IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA SUB-REGISTRY)
AT ARUSHA

CIVIL APPEAL NO. 40 OF 2022
(Emanating from the decision of the District Court of Arumeru, Civil Case No. 4 of 2020)

T.G WORLD INTERNATIONAL LIMITED ..... APPELLANT

Versus

CARRIER OPTIONS AFRICA (TANZANIA) LIMITED ..... RESPONDENT

JUDGMENT

30th October & 13th December 2023

Masara, J.

A. INTRODUCTION

In the District Court of Arumeru ("the trial court"), the Respondent herein successfully sued the Appellant for a claim of breach of contract executed in September 2019.

In the plaint, the Respondent sought several reliefs including: a declaration that the Appellant breached the contract; an order that the Appellant refunds the purchase price advanced to it amounting to USD 20,000.00 (equivalent to TZS 46,000,000/=) for importation of a Caterpillar Shovel Loader 950G, Chassis No. 5MW0275, which the Appellant failed to import; an order for payment of specific damages to the tune of USD 5,000.00, being the amount incurred by the Respondent in hiring other caterpillars; an order for payment of general damages at

the court's assessment; interest at the rate of 12% from the date of judgment to the date of full payment; costs of the suit and any other relief that the court deemed just and equitable.

In the written statement of defence, the Appellant admitted that the Respondent advanced the USD 20,000.00 for importation of a caterpillar specified and alleged by the Respondent in the plaint. However, the Appellant disputed the allegation that it had breached the contract for failure to deliver the caterpillar on the time agreed. In its view, time agreed had not elapsed.

At the end of the trial, the trial court held that the Respondent had proved its case on the balance of probabilities. The trial magistrate declared the Appellant to have breached the contract. Consequently, the Appellant was ordered to refund to the Respondent USD 20,000.00 (equivalent to TZS 46,000,000/=) being the amount paid by the Respondent to the Appellant for importation of the caterpillar shovel loader 950G with chassis No. 5MW0275 which the Appellant failed to import. The amount awarded carried an interest of 12% from the date of judgment to the date of full satisfaction. The trial magistrate further ordered the Appellant to pay general damages to the tune of USD 4,000.00 and costs of the suit.

Irked, the Appellant has preferred this appeal on the following grounds, reproduced *verbatim*:

a) *That, the learned trial magistrate grossly erred in law in giving its decision by improperly admitting the electronic evidence tendered by the Respondent despite objection raised by the Appellant on the admissibility of such evidence leading to erroneous decision;*
b) *That, the learned trial magistrate grossly erred in law and fact in giving its decision in favour of the Respondent while the Respondent had no locus standi against the Appellant;*
c) *That, the trial court erred on point of law and fact by declaring the Appellant to be in breach of the contract for importation of a caterpillar shovel loader 950G without ascertain the terms of the contract;*
d) *That, the trial court erred on point of law and fact for failure to properly evaluate the evidence tendered before the honourable court and in turn to trial magistrate reaching to erroneous decision;*
e) *That, the trial court erred on point of law in exercising judicial discretion unreasonably by awarding general damages of USD 4000;*
f) *That, the trial court erred on point of law and fact in admitting evidence which were tendered by improper person which led to the Appellant being at disadvantage position; and*
g) *That, the learned trial magistrate grossly erred in point of law and in fact for failure to properly evaluate the defence evidence tendered before the honourable court and in turn led to the trial magistrate reaching to erroneous decision against the Appellant.*

B. BACKGROUND

According to the pleadings and the evidence on record, the Appellant is a company that deals with importation of various goods from abroad, including motor vehicles. The Respondent was in need of a caterpillar shovel loader 950G. Mr Joseph Ndungu Mathenge (PW1), a director of the Respondent, approached the Appellant, through its director Mr Deogratius Temba (DW1), and expressed the Respondent's interest. The two made several communications through *WhatsApp* conversations. They agreed on the price, model of the caterpillar, time that will be taken for the same to reach Tanzania and mode of payment. The Appellant searched and found the specified caterpillar. It then issued a proforma invoice to the Respondent. The same was from China Machinery Limited dated 11/09/2019. The same was handed over to the Respondent on 25/09/2019. They agreed USD 23,000.00 as the price which also included transport costs. The Respondent advanced the first instalment of USD 20,000.00 to the Appellant on the same date, which the Appellant acknowledged by issuing the Appellant with a receipt.

