

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

AT DAR ES SALAAM

CIVIL CASE NO. 09 OF 2020

GREEN DIAMOND JOINT

STOCK COMPANY.....PLAINTIFF/DEFENDANT IN COUNTER CLAIM

VERSUS

TATA AFRICA HOLDINGS

(TANZANIA) LIMITED.....1ST DEFENDANT/PLAINTIFF IN COUNTER CLAIM

ADILI AUCTION MART LTS.....2ND DEFENDANT

EX-PARTE JUDGMENT

Date of last Order: 16/05/2023

Date of judgment: 16/06/2023

E.E. KAKOLAKI, J.

Before the Court the plaintiff herein and defendant in the counter claim, a company duly incorporated under the Companies Act, No. 12 of 2002, is suing the 1st defendant and plaintiff in the counter claim and 2nd defendant jointly and severally, both being legal persons for orders:

- (a) Determining the legality, validity and enforceability of the hire purchase agreements for equipment and Lorries.
- (b) Permanently restraining the 1st and 2nd defendants from attachment and repossession of the Plaintiff's 3 equipment described as Tata

Hitachi EX210 LC Super Model Excavators Reg. No. T 542DJE and T915 DJQ.

- (c) Declaring unlawful the unilateral enforcement by attachment and repossession of 2 Motor Vehicles (Lories) Make TATA LPK 2516-14 CUM TIPPER Reg. No. T261 DKZ and T 468 DLL.
- (d) Restraining sale or in the alternative if sale has been done, declaring it unlawful, null and void and consequently ordering release of the already attached 2 Motor Vehicles (Lorries) Make TATA LPK 2516-14 CUM TIPPER Reg. No. T 261 DKZ and T 468 DLL.
- (e) In the alternative an order returning the partly paid of hire price of USD 199,280 or purchase price of the almost brand new Lorries and equipment less depreciation at 10% per annum or as may be determined by the Court.
- (f) Payment of specific and punitive damages from deliberate acts and omissions of the defendants.
- (g) Interest on the liquidated sum at twenty percent (17%) from the date of filing the suit to the date of judgment and decree and for interest on the decretal amount at seven percent (7%) from the

date of judgment and decree to the date of satisfaction of the decree.

(h) Costs of this suit.

Briefly the plaintiff with intent to engage in a mining venture under sister company Central Geita Gold Mines Limited, in 2017 and 2018 had entered into hire purchase agreement with the 1st defendant and plaintiff in the counter claim, for purchase of equipments and Lorries with down payments starting from 40% of the purchase price. However, the intended venture was later on frustrated by the Government compliance regime which necessitated stopping of all activities in the intended mining activities under mining licence PML 0001054 located at Saraguwa village, hence the equipments and lorries never worked, the result of which the plaintiff failed the repay the outstanding hire purchase price. It is was out that failure the 1st defendant/plaintiff in the counter claim engaged the plaintiff for attachment and repossession of the said equipment and lorries hence the suit against the two by the plaintiff for the afore stated reliefs.

When served with the plaint the 1st defendant filed her written statement of defence resisting plaintiff's claim while at the same time raising the counter claim against her. It is deposed in paragraphs 10 of the counter claim that,

the 1st defendant/plaintiff to the counter claim is claiming for total sum of USD 130,000 being outstanding balance for excavators and vehicles purchase price, interest accrued and recovery costs thereto as specific damages for breach of contract, General damages to be assessed by the court, costs of the suit and any other relief this Court deems fit to grant.

It transpired that since institution of this suit on 17/01/2020, in between the plaintiff abandoned her case as she lastly appeared in Court on 20/10/2021, the default which moved the Court on 06/09/2022, to dismiss the suit with costs under Order VIII Rule 20(1)(a) of the Civil Procedure Code, [Cap. 33 R.E 2019] the CPC, at the instance of the 1st defendant for failure to attend in Court when the matter was set for 1st Pre-Trial Conference. As there remained a counter claim, it was ordered that the same proceed with hearing, but before hearing could take off the plaintiff in the counter claim prayed the Court to amend the said counter claim, the prayer which was granted. Further to that the plaintiff in the counter claim was ordered to serve the defendant in the counter claim, the service which could not be effected under normal services hence resorted to substituted services by publishing the summons in Mwananchi newspaper of 18/03/2023 and Nipashe newspaper of 07/04/2023.

