by the police and the plaintiff's vehicle was seized on the reason that there was no valid permit for transportation of forest produce. The driver called PW1 and informed him all what had happened. PW1 called the defendant and explained to him what happened. The defendant confirmed to him that he had all required documents and permit for transportation of forest produce and assured him that he was making a follow up of the matter. PW1 called the defendant several times to find out if he had resolved the problem. Despite the defendant's assurance that he had all the required documents, the plaintiff's Vehicle was never released. Finally the driver and the turn boy were arrested and put in remand prison. The defendant together with the driver, the turn boy and another person were arraigned at the Resident Magistrate's Court of Mbeya vide Criminal case No. 17 of 2017 and charged of several offences including unlawful possession of forest produce and transporting forest produce without pass. PW1 appeared at the Resident Magistrate's Court of Mbeya to testify in respect of the plaintiff's vehicle. The case was finally determined and all accused persons were found not guilty. PW1 tendered in Court the Motor Vehicle registration cards for the Plaintiff's vehicle which were admitted as Exhibit P 1 collectively and the judgment in respect of the said Criminal case No. 17 of 2017 which was admitted in evidence as Exhibit P2.

PW2, Mr Edward Francis Matupila , the plaintiff's accountant, in his testimony told this Court that in 2016 one of the plaintiff's vehicle , the subject to this case was confiscated in Mbeya sometimes in August 2016.It had logs which were supposed to be transported to Dar es Salaam. With the regard to the transportation agreement PW2 told this court that the operation department is the one responsible with contracts for the Company. The Company uses both written and oral contracts. The Managing director is the one who signs the written contracts. The Company has two shareholders namely Thomas Disii (PW1) and Henry Hamis Mboha. He did not say anything pertaining to the agreement for the transportation of the defendant's Timber.

On the other hand,the defendant testified as follows; That he never entered into any transportation agreement with the plaintiff . The transportation agreement was between him and one Lucy Komanya. He hired Lucy's vehicle, that is, Scania and its trailer to transport his timber from Mafweko to Mbeya City.When he was in Mbeya, Lucy Called him and informed him that her vehicle was in Mbeya. He asked him if he had any goods for transportation . Thereafter he connected Lucy with his employee, namely Edward Chem who was at Mafweko responsible for collecting timber for him, and confirmed to him that he had enough

timbers for transportation. All procedures for transportation of the timbers were already done. He had agreed with Lucy that his timbers would be transported from Mafweko to Mbeya. At Mbeya the defendant was supposed to meet with Lucy and enter into an agreement on the transportation of the timbers. Upon being cross examined by Advocate Maeda, the defendant admitted that his timbers were being transported in vehicle No. T969 DEM with trailer No. T. 713 BEP. He also told this court that he had a licence for harvesting forest produce and the permit for transportation of the timbers indicated the registration number of the plaintiff's vehicle, that is, T 969DEM and trailer No. T 713 BEP as the one which was going to be used for transportation of the timbers, but he had never known the owner of the vehicle.

Before embarking on the determination of the issues raised, I wish to point out that I have noted that Mr. Otarru started his submission with an argument in which he was raising a point of preliminary objection. It has to be noted that final submissions are not part of the pleadings. It is just a summary of arguments. [See the case of Tanzania **Union of Industrial and Commercial Workers (TUICO) at Mbeya cement Company Ltd Vs Mbeya Company Ltd and National Insurance Corporation (T) Ltd, Civil Case No. 315 of 2000** ( unreported)] Thus, it was

improper for Mr. Otarru to raise a point of preliminary objection in his final submission. That was a pure after thought which I cannot entertain it in this judgment.

Having analyzed the testimonies of the witnesses and the exhibits tendered in evidence, I have noted that the defendant himself throughout his testimony has admitted that his timbers were seized at Mafweko while loaded in the plaintiff's vehicle . He also admitted that there was a criminal case which was opened in the Resident Magistrate's Court of Mbeya, in which he was among the accused persons and PW1 came to give evidence in Court concerning the plaintiff's vehicle which was used in transportation of the defendant's timbers. The Court in its judgment ordered the Vehicle to be handed over to PW1 and found all accused persons not guilty . In addition Exhibit P1 collectively prove that the vehicle which was used for the transportation of the defendant's timbers belongs to the plaintiff. The defendant's averment that he entered into transportation agreement for his timbers with Lucy Komanya lacks basis and contradicts the defendant's own evidence because as alluded earlier in this judgment , the defendant admitted that the vehicle which was used for the transportation of his timbers belongs to the plaintiff. Now, how come then Lucy Komanya is the one who entered into the