According to the Respondent, the Appellant promised that the caterpillar would take six weeks of shipment from Shanghai-China to reach Dar es Salaam port. On 14/10/2019, the Appellant sent to the Respondent

inspection report from China Machinery Limited, the exporter, which however had different chassis number from the one they had agreed before. The Respondent clandestinely made inquiry from China Machinery Limited, the purported exporter, who assured the Respondent that the Appellant withdrew the intention of buying the caterpillar from them as they secured a cheaper exporter.

The agreed time for delivery of the caterpillar elapsed without the Appellant delivering the caterpillar to the Respondent, despite several reminders and inquiries. That coupled with the fact that there was change of the model that the Respondent had ordered in respect of the chassis number, made the Respondent to cancel the order through a letter dated 04/11/2019. Subsequent to the cancellation of the order, on 08/11/2019, the Appellant issued the Respondent with a bill of lading from another exporter, Red Machinery International.

On 07/11/2019, the Respondent, through her lawyers, demanded from the Appellant the refund of the purchase price of USD 20,000 on grounds of lack of good faith on the part of the Appellant and the delay on importing the caterpillar, which amounted to breach of contract. Further, the Respondent also demanded payment of USD 5000 as costs of hiring

other caterpillars to undertake the work which ought to have been performed by the ordered one.

On 21/11/2019, the Appellant responded to the Respondent's demand letter, disputing breach of contract. The Appellant denied to have promised the Respondent that importation of the caterpillar would take six weeks from Shanghai to Dar es Salaam; on the contrary, that what was promised is that delivery would take six weeks after shipment was done by the exporter, and time would start to run after shipment. The Appellant further informed the Respondent that the bill of lading was sent to them implying that the caterpillar was on transit already. The Appellant also informed the Respondent that there was no delay hence there was no breach of contract because they were still on time. The Appellant warned that in case the Respondent maintained the position to cancel the order, owing to the fact that the cargo was on transit, the Respondent was obliged to pay 25% (calculated to USD 5750) of the total purchase price as cancelation fee, in accordance with the company policy. The Appellant urged the Respondent to pay the balance of USD 3000 and submit the Respondent's TIN for TRA assessment of VAT. Further, the Respondent was called upon to pay other charges such as assembling costs, clearing costs and delivering costs which was calculated at TZS

5,000,000/=. The Respondent was required to comply within 14 days otherwise the Appellant would proceed with change of name of consignee. The Respondent did not comply, resultantly, the Appellant changed the name of the consignee of the wheel loader to its own name.

Subsequently, through telephone conversations, DW1 managed to convince PW1 to change their mind and take the already imported caterpillar. On 07/01/2020, the Respondent wrote a letter to the Appellant intimating that they were ready to take up the other imported caterpillar which was distinct from the one ordered but subject to an opportunity to inspect it to be assured of its suitability for the intended use. The Appellant responded in a letter dated 09/01/2020 refuting the Respondent's prayer. To the contrary, the Appellant offered to refund the purchase price after deducting the 25% of the cancellation fee, which would be done after selling the caterpillar to other buyers. That prompted the Respondent to institute the suit in the trial court. As intimated above, the trial court held in favour of the Respondent.

C. REPRESENTATION

At the hearing of the appeal, Mr Matuba Nyerembe and Mr Zuberi M. Ngawa, learned advocates, appeared for the Appellant and Respondent

respectively. Hearing of the appeal was through filing of written submissions.

D. SUBMISSIONS

In the written submissions, Mr Nyerembe abandoned the 6th ground of appeal. In support of the 1st ground of appeal, Mr Nyerembe submitted that the trial magistrate was wrong when he relied on printout documents generated from *WhatsApp* and text messages which are electronic evidence. He accounted that all documentary evidence tendered and admitted were electronic evidence with the exception of the demand notice and its reply (exhibits P11 collectively). He further submitted that admissibility of the electronic exhibits contravened section 18(2) of the Electronic Transactions Act, No. 13 of 2015 (henceforth, "ETA"). He stated that the law requires filing of an affidavit of authenticity showing that the machine in which the information was recorded, stored and ultimately the documents printed out was not tampered with, from the time of procurement to the time it was tendered in court as exhibit. That the remedy for improperly admitted documentary exhibits is to have the exhibits expunged from the court record, he submitted. To augment his position, Mr Nyerembe referred to the following decisions of this Court: **Musa Zambi vs Erick Minga, Civil Appeal No. 13 of 2019**, **Amina**

Mohamed @Fani Mohamed vs Gullamhussein Dewji Remtullah @Gulam, DC Civil Appeal No. 5 of 2020 and the Court of Appeal decision in **Airtel Tanzania Limited vs Ose Power Solutions Limited, Civil Appeal No. 206 of 2017** (all unreported).

