IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB-REGISTRY)

AT DAR ES SALAAM

CIVIL CASE NO. 112 OF 2022

ALISTAIR JAMES COMPANY (TZ) LIMITED.....PLAINTIFF

VERSUS

CJ SC LOGISTICS (T) LIMITED.....DEFENDANT

JUDGMENT

6th December, 2023 & 16th February, 2024

MWANGA, J.

The plaintiff, **ALISTAIR JAMES COMPANY (T) LIMITED** claims against the defendant the sum of USD 64,135.00 being the principal sum due to the plaintiff as unpaid balance after the plaintiff transported the defendant's goods from Dar e Salaam Port to Likasi, Lubumbashi, Katanga province, in the Democratic Republic of Congo in the year 2018. Also, claims of USD 275, 781.00 which is the late payment charges on the principal sum at 10% per month from January 2019 to July 2022 as allegedly agreed in clause 5 of Part A of the General terms. Other claims

are interest on the decretal sum at the court's rate from the date of the judgment to the date of the execution, general damages, and cost of the suit.

The case of the plaintiff from the facts is that in October 2018 the defendant engaged the service of the plaintiff to transport two shipments of goods (the bulk of sulfur) involving 66 trucks from Dar es Salaam Port, Tanzania to Likasi, Lubumbashi, Katanga province in the Democratic Republic of Congo. The first shipment was confirmed by the defendant on 11 October 2018. Whereas, the defendant confirmed the second shipment on 20 October 2018. Under the agreement, the first shipment was for the carriage of 29 trucks.

I would say that some of the terms of the agreement were somehow general. Because no specific time was fixed for the completion of the job by the plaintiff. Be that as it may, as per the existing job confirmation accepted by the defendant in exhibit PE(b), the terms were that the defendant had to pay 70% of the total transport cost after loading, and the balance was to be paid within fifteen days after the submission of the proof of delivery (POD). More so, the second shipment involved the

transportation of 37 trucks with similar terms and conditions as in the first shipment.

The plaintiff managed to transport all 29 trucks of sulfur in the first shipment to the destination after the defendant paid 70% advance payment before the loading. The remaining 30% were not paid. In the second shipment, the plaintiff transported 26 out of 37 trucks, hence leaving 11 trucks hanging at the port. The plaintiff alleged that such failure was due to political instability in the Democratic Republic of Congo including the province of Katanga where the two shipments were to be delivered. The other reason was that there was slow clearance of the goods by the defendant at Dar es Salaam Port.

The late payment charges claimed by the plaintiff are pegged under Clause 5 of Part A of the general terms and conditions. That, the plaintiff reserves the right to charge late payment charges to be calculated at the rate of 10% per each month of delay on any account that remains unpaid for 30 days or more from the date of invoice.

It is based on those facts, that the plaintiff invoiced the defendant USD 64,135.00 unpaid balance for the first shipment on 14th December

2018 and USD 275,781.00 as late payment charges for the second shipment on 17th January 2019; but contends that, despite such demands, the defendant refused to make any payment and denying any outstanding. The plaintiff has, thus, instituted this suit seeking the assistance of the court to compel the defendant to settle the claimed amounts.

In contrast, the defendant filed a written statement of defense denying the claims. The defendant asserted that all that was due was paid to the plaintiff. The defendant maintains that there is no email received to show that the defendant agreed to the plaintiff's terms and conditions for the late payment charges enclosed in Clause 5 of part A of the general terms and conditions of the job confirmation.

Conversely, the defendant also averred that it was the plaintiff who breached the contract as was unable to provide 11 flatbed trucks out of the agreed 66 flatbed trucks to transport 11x40 containers of sulfur. Henceforth, the delay caused considerable port and demurrage charges on the part of the defendant.

Ultimately, following the plaintiff's failure to provide 11 flatbed trucks, the defendant secured a railway wagon to transport the remaining 11flt bed containers.

In an attempt to escape liability, the defendant emphasized that the customs clearance process for the 37 trucks was completed, transport documents were handled earlier to the plaintiff and, importantly, there was no political instability in DRC as the plaintiff was not notified so.

As a result of the above assertions, the defendant raised a counterclaim asking this court to declare that it was the plaintiff who breached the agreement. Therefore, be ordered to pay the plaintiff the following remedies;

i. Payment of Tshs. 315,000,000/= as a specific cost incurred by the plaintiff.
ii. Payment