

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**(DAR ES SALAAM SUB REGISTRY)**  
**AT DAR ES SALAAM**

**CIVIL CASE NO. 88 OF 2022**

**BETWEEN**

**BIG BOSS TRANSPORT CO. LIMITED ..... PLAINTIFF**

**VERSUS**

**SIMAGUNGA GENERAL TRADING CO. LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**DAR LUX CO. LTD ..... 2<sup>ND</sup> DEFENDANT**

**DONALD SIMAGUNGA ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

*6<sup>th</sup> September & 23<sup>rd</sup> October, 2023*

**I.C. MUGETA, J.**

The plaintiff's claim against the defendants is based on breach of the Memorandum of Understanding (the MoU) executed on 21/8/2018. The same was admitted in evidence as exhibit P3. According to the MoU, the 1<sup>st</sup> defendant had to supply the plaintiff with 4 units of Higer Buses, Model KLQ6138DF worth USD 684,000 within 90 days of payment of the purchase price in the accounts of the 1<sup>st</sup> defendant. The plaintiff avers in the plaint that the said US dollar amount is equivalent to Tshs. 1,400,000,000/= . The plaintiff alleges further that the MoU was negotiated by the 3<sup>rd</sup> defendant who is the Director and majority shareholder of both the 1<sup>st</sup> and 2<sup>nd</sup> defendants. According to the

plaintiff, the money was deposited into the 2<sup>nd</sup> defendant's bank account instead of the account stated in the MoU upon oral instructions of the 3<sup>rd</sup> defendant to the director of the plaintiff Mr. Eliud Jones Kijalo (PW1).

The defendants have all along denied the plaintiff's claims. The third defendant in his evidence, on behalf of all defendants, disputed neither to have executed the MoU nor receiving money for the supply of buses.

The issues for my determination are:

1. Whether there was an agreement for supply of four buses make Higer between the plaintiff and the 1<sup>st</sup> and 3<sup>rd</sup> defendants herein.
2. If the 1<sup>st</sup> issue is answered in the affirmative, whether there was breach of the agreement.
3. To what reliefs are the parties entitled.

The plaintiff is represented by Herman Kilenzi, learned advocate whereas as Ally Jamal, learned advocate represents all the defendants.

Hereunder, is a summary of the evidence from the parties.

Eliud Jones Kijalo (PW1) is the Managing Director of the plaintiff. He was the sole witness for the plaintiff and his evidence was received by way of a witness statement. In order to establish existence of the contract between the parties, he relied on the MoU and documents for the payment of the contract consideration. Such documents form

exhibits P4 (the bank money transfer form) and exhibit P5 (1 – 9) (the bank deposit slips). In exhibit P4, Tshs 500,000,00/= was transferred while in exhibit P5 (1 – 8) a total of Tshs. 550,000,000/= was deposited in cash on different dates. In exhibit P5 (9), USD 95,000. PW1 testified this money was for the buses' importation taxes clearance. All transfers and deposits were made to the 2<sup>nd</sup> defendant's account by either PW1 or the plaintiff's agents.

Further, PW1 testified that in a bid to refund the money, the third defendant issued fake cheques to him. He tendered the same as exhibits P6 (1 – 3). Their total value is Tshs 1,302,000,000/=.

On his part, the 3<sup>rd</sup> defendant who testified as DW1 (hereinafter Mr. Simagunga) who is the lone witness for the defendants' side denied signing the MoU for the supply of the said buses. He disputed his signature on both the MoU and the demand notice (exhibit P7). He admitted his signature on the cheques arguing that they were just for proving to PW1's creditors and PCCB who had detained him that he had pending payments. According to Mr. Simagunga he had a tyres supply business with the plaintiff's director (PW1) and the money he deposited in the 2<sup>nd</sup> defendant's account was payments for goods supplied in that business. He testified further that PW1 is his longtime friend and they traded in motor vehicle tyres only.

In his final submissions, Mr. Jamal argued that the plaintiff failed to prove his claims as exhibit P3 is not authentic as there are different years appearing on the contract which are years 2016 and 2018. In his views, as no money was paid in the agreed account, no consideration was received.

It is my view and holding that the difference in years is a typing error as explained by PW1 in his testimony. Thus, the correct year is 2018. The fact that the money was deposited in the 2<sup>nd</sup> defendant's account and not the 1<sup>st</sup> defendant's account as agreed in the MoU was explained by PW1. I shall revert to this issue after determining the first issue.

The first issue is whether there was an agreement for supply of four buses make Higer between the plaintiff and the 1<sup>st</sup> and 3<sup>rd</sup> defendants. I shall determine this issue based on facts pleaded and proved in evidence by all the parties.