Mr Nyerembe cautioned that the overriding objective principle in the circumstances of this case is inapplicable as the principle cannot be applied blindly to circumvent mandatory provisions of procedural law which go to the foundation of the case. To bolster his argument, he referred the case of **Njake Enterprises Ltd vs Blue Rock Ltd and Another, Civil Appeal No. 69 of 2018** (unreported).

Elaborating the 2nd ground of appeal, Mr Nyeremba argued that the Respondent did not have *locus standi* to sue the Appellant at the trial court. He amplified that documents used to purchase the said caterpillar shovel loader 950G, refer to Double M Investment in negotiations leading to the purchase of the said caterpillar and even the invoice and the payment was made by the said Double M Investment, but not the Respondent herein. He made reference to exhibit P4 which refer to the Appellant and Double M Investment, insisting that the Respondent had no *locus standi* to sue. Demonstrating his proposition on the *locus standi* to sue, Mr Nyerembe made reference to the case of **Lujuna Shubi Balonzi,**

Senior vs Registered Trustees of Chama cha Mapinduzi [1996] TLR 203.

He maintained that, even assuming that Double M Investment and the Respondent herein were under the same director, still the two are separate legal entities and one cannot assume the mandate to sue on behalf of the other. It was further submitted that the Respondent failed to produce any written document in support of the purchase of the said caterpillar whilst payment was made by Double M Investment and receipt acknowledging payment was issued to that effect. According to counsel for the Appellant, the argument by the Respondent that BRELA refused to register Double M Investment during registration process was not backed up by any document from BRELA.

On the 3rd ground of appeal, the Appellant's counsel averred that the respondent's witness failed to prove existence of an oral agreement and the terms of the said agreement. It was wrong for the trial court to rule that the Appellant breached the terms of the contract without there being proof of the terms of the said agreement, Mr Nyerembe submitted. He maintained that the holding by the trial magistrate that the Appellant breached the terms of the contract by importing the caterpillar different from the one ordered was erroneously arrived at, owing to the fact that

there was no material evidence before him to reach that conclusion. According to Mr Nyerembe, even by relying on the demand notice and its reply to assume existence of contract was wrong because the demand notice cannot be used to determine existence of a contract nor prove its terms. Furthermore, counsel for the Appellant asserted that the Appellant denied to have instructed any one to reply to the demand notice, hence the reply to the demand notice was not prepared under the Appellant's instructions.

Submitting on the 4th and 7th grounds of appeal collectively, Mr Nyerembe fortified that this Court being the first appellate court is enjoined to re-evaluate the evidence and come up with its own findings. He sought reliance on the decision in **Yasin Ramadhani Chang'a vs Republic [1999] TLR 481**. He submitted that there was no evidence to prove that the Appellant and the Respondent agreed on the specified caterpillar shovel loader because the purported chassis number does not even feature in exhibit P1. He maintained that the documents tendered do not prove the existence of the contract or breach of its terms because the record shows that the documents bear the name of Double M Investment Ltd as per exhibit P4. It was further his submissions that the correspondences on the purchase of the caterpillar were between

directors of the Appellant and Double M Investment Ltd as reflected in exhibits P1 and P4, hence the Respondent was not a party.

Mr Nyerembe faulted the trial magistrate's decision, stating that he just summarized the evidence without subjecting it into objective evaluation in order to separate the chaff from the grain. In support of his proposition, he made reference to the case of **Leonard Mwanashoka vs Republic, Criminal Appeal No. 226 of 2014** (unreported), which underscored that position. According to Appellant's counsel, the Appellant's evidence was not considered because DW1 testified that the Appellant did not instruct any person to respond to the demand notice, but such piece of evidence was not considered. In his view, such misdirection by the trial magistrate prejudiced the Appellant as per the Court of Appeal decision in **Hussein Idd and Another vs Republic [1986] TLR 166**.

Submitting in support of the 5th ground, the Appellant's counsel asserted that the Respondent was not entitled to be awarded USD 4,000 as general damages because there was no contract between the Respondent and the Appellant, hence the allegation that there was breach of contract was not proved. He maintained that the agreement existed between the Appellant and Double M Investment Ltd; therefore, there was no transaction between the Appellant and Respondent. To support his contention, he

referred the decision in **Frank Madege vs Attorney General, Civil Case No. 187 of 1993** (unreported), which encapsulated the principles of assessment of damages. Based on his submission, Mr Nyerembe urged the Court to quash the decision of the trial court and allow the appeal with costs.