In the amended counter claim the plaintiff therein (plaintiff) is claiming for declaration that, the defendant in the counter claim (defendant) is in breach of terms and conditions of sale of motor vehicles and excavators agreements she had entered into with her hence entitled to attach and dispose the vehicles and excavators for recovery of the outstanding money, payment of specific damages of USD 130,000 as outstanding balance of excavators and motor vehicles accrued interest and recoveries costs, general damages to be assessed by the court, cost of the suit and any other reliefs as the Court deem fit to grant.

Hearing of the matter was conducted orally, while the plaintiff parading one witness and relying on four documentary exhibits, in a bid to prove her case in terms of the provisions of section 110(1) and (2), 112 and 3(2) of the Evidence Act, [Cap. 06 R.E 2022], calling for whoever alleges existence of a certain fact to prove its existence and such proof to be on the balance of probabilities or preponderances. See also the cases of **Anthoni M. Masanga Vs. Penina (Mama Ngesi and Another**, Civil Appeal No 118 of 2014, **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, (both CAT- unreported). Now

the issue which this Court is called to answer is whether the plaintiff in the counter claim has managed to prove her claims.

As alluded to the plaintiff in the counter claim relied on single witness one, Rosemary Zakaria Kimaro (PW1), the debt clerk executive from the plaintiff's company responsible for debts collection and reconciliation of clients' accounts with the company among other duties. It was her evidence that, in 2017 the defendant approached the plaintiff and executed a hire purchase agreements for two motor vehicles and two excavators. For the vehicles she testified the purchase price was USD 55,000 for each vehicle make TATA tipper in which advance payment was USD 13,750 for each vehicle while the remaining balance for each vehicle was USD 41,250 to be paid in instalments from October 2017 up to September 2018. As for excavators each was sold at USD 96,000 in which advance payments were USD 50,000 and USD 20,000 respectively hence the remaining balance being USD 46,000 and USD 76,000, respectively, as the payments of outstanding amount for the first and second excavator was to be completed within six (6) and twelve (12) months ranging from June, 2017 to December, 2018, respectively. PW1 went on to inform the Court that, it was their term also that, repossession could be exercised by the plaintiff in case of default of payment of the outstanding

balance chargeable with 2% of the monthly instalment. Two agreements for Excavator make TATA HITACHI with Reg. No. T 542 DJE and T 915 DJQ, were admitted as exhibit PE1 collectively to prove existence of hire purchase agreement under the specified terms and conditions above between parties. Further to that, one motor vehicle sale agreement make TATA LPK 2516 was admitted as exhibit PE2 as the agreement for the second motor vehicle agreement she said was in the possession of the defendant. When referred to PE1, PW1 was able to point out that, under paragraph 2.2, the outstanding amount was to be effected monthly in which its default would attract 2% interest monthly.

In her further testimony this witness informed the Court that, the defendant failed to honour the terms of contracts, the result of which several meetings were held between the parties to discuss on the mode of payment, the meetings which gave birth to an agreement for reschedule of debt payment duly executed on 09/11/2018 exhibit PE3, which was also defaulted. Upon several follow ups and demand notices PW1 averred, the defendant issued the plaintiff with a letter acknowledging the outstanding debt, dated 01/20/2019 exhibit PE4, in which she managed to repay only USD 10,000 of USD 140,000 penalties inclusive and thereafter continued to reduce the

outstanding balance in small instalment but ceased when the balance has reached a total of USD 132,950 penalties inclusive as per the client's account statement exhibit PE5.

Explaining on the variance between USD 132,950 in exhibit PE5 and USD 130,000 pleaded in the amended counter claim as outstanding amount, PW1 detailed it was due to variation or fluctuation of exchange rate of dollar. In the end she prayed the Court to assist the plaintiff to recover its debt and costs incurred in the suit.