The facts on execution of the MoU are pleaded under paragraph 9 of the amended plaint. It reads:

*"... the plaintiff as buyer and the 1<sup>st</sup> defendant as supplier entered into a memorandum of understanding for the purchase of four (4) buses namely higer buses model KLQ 138DF for a total price of United States Dollars six hundred eighty four thousand ..."*

The reply to that paragraph is in paragraph 6 of the joint WSD of the defendants where it is stated:

*"The contents of paragraphs 9 and 10 of the plaint (sic) are disputed and the plaintiff is put to strict proof thereof. The defendants state that the document attached ... is just memorandum not distributorship agreement, the space of the distributor indicated to have been executed in 2016 it has not been witnessed by the Commissioner for oaths, the document has not been stamped and registered to the Registrar for the title to give the agreement the legal status"*

I hold that the foregoing defendants' reply is a general denial of the allegation about the execution of the MoU. It concentrates on the defects in form and compliance with laws to make the MoU a valid document in evidence. There is no specific denial of the signature of Mr. Simagunga as he did in evidence. This is contrary to Order VIII rule 2, 3 and 4 of the CPC which obligates the defendant:

- i. To raise all grounds of defence as, if not raised, would be likely to take the opposite party by surprise;
- ii. Not to make general denial but to deal specifically with each allegation of fact of which he does not admit the truth; and
- iii. Not to be evasive but answer the point of substance

I hold that Mr. Simagunga's disowning his signature in evidence without pleading that fact took the plaintiff by surprise. No wonder

counsel for the plaintiff questioned him if he was ready to have that signature examined by experts and he conceded, presumably, knowing that window has been closed.

In the case of **Barclays Bank (T) Ltd v. Jacob Muro**, Civil Appeal No. 357/2019, Court of Appeal – Mbeya (unreported) it was held:

*"As parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings ... For the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial."*

Further, by repudiating his signature during evidence in defence without pleading that fact, the defendants raised matters of fact involving fraud not arising out of the plaint. Such moves are barred by Order VIII rule 2 of the CPC. Consequently, such evidence cannot be afforded any probative value for being not pleaded, hence, taking the plaintiff by surprise. Consequently, I hold that the plaintiff has proved that the MoU was executed. The first issue is answered in the affirmative.

Having answered the first issue in the affirmative, the second issue is whether there was breach of the agreement. According to exhibits P4 and P5 (1 – 8) the plaintiff met his part of the bargain by paying Tshs.

1,050,000,000/= in the account of the 2<sup>nd</sup> defendant. In exhibit P5(9) the plaintiff paid USD 95,000 for, allegedly, clearance of the cargo. Mr. Simagunga testified that all these monies were payment of tyres supplied to PW1.

I find that this defence was not pleaded too. Throughout their joint WSD the defendants never admitted the payment nor assigned any reason for the receipt of the same. The tyres business claim surfaced just in defence evidence. Likewise, the reason for issuing the cheques (exhibit P6) were not pleaded despite the plaintiff alleging in paragraph 19 of the plaint that the same were for refunding the money paid for the buses purchase. Nowhere in the amended WSD the plaintiff stated that the cheques were intended for PW1 to show his creditors that he expected payments from his debtors or to show PCCB who had arrested him so that he can be released on bail. Failure to plead a fact that has to be relied upon in defence makes evidence of unpleaded fact an afterthought. Such evidence cannot be acted upon for taking the other party by surprise.

As a result, I hold that the plaintiff paid Tshs. 1,050,000,000/= for bus purchase and USD 95,000/= for taxes and port customs clearance fees but the defendants failed to deliver the agreed 4 units of buses make Higer, model Model KLQ6138DF. The defendants, therefore, breached the contract.

I promised to come back to the issue of paying the contact consideration in the account of the 2<sup>nd</sup> defendant instead of that of the 1<sup>st</sup> defendant's account stipulated in the MoU. Indeed, the money was not paid in the agreed account. PW1 said he did so on oral instruction of Mr. Simagunga. Considering the evidence of Mr. Simagunga that they were good friends, which evidence I have no reason to doubt, I find PW1 credible. This finding is supported by the fact that the defendants have not proved the payment was for other use than the buses purchase. Their evidence that it was for a tyres business has been disregarded for reasons above stated.

Before I consider the reliefs, I shall address some pertinent matters raised in the pleadings and the parties written submissions particularly by the defendants' counsel.

On the legality of the MoU, I have failed to understand the concern of the defendants as raised in paragraph 6 of the WSD regarding attestation, stamping and registration. Indeed, the attestation part where Mr. Simagunga signed was not witnessed. However, this does not invalidate the document where consideration was paid and acknowledged. If by stamping the defendants referred to stamp duty, the MoU has the stamp duty. Regarding registration with the Registrar of Titles, I doubt if the MoU is a compulsorily registrable document



under section 8 and 9 of the Registrar of Documents Act [Cap. 117 R.E 2002].