On the other hand, Mr Ngawa, in response to the 1st ground of appeal, submitted that the Appellant's counsel did not state clearly which exhibits were generated from *WhatsApp* data messages and which ones were from text messages and how they contravened section 18(2) and (3) of the ETA. He amplified that exhibit P1 was properly admitted because PW1 clearly stated that his phone was encrypted and was working properly. That PW1 showed his phone to the court, and it was the same phone he connected to the computer in order to print the messages. According to Mr Ngawa, PW1 demonstrated the authenticity of the WhatsApp print out to the satisfaction of the trial court. He maintained that section 18(2) and (3) of ETA do not require an affidavit or endorsement by anyone to authenticate an electronic document. To back up his submission that the law does not require an affidavit or certificate of authentication, Mr Ngawa cited this Court's decisions in **Standard Chartered Bank Tanzania Ltd vs Tineishemo, Revision Application No. 184 of 2022** and

Mohamed Enterprises (Tanzania) Limited vs Tanzania Railways Corporation and Another, Civil Case No. 7 of 2021. Mr Ngawa was of the view that since PW1 gave evidence under oath and dully explained how the data messages were retrieved from the electronic device without any manipulation or alteration, the requirement of authentication under section 18 was complied with. He was thus of the view that the electronic documents were properly tendered and admitted in evidence.

In response to the 2nd ground of appeal, Mr Ngawa accounted that during negotiations, parties herein agreed to change the name from Double M Investment Ltd to the current Respondent, since the name of Double M Investment failed to be registered with BRELA. He referred to pages 15 and 16 of exhibit P1, stating that the director confirmed the said changes and from then onwards, all correspondences were made between the parties herein; that is why the Respondent was named as the consignee. He also referred to exhibits P6 (clarification letter), P7 (inspection report) and P10 (the bill of lading) which named the Respondent as the consignee. He maintained that the trial court was correct to hold in favour of the Respondent as the party who had a claim of right against the Appellant.

Answering the 3rd ground of appeal, Mr Ngawa reiterated that there existed a contract between parties herein, making reference to exhibit P1. Also, that during testimonial account, PW1 managed to prove the terms of the contract through various exhibits tendered. Further, it was counsel's view that DW1 admitted to have sent exhibit P3 to Double M Investment prior to change of name; that the invoice showed specifications of the caterpillar shovel loader selected by the Respondent, including its model number and chassis number (5MW0275). Mr Ngawa added that, during the cross examination of DW1, as reflected at page 47 of the proceedings, he admitted that the chassis number in exhibit P7 differed with that in exhibit P3. Further, that DW1 admitted that they did not agree to order a caterpillar other than the one reflected in exhibit P3, which the Respondent chose by making payment. Regarding reply to the demand notice, it was counsel's submission that the record is clear at page 40 that it was the Appellant's witness who prayed to tender it and the same was admitted as exhibit D1. Counsel for the Respondent endorsed the trial court's decision stating that it was appropriate for the trial court to make a finding that the Appellant breached the terms of the contract.

Reacting to the 4th and 7th grounds of appeal, Mr Ngawa canvassed that issues of chassis number were proved through exhibit P3. The Respondent

sealed by paying the purchase price after being satisfied with the quality of the consignment reflected in the invoice. In addition, that exhibit P1 proved the existence of a contract between parties herein, as admitted by DW1 in his evidence as reflected at page 38. On the contention that the trial magistrate just summarized the evidence without subjecting it to objective evaluation, Mr Ngawa submitted that each magistrate or judge has own writing style. The only prerequisite to observe is that, in judgment writing, the important contents of a judgment must be reflected. He pondered that the trial magistrate considered all the important components of a valid judgment and made a thorough evaluation of the evidence of both sides.

Regarding re-evaluation of the evidence by this Court, Mr Ngawa countered that this Court's powers to reappraise the evidence can only be invoked where there is misdirection or non-direction of the evidence by the trial court, which, in his view, does not exist in the appeal under scrutiny. To buttress his contention, Mr Ngawa referred to the decision of the Court of Appeal in **Khalife Mohamed (As surviving Administrator of the Estate of the late Said Khalife) vs Aziz Khalife and Another, Civil Appeal No. 97 of 2018** (unreported).

Responding to the 5th ground, Mr Ngawa postulated that since there was proof of the existence of a contract, and since it was the Appellant who was in breach of the said contract, the Respondent deserved the general damages awarded by the trial court. He underscored that, the Respondent incurred costs by hiring other caterpillars to carry on their duties due to the delay occasioned by the Appellant, which as well entitled her damages. He therefore found the USD 4000 awarded by the trial court reasonable and justified. On the totality of his submission, counsel for the Respondent prayed for dismissal of the appeal with costs.