transportation agreement with him?. Under the circumstances, If at all Lucy Komanya did enter into any transportation agreement with the defendant then she did so as an agent of the plaintiff. In fact PW1's testimony that Lucy Komanya is the one who connected the plaintiff to the defendant makes sense. In short the defendant's testimony combined with the testimony of PW1 brings home one message that the defendant and PW1 , who is the plaintiff's shareholder and director discussed on the phone on an agreement for transportation of defendant's timber using the plaintiff's vehicle . I do not agree with the defendant's contention that he had no any communication with the plaintiff or PW1. It is incomprehensible how can a person take another person's vehicle , load his goods and start heading to his destination without any communication with the owner of the vehicle or any officer from the owner's company or even being aware as to who is the owner of that vehicle.

As correctly submitted by both counsel in their final submissions, the evidence revealed that there was no written agreement between the parties. So, the contract between the parties as testified by PW1 was an oral agreement. The evidence also revealed that despite the fact that the defendant loaded his timbers into the plaintiff's vehicle , no any

advance payment for the transportation costs was made because by the time the vehicle was seized it had not reached in Mbeya where the parties agreed that after reaching there, advance payment would be made. I made to understand that the defendant was allowed to proceed loading his timbers into the plaintiff's vehicle out of trust developed in course of business. On part of the plaintiff it shows that the plaintiff had great trust to Lucy Komanya who connect him to the defendant. Likewise the defendant had great trust in Ms Lucy Komanya as he said in his testimony that he knew Lucy Komanya and worked with her for quite a long time. Surprisingly, neither the plaintiff nor the defendant called Lucy Komanya to testify in Court, despite the fact that both parties testified that Lucy Komanya was involved in the transaction which lead to the plaintiff's vehicle being hired for transportation of the defendant's timbers. The above facts have led to two opposing opinion between the learned advocate appearing in this case. In his final submission Mr Maeda referred this Court to the provisions of section 10 the Law of Contract Act, which provides as follows;

*" All agreements are contracts if they are made by free consent of the parties competent to contract , for lawful consideration and with a lawful object , and are not hereby expressly declared void...."*

He contended that the evidence adduced by both sides proves that there was an oral agreement between the plaintiff and the defendant, for transportation of the defendant's forest produce from Mafyeko , Chunya to Dar es Salaam at the consideration of Tshs 2,500,000/=

On the other hand Mr Otarru referred this Court to the provisions of section 38 (a) (b) of the Companies Act, which provides as follows;

*" A contract may be made ;*

*(a) By company , by writing under its Common seal or*

*(b) On behalf of a Company, by any person acting under authority ,  
express or implied and any formality required by Law in case the  
contract is made by an individual also apply, unless a contrary  
intention appears.*

Moreover, Mr.Ottaru submitted that section 39 of the Companies Act states categorically that a contract by a Company has to be executed by one director and a Company seal affixed thereon , in the absence of a Company seal , then the contract has to be signed by two directors or a director and company secretary. He contended that in the case in hand, the alleged contract between the parties herein is invalid for failure to comply with the provision of the section 39 of the Companies Act.

Having analyzed the evidence adduced and the arguments raised by the learned advocates, I wish to point out that as correctly submitted by Mr Ottaru, Pursuant to section 39 of the Companies Act, contract entered into by a company has to be reduced in writing. That is the dictates of the law. In my opinion what happened in this case is that PW1 entered into agreement with the defendant and allowed the defendant to use the plaintiff's vehicle for transportation of his timbers. It has to be noted that PW1 as the Director of the Plaintiff is distinct from the plaintiff's Company. (See the case of **Salomon Vs Salomon and Co Ltd , ( 1897) A.C.22**).In my considered opinion PW1 made the contract in his personal capacity not for the Company.

From the foregoing, the answer to the first issue is that there was no contract between the Plaintiff's company and the defendant for transportation of forest produce.

Having answered the 1<sup>st</sup> issue in a negative, it is obvious that the second issue has been rendered redundant. However, for the sake of argument, even if I would have answered the first issue in the affirmative, the answer to this issue would be the same because the evidence adduced has shown that the contract for transportation of the defendant's timber was frustrated following the seizure of the vehicle and the timber before

reaching its destination. According to exhibit P2 the vehicle was wrongly seized since the defendant had valid permit for transportation of his timber. That remains to be the position as there is no any evidence in Court to the effect that the judgment of the Resident Magistrates' Court of Mbeya was overturned. In short what happened was beyond the defendant's control. Under the circumstances the defendant cannot be held liable for breach of contract.