Another complaint concerns the plaintiff's board resolution to file this case. That the plaintiff being a company could not validly file a suit without a board members resolution to sue as required by section 147 of the Companies Act [Cap. 212 R.E 2019]. Counsel for the defendants has referred me to the case of **Tanzania American International Development Cooperation 2000 Limited (TANZAM) & Another v. First World Investment Auctioneers, Court Brokers**, Civil Case No. 15 of 2017, High Court – Arusha (unreported) to support his argument. He has also cited **Francis Eugen Polycard v. M/S Panone & Co. Ltd**, Civil Appeal No. 8 of 2019, High Court – Moshi (unreported) to argue that the board resolution which was attached to the amended plaint is not evidence because it was not tendered.

The plaintiff attached a copy of the board resolution to the plaint but, indeed, the same was not tendered in evidence as argued by counsel for the defendant. While I agree with him that documents attached to pleadings but not tendered and admitted are not evidence, it is my view that the documents referred to in **Fransis Eugen Polycard case** (supra) are documents relevant to the facts in issue. A board resolution is necessary to prove competency of the suit at institution of the suit not after a trial. On that account, I do not agree

with counsel for the defendants that a board resolution attached to pleadings must be tendered in evidence to make the suit tenable. I am settled in my mind that an objection for want of board resolution fails in the category of objections which ought to be raised before trial begins and not thereafter because evidence is for proving framed issue and matters not included in disputed issues are deemed undisputed. While I agree with counsel for defendants that a company cannot sue without a board resolution to that effect, I go along with the holding of my sister Opiyo J. in **Tanzania American International Development Cooperation 2000 Limited (TANZAM) & Another** (supra) where her Ladyship held:

*"I am of the firm view that, it is a legal requirement that a legal cooperate or company in institution of a suit, the plaint must be accompanied by a board resolution sanctioning the same. In the present suit as conceded by the plaintiff's counsel the plaint is not accompanied with the same"*

The above holding means that the relevance of the board resolution is for proving competency of the suit at the preliminary stages of the suit no more. In this case the board resolution is pleaded in the amended plaint. Its existence was not disputed and that is why no issue was frame to prove it. Other documents ought to be tendered as their contents are central to the dispute to prove the framed issues for

determination. The cited cases are distinguishable because the board resolution in the case of **TANZAM** (supra) was not pleaded and the documents referred to in the case of **Francis Eugen** (supra) are those proving framed issues.

There is also a complaint that Abdallah Karim and Victor Zakaria who deposited the money in exhibits P(1), P(8) and P5 (2) respectively were not summoned to testify, therefore, the court should draw adverse inference for failure to summon material witnesses. This is a misdirection on part of the counsel for the defendants because there is no dispute that the money was deposited. What is at issue is the purpose to which the money was to be applied. Adverse inference is drawn when a witness is not summoned to prove a material disputed fact. PW1 testified that Abdallah and Victor were his employees and the defendants has not led evidence to show that the use to which the money was to be applied, which is the fact in issue, was known to them. Without such evidence, adverse inference cannot be drawn.

Next for consideration is the reliefs. In his plaint, the plaintiff prayed for the recovery of 1,400,000,000/= being the purchase price of the 4 Higer buses. However, payments proved is Tshs. 500,000,000/= transferred on 4/12/2018 to the 2<sup>nd</sup> defendant's account vide exhibit P4, Tshs. 550,000,000/= through exhibit P5 (1 – 8) and USD 95,000 vide

exhibit P5 (9). Therefore, the plaintiff has proved specific loss suffered of Tshs. 1,050,000,000/= and USD 95,000 which I, accordingly, award.

The plaintiff also prayed for the award of Tshs. 1,600,000,000/= for the loss of business. In his final submissions counsel for the plaintiff has urged the court to award the same as loss of profit for failure to run the intended business. However, there is no evidence tendered to prove that the intended business would have yielded such profit. I reject the prayer.

The plaintiff also claims Tshs. 1,000,000,000/= as the value of the plaintiff's three houses sold so as to service the loan he procured from Equity Bank to purchase the buses. In his evidence, PW1 tendered exhibits P8, P9 and P10 to show that he sold his houses to repay the loan. However, this allegation is unproved because no loan agreement was tendered to support the claim. A loan facility is a document whose existence cannot be proved by oral evidence as required by section 100 of the Evidence Act [Cap. 6 R.E 2022].

On the claim for general damages, I am convinced that the plaintiff has suffered damages from the breach of the terms of the MoU. Considering the expected commercial use of the buses, inconvenience suffered from 2018 to date, I assess general damages at the tune of Tshs. 500,000,000/=.

I further order that the specific damages suffered shall attract 15% bank interest from 4/3/2019 being the date the 90 days of delivery per item 9 of the MoU lapsed calculated from 4/12/2018 when the last instalment was paid per exhibit P4. The decretal sum shall attract interest at court's rate from the date of this judgment to the date of full settlement of the claim. The defendants are also ordered to pay costs of the suit.

  
I.C. Mugeta

**JUDGE**

**23/10/2023**

**Court:** Judgment delivered through virtual court in the presence of Herman Kilenzi, learned advocate for the plaintiff and Ally Jamal, learned advocate for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

Sgd. I.C. Mugeta

**JUDGE**

**23/10/2023**