The Applicant opted not to file a rejoinder submission.

E. DETERMINATION OF THE APPEAL

I have dully considered the grounds of appeal; the trial court records as well as the rival submissions by the trained minds representing parties herein. I will determine the appeal in the manner the grounds of appeal were argued by counsel.

In the 1st ground, the Appellant challenges the trial court for admitting electronic evidence despite objections from the Appellant on the grounds that admission of such exhibits contravened section 18(2) and (3) of the ETA. On the other hand, the Respondent's counsel faulted the submission by Appellant's counsel for failure to specify the electronic evidence

admitted, because the Appellant's counsel excluded only exhibit P11, referring the rest of the exhibits as electronic evidence.

From my reading of the submissions by the Appellant, the most objected documents that they were electronic documents are the *WhatsApp* messages printouts (exhibit P1). My examination of the records reveals that during hearing, when the Respondent's witness PW1 sought to tender the print out *WhatsApp* messages, the Appellant's counsel objected on the ground the authenticity of the documents sought to be tendered was not ascertained. The trial magistrate overruled the objection on the account that the law under section 18 of ETA does not require production of the gadgets or the media through which the document was printed. In his submission, counsel for the Appellant maintained that there ought to be produced an affidavit of authenticity in terms of section 18(2) and (3) of ETA.

For easy of reference, section 18 of ETA which is the permissive section governing admissibility of electronic evidence provides:

> *"18.- (1) In any legal proceedings, nothing in the rules of evidence shall apply so as to deny the admissibility of data message on ground that it is a data message.*
> *(2) In determining admissibility and evidential weight of a data message, the following shall be considered-*

(a) the reliability of the manner in which the data message was generated, stored or communicated;

(b) the reliability of the manner in which the integrity of the data message was maintained;

(c) the manner in which its originator was identified; and

(d) any other factor that may be relevant in assessing the weight of evidence.

(3) The authenticity of an electronic records system in which an electronic record is recorded or stored shall, in the absence of evidence to the contrary, be presumed where-

(a) there is evidence that supports a finding that at all material times the computer system or other similar device was operating properly or, if it was not, the fact of its not operating properly did not affect the integrity of an electronic record and there are no other reasonable grounds on which to doubt the authenticity of the electronic records system;

(b) it is established that the electronic record was recorded or stored by a part to the proceedings who is adverse in interest to the part seeking to introduce it; or

(c) it is established that an electronic record was recorded or stored in the usual and ordinary course of business by a person who is not a part to the proceedings and who did not record or store it under the control of the part seeking to introduce the record.

(4) N/A."

As pointed out earlier on, section 18(1) of the ETA is a permissive section; it seeks to allow data messages and information stored in electronic

gadgets to be tendered in evidence just as any other paper exhibits or documentary evidence. Section 18(2) requires that for electronic evidence to be admitted the trial court must consider the criteria detailed at paragraphs (a) (b) (c) and (d) of that section. Authenticity of the document is proved after satisfying the conditions encapsulated under paragraphs (a), (b) and (c) of section 18(3) of ETA.

The question is whether the above legal requirements were met before admitting exhibit P1. During tendering of exhibit P1, PW1 testified that the print our messages were conversations between him and the Appellant's director, who was using phone number 0754441146 while PW1 was using phone number 0759310149. While testifying, PW1 had his phone which had the messages which he wanted to show the court. He also stated that his phone and the messages therein were not tempered with or altered by any person. He also testified that his phone was encrypted and was functioning properly, so the *WhatsApp* conversations were intactly stored, as exchanged between him and the Appellant's director.

Notably, in paragraph 3 of the written statement of defence, the Appellant admitted the contents of paragraph 4 of the plaint, to the effect that the two directors made several communications through phones. In his

evidence at page 38 of the proceedings, DW1 also admitted that he regularly communicated with PW1, the Respondent's director, via text messages, including *WhatsApp* chatting.

It is further observed that, when the WhatsApp messages were sought to be tendered, PW1 confirmed to the trial court that there was no manipulation of the same and that the messages could not by any means be altered by any person, including himself. In my view, the trial court was right to believe that the documents were authentic, because PW1, who was the custodian, explained that they were WhatsApp text messages exchanged between him and DW1, through the phone numbers above shown. Similarly, PW1 printed the said messages through a computer which could not be tempered with. DW1 admitted the existence of the conversations through the phone and Appellant's counsel did not seem to doubt any of the printed-out messages apart from generally faulting their admissibility on the pretext of authenticity. In the circumstances, exhibit P1 and any other document purported to be electronic evidence were properly admitted in evidence after their authenticity was cleared by PW1, the custodian of the relevant documents.