Now reverting back to the issue at hand and as the evidence by PW1 leads corroborated by exhibits PE1 collectively, PE2, PE3 and PE5 there is no dispute that, the defendant herein beached the sales agreements for purchase of two motor vehicles and two excavators, hence entitle her to reliefs. As to what reliefs is she entitled to, in paragraph 18 of the counter claim the plaintiff is claiming specific damage of USD 130,000 being the outstanding amount of purchase price of two motor vehicles and two excavators, penalties accrued and recovery costs for breach of sale agreements of equipment and motor vehicles. It is principle of law that, specific damages must be pleaded, particularized and proved (three Ps). See the cases of **Stanbic Bank Tanzania Limited Vs. Abercrombie & Kent**

(T) Limited, Civil Appeal No. 21 of 2001 and **Reliance Insurance Company (T) Ltd and 2 Others Vs. Festo Mgomapayo**, Civil Appeal No. 23 of 2019 (both CAT-unreported) and commentaries by 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, which I find very relevant and adopt them on the requirement of proof specific damages, where he had this to say:

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

Going through the counter claim it is noted that, apart from pleading the claimed specific damage of USD 130,000, the plaintiff particularized it in paragraphs 19, 20 and 21 in that, out of USD 55,000 per unit of the two motor vehicles make TATA TIPPER only USD 13,750 for each unit was paid as advance payment, while the remaining outstanding balance was USD 41,250 for each unit. And further that, for the excavators the purchase price for each unit was USD 96,000 in which the defendant paid advance of USD 50,000 for the first excavator and USD 20,000 for the second excavator as the outstanding amount was USD 46,000 and USD 76,000 respectively. In

proving those pleaded and particularized claims, PW1 gave detailed account on the same claimed amount as evidence in the summary of evidence herein above which by calculation the outstanding amount stood at USD 122,000. It was in her further evidence relying on the letter of commitment to pay debt by the defendant in the counter claim exhibit PE4 that, the acknowledged debt by the defendant up to 1st February 2019, had raised to USD 140,566. However, it is this witness who undisputedly confirmed to the Court that, the defendant managed to repay USD 10,000 which if deducted from the acknowledged debt by the defendant of USD 140,566 the remaining outstanding balance is USD 130,566. That aside the plaintiff sought to rely on exhibit PE5, the client account statement to prove to the Court that, with 2% monthly interest for delayed instalments and fluctuation of exchange rate of dollar, the claimed outstanding amount had raised to USD 132,000 far beyond the pleaded amount of USD 130,000 in the amended counter claim. I do not accept this explanation for one good reason that, PW1 failed to explain to the Court the exchange rates of dollars obtained at the time of accrual of interest up to the time of printing the said document to justify the variation. That said and done, I find the only specific damages the plaintiff has managed to prove is USD 130,000 as pleaded.

The plaintiff has also claimed for general damages. It is a principle of law on general damages that, Court's function is to determine and quantify the amount to be awarded to the injured party, but it is also the claimant's duty to give material evidence leading the Court to believe such damage was suffered before the same is awarded as it was stated by Lord Dunedin in the case of **Admiralty Commissioners v SS Susquehanna** [1950] 1 ALL ER 392 which was also cited with approval by the Court of Appeal in **Peter Joseph Kilibika** (supra) where it was stated:

"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."

In this case the plaintiff never adduced any evidence that would guide the Court to consider and quantify the damages to be awarded to her. I therefore find she is not entitled to such relief. Lastly is on the claim for costs of this suit which issue I think need not detain this Court as it is obvious in prosecuting this case she has incurred some cost. The plaintiff I find is entitled to the costs. Since the withheld money of the plaintiff by the defendant would have been invested and produced profit I hold he is entitled to interest of the decretal amount.

All said and done, I enter judgment in favour of the plaintiff, declare and order the following:

- (1) Defendant in the counter claim is in breach of the terms and conditions of the sale agreements entered with the plaintiff for the sale of two motor vehicles and two excavators.
- (2) Payment of USD 130,000 by the defendant to the plaintiff being the outstanding hire purchase price for two excavators and two motor vehicles plus accrued interest.
- (3) Payment by the defendant of interest of 7% on the decretal amount from the date of judgment to the date of full payment.
- (4) Costs of the suit.

It is so ordered.

It is so ordered.

DATED at Dar es salaam this 16th June, 2023.



E. E. KAKOLAKI

JUDGE

16/06/2023.

The Judgment has been delivered at Dar es Salaam today 16th day of June, 2023 in the absence of both parties and Ms. Zubeda Kaungu, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI
JUDGE
16/06/2023.