With regard to the third issue that is **Whether the Plaintiff's truck was seized by TANAPA officials while under the control of the defendant**, PW1 testified that the plaintiff's vehicle was seized by TANAPA officials while under the control of the defendant. He told this Court that at the time of seizure the vehicle was loaded with the defendant's goods/ timber. He was emphatic that vehicle was under the control of the defendant because he is the one who was determining the movement of the vehicle. Moreover, he testified that when once a client hires a Vehicle , he becomes the controller of that Vehicle.

PW2's did not testify anything concerning the control of the plaintiff's vehicle at the time of its seizure.

On the other hand the defendant ( DW1) testified the plaintiff's vehicle was seized while it was under the control of the owner ( the plaintiff).

After loading the timbers, the journey to Mbeya commenced. . Unfortunately when the vehicle reached Isanga one area it sustained a breakdown. While it was parked awaiting to be repaired, government officials approached the driver and requested him to produce document for the transportation of the timbers loaded in the Vehicle. Documents for transportation of the timbers were produced as requested , but the government officials claimed that the same were not proper ones .Thereafter the vehicle was seized. Moreover DW1 testified that the driver and the turn boy were plaintiff's employees.

The evidence adduced show clearly that the plaintiff's vehicle was seized while loaded with the defendant's goods/ timbers heading to Mbeya. Thus, it is obvious that the vehicle was under the control of the defendant since the driver was receiving directives from the defendant and /or his assistance on where should the vehicle be driven as it was loaded with the defendant's timbers. With due respect to Mr Ottaru, it is illogical to argue that the vehicle was not under the control of the defendant while it was loaded with the defendant's timber and the driver , though was the plaintiff's employee was not in a position to decide where to take the timbers that were loaded in the vehicle. Therefore the third issue is answered in the affirmative.

Now, coming to the last issue , that is, **to what reliefs the parties are entitled to;** PW1 testified that before the seizure of the vehicle , the plaintiff used to earn a sum of Tsh 10,000,000/= per month .The plaintiff's claim for a sum of Tshs 375,000,000/= which is indicated in the plaint is for periods between 2016 to the date of filing this case.PW2 testified that the seizure of the vehicle has cause colossal loss to the plaintiff. The plaintiff used to earn a sum of Tshs 10,000,000/= per month out the transportation business using that vehicle. Moreover, PW1 testified that from the date of seizure of the plaintiff's vehicle to the date of filing this case more than 38 months has lapsed. Up to the date of hearing this case the Plaintiff has incurred loss to tune of Tshs 630,000,000/=.There is also depreciation of the vehicle is 25% per year which equal to a sum of Tshs 40,000,000/= per year. After being parked for a long time as of now the condition of the vehicle is very bad. Moreover, PW2 told this Court that before the seizure of the vehicle the plaintiff used to pay taxes very well. He tendered in Court a copy of plaintiff's Tax clearance certificate ( Exhibit P3) dated 18<sup>th</sup> February 2019.Upon being cross examined by Advocate Ossu, on whether the Company has audited financial reports and if it has , why hasn't he tendered them in evidence , he replied that the company has audited financial reports, but he has not tendered them in evidence because he believed that there was no need of tendering the

audited financial report in evidence. PW2 told this court that the audited financial report, contains so much information which some of them are not related to this case and the current ones do not have any information concerning the vehicle at issue as the same is not longer in use by the Company. He maintained that he decided to bring in evidence the tax clearance certificate for the year 2019, because that is the year when this case was filed in Court.

The defendant refuted all of the plaintiff's claims. He testified that in criminal case No.17 of 2017 the Court declared that the vehicle was wrongly confiscated. He ordered the vehicle to be handed over to PW1. PW1 is supposed to take/collect his vehicle from TANAPA. The same has never been in his possession. He was emphatic that he is not responsible for the loss claimed to have been incurred by the plaintiff.

The evidence adduced shows that the vehicle was wrongly confiscated while under the control of the defendant and up to date the defendant has not managed to repossess his timbers. Likewise, the plaintiff has never regained the possession of his vehicle. Thus , each party has suffered losses. Moreover, the evidence adduced has proved that what caused all losses suffered by the parties herein is the seizure of the vehicle and the timbers by TANAPA officials. In other words neither the

plaintiff nor the defendant caused the losses. In my considered opinion loss should lie where it falls. Defendant is not responsible for the losses suffered by the plaintiff. In fine , this suit is dismissed and looking at the circumstances of this case, I hereby order that each party will bear his own costs.

Date this 16<sup>th</sup> day of February 2022



A handwritten signature in blue ink, appearing to read "B.K. Phillip", is written over a circular stamp.

**B.K.PHILLIP**

**JUDGE.**