The contention by the Appellant's counsel that there ought to be filed affidavits of authentication, is misconceived, as that is not what the law provides. The cited cases by Respondent's counsel; namely, **Standard Chartered Bank Tanzania Ltd** (supra) and **Mohamed Enterprises (Tanzania) Ltd** (supra), demonstrate the position of the law on electronic evidence. I would add one more decision of the Court of Appeal in **Stanley Murithi Mwaura vs Republic, Criminal Appeal No. 144 of 2019** (unreported), which made the following observation regarding admissibility and authenticity of electronic evidence. It was held:

> *"Admittedly, it is true there is no record that the court considered those points but the bank statement complained of, were printed from banks where PPCL and the appellant had bank accounts and Happy Usiri (PW9) when tendering exhibit P10 which was a bank statement which was printed from the computer linked to Azania Banking System,* ***she testified that there were no possibilities of tempering with that system****. The other document is exhibit P11 which was a bank statement of the appellants own account from Equity Bank. This was tendered by Godfrey Henry Kiama (PW12), a bank official from the appellant's bank.* ***He testified at page 268 of the record of appeal that Equity Bank system does not permit editing or alteration of any entries****. Like exhibit P11, exhibit P16 was the bank statement from the appellant's own bank account generated by KCB banking system. The document was tendered by Godfrey Joseph (PW16), who during cross examination*

stated that the statement cannot be edited by anybody and it is automatically dated*. Further, exhibits P10, P11 and P16 were all tendered to demonstrate that there were payments that were made from PPCL to the appellant and Stano,* ***which fact the appellant never denied****."* (Emphasis added)

Since PW1 demonstrated clearly that the documents he tendered as exhibit P1 were the same *WhatsApp* messages he communicated with the Appellant's director, I, like the trial court, have no reason to doubt their authenticity. There being no objection from the Appellant that there existed *WhatsApp* conversations, and there being no evidence showing that the messages tendered were different from those exchanged, there is no iota of doubts that the same messages which the two directors communicated were the printed outs tendered and admitted as exhibit P1. That being the case, I endorse the findings of the trial court. Consequently, I do not find merits in the first ground of appeal. I proceed to dismiss it.

I now turn to consider the second ground of appeal in which the Appellant faults the Respondent's *locus standi* to sue on the ground that all negotiations and communications linked with ordering of the caterpillar shovel loader 950G were between the Appellant and Double M Investment Ltd. I have equally revisited the trial court record. To begin with, I

examined the pleadings, which are the key documents for instituting any civil claim. In the plaint, the Plaintiff in the trial court was Carrier Options Africa Ltd, the Respondent herein. The Plaintiff in the trial court expressed the cause of action against the Appellant under paragraph 3 of the plaint, which the Defendant (Appellant herein) admitted under paragraph 2 of the written statement of defence. The well settled position of the law is that parties are bound by their pleadings, and no party is allowed to depart from what is stated in the pleadings. See **Scan Tours Ltd vs The Catholic Diocese of Mbulu, Civil Appeal No. 78 of 2012**, **Charles Richard Kombe t/a Building vs Evarani Mtungi and 3 Others, Civil Appeal No. 38 of 2012** and **Paulina Samson Ndawavya vs Theresia Thomasi Madaha, Civil Appeal No. 45 of 2017** (all unreported).

In the written statement of defence, the Appellant admitted to have received USD 20,000 from the Respondent herein for the purchase of a Caterpillar Shovel Loader 950G Chassis No. 5MW0275. By so admitting, the Appellant is precluded from denying the Respondent as the party they transacted with.

Incidentally, PW1 testified that he was both the director of Carrier Options Africa (T) Ltd and Double M Investment Ltd. He also gave an account as to why Carrier Options Africa (T) Ltd filed the suit although negotiations

were initiated by him on behalf of Double M Investment Ltd. He stated that they were in the process of registering a new name because Double M Investment Ltd was refused by BRELA as reflected at page 27 of the typed proceedings. Further, as submitted by counsel for the Respondent, the intention of replacing Double M Investment with Carrier Options (T) Ltd. was communicated by PW1 to DW1 through exhibit P1, as reflected at pages 15 and 16 of exhibit P1. In his evidence, DW1 also admitted that PW1 was the director of both Double M Investment and Carrier Options Africa (T) Ltd, and even the bill of lading, consignee name was Carrier Options Africa (T) Ltd. When cross examined, DW1 also admitted that he knew Carrier Options through PW1, its director.

Notwithstanding the evidence of both parties, which identified the Respondent as the owner of the caterpillar, most of the documentary evidence identified the Respondent as the party that contracted the Appellant to import the caterpillar shovel loader 950G. Apart from the invoice (exhibit P3) and the receipt (exhibit P4), issued in the name of Double M Investment, the rest of the documentary exhibits were documented in the name of the Respondent herein. Exhibit P5, a letter written by the Respondent to the Appellant requiring evidence of shipment of the caterpillar, was written by the Respondent herein. The Appellant

replied to exhibit P5 on the same day addressing it to the Respondent herein (See exhibit P6). The Inspection Report (exhibit P7), conducted by BV on 14/10/2019, was addressed to Carrier Options Africa Ltd, the Respondent herein. Other correspondences by the Respondent dated 01/11/2019 and 04/11/2019 (exhibits P8 and P9 respectively), were written by the Respondent. The bill of lading dated 08/11/2019 (exhibit P10), was addressed to Carrier Options Africa Limited as the consignee of the ordered caterpillar. Furthermore, the demand letter from the Respondent was replied by the Appellant, in the Respondent's address as Carrier Africa Limited, acknowledging receipt of the purchase price. (See exhibit P11 collectively).

From the above set of facts, there is no dispute that the purchase price was paid by Double M Investment whose director was PW1, but whose affairs were taken over by the Respondent herein. Equally, there is no doubt that the Appellant dealt with the Respondent as reflected in all the correspondences, including exhibit P7, which identified the Respondent as the consignee, prior to change of name by the Appellant to its own name. The above set of affairs, coupled with the fact that the Appellant admitted in the pleadings the claim against the Respondent, leads me to find and hold that there was a valid contract and transactions between the

Appellant and the Respondent herein. The case of **Lujuna Shubi Balonzi** (supra) relied on by the Appellant's counsel is distinguishable in the circumstances of this case. It therefore goes without saying that the Respondent had *locus standi* to sue the Appellant. The 2nd ground is as well devoid of merits.

I now proceed to determine the 3rd ground of appeal, which faults the trial court on the ground that there was no contract entered between the parties herein. This ground will not detain me. As I have pointed out when determining the preceding grounds of appeal, there was a clear admission by the Appellant, both in the pleadings and in the evidence adduced, that there was a contract entered between the duo, for importation of a caterpillar shovel loader 950G, with chassis number 5MW0275. The same is reflected under paragraph 2 of the written statement of defence, where the Appellant is quoted to have stated:

> *"2. That the contents of Paragraph 3 of the Plaint are admitted to the extent that the Plaintiff owes USD 20,000/ (Twenty Thousand United States Dollar) which is equivalent to Tshs 46,000,000/- (Forty Six Million) an amount paid by the Plaintiff to the Defendant for importation of Caterpillar Shovel Loader 950G Chassis No. 5MW0275 and the rest are refuted."*

Similarly, in all the correspondences, the Appellant admitted to have received USD 20,000 from the Respondent for the purposes of importing

the said caterpillar, which was however not handed to the Respondent. Exhibit P1, which the Appellant does not dispute, clearly shows that there were conversations between the directors of the parties herein, which ended up with the agreement of ordering the said caterpillar and eventually part of the purchase price was paid to the Appellant. That was clearly admitted by the Appellant in exhibits P3, P4, P6, P7, P10, P11 and D1. The contention by Appellant's counsel that the Appellant did not reply nor authorise any person to reply to the demand notice is disingenuous because it was DW1 who prayed to tender the reply to demand notice and the same was admitted as exhibit D1. Likewise, the allegation that there was no document tendered by the Respondent to prove the existence of the contract is defeated by the documentary exhibits tendered by the Respondent and the Appellant. All documents clearly depict that there was an agreement between the parties herein as correctly found by the trial court. In the circumstances, the decision of the trial court in that respect was justified. The 3rd ground of appeal is dismissed as well.

On the 4th and 7th grounds of appeal, I have to a large extent dealt with the same while determining the 1st and 2nd grounds of appeal. The substance of the two grounds relates to evaluation of evidence. Mr

Nyerembe invited this Court to re-evaluate the evidence and come up with its own findings. Mr Ngawa, on the other hand, urged this Court to decline the invitation, reasoning that there are no misdirection or non-direction by the trial court.

In my scrutiny, the trial magistrate made sound and tangible evaluation of the evidence on record. There is no dispute that the Appellant received USD 20,000 from the Respondent with agreement that the former would import caterpillar shovel loader 950G with chassis number 5MW0275. That is patently clear in the evidence of both PW1 and DW1, as well as the pleadings as I have endeavoured to demonstrate while determining the preceding grounds of appeal.

It is equally an undisputed fact that the caterpillar shovel loader ordered by the Respondent was not received to the moment the suit was instituted in the trial court. The record shows that there was an attempt by the Respondent to agree to the already imported caterpillar with chassis number 5MW01275, which was different from the one the Respondent had ordered as reflected in exhibit P3. That intention is reflected in the letter dated 07/01/2020 (exhibit P12), where the Respondent expressed interest to accept the already imported caterpillar subject to inspection. However, the Appellant did not want to have the matter settled amicably.

The Appellant, in turn, maintained the cancellation letter (exhibit P9) and demanded payment of the cancelation fee amounting to 25% of the purchasing price and other incidental costs. Further, that the remaining balance owed to the Respondent was to be paid after the imported caterpillar was sold to another buyer.

The foregoing leads one to the conclusion that there was a undoubtedly a contract between parties herein which was breached by the Appellant, when it failed to import the agreed caterpillar shovel loader 950G, chassis number 5MW0275, within the agreed time. I, thus, have no reasons whatsoever to interfere with the trial magistrate's evaluation of the evidence. If I was to do so, I would, undoubtedly, lead me to the same findings of fact.

The contention by the Appellant's counsel that the Appellant's defence was not considered, is unmerited. The said evidence was thoroughly considered as reflected at pages 17 and 18 of the judgment. Consequently, the 4th and 7th grounds of appeal as well lack merits, and are hereby dismissed.

Finally, in the 5th ground of appeal, the Appellant faults the trial magistrate for awarding USD 4000 as general damages. The Respondent's counsel considers the award justifiable. It is trite law that in awarding general

damages, the quantification of such damages remains in the discretion of the court. The Court of Appeal in the case of **Peter Joseph Kibilika and Another vs Patric Alloyce Mlingi, Civil Appeal No. 37 of 2009** (unreported) observed:

> *It is the function of the Court to determine and quantify the damages to be awarded to the injured party. As Lord Dunedin stated in the case of* ***Admiralty Commissioners v SS Susqehanna*** *[1950] 1 ALL ER 392.* ***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.*** "(Emphasis added)

From the factual background of the appeal at hand, the negotiations and transactions were made in September, 2019. The purchase price was paid to the Appellant on 25/09/2019. According to DW1 and the submission by counsel for the Appellant, the caterpillar ordered by the Respondent ought to have reached Tanzania within six weeks after shipment by the exporter. The record shows that the Respondent made several inquiries regarding the bill of lading and the time the caterpillar would be shipped without success. On 07/01/2020, that is almost three months after the purchase price was paid, the Respondent still expressed interest to take the already imported caterpillar but subject to inspection. However, the Appellant resisted claiming the cancellation fee in accordance with the company's policy.

From the evidence on record, the Respondent informed the Appellant the purpose of the ordered caterpillar. Both in the pleadings and the evidence adduced, the Respondent claimed to have suffered loss for hiring other caterpillars to take over the assignment which was to be performed by the ordered caterpillar had it been delivered within the time agreed. Under part (iii) of the reliefs claimed in the plaint, the Respondent claimed payment of TZS 5,000,000/= as costs for hiring other caterpillars. Even in the absence of proof that the Respondent hired other caterpillars, still the purchase price had been in the Appellant's possession for more than four years.

Undoubtedly, the Respondent suffered loss as a result of the delay to receive the caterpillar. As stated in exhibit P5 addressed to the Appellant, the ordered caterpillar was needed at a quarry mine in Holili to carry out ground clearance for the quarry stone cutting. Since the caterpillar did not reach the Respondent at the agreed time, as stated under paragraph 14 of the plaint, the Respondent had to incur costs to hire other caterpillars to carry out the quarry works.

A fair assessment of the circumstances obtaining in this appeal, it is appalling for the Appellant's counsel to dispute the quantum of general damages awarded by the trial court. In my considered view, the amount

awarded appears to be rather moderate. Had there been a counter appeal, I would been inclined to enhance the same as the Appellant's continued holding of the money received is without justification. Nevertheless, I will not interfere with the discretion properly exercised by the trial court magistrate. By all intents, the 5th ground of appeal is bound to fail.

Consequently, from what I have endeavoured to demonstrate, the appeal by the Appellant lacks merits on all grounds. It is dismissed in its entirety with costs. The decision of the trial court is hereby upheld.

Y.B. Masara

JUDGE

13th December 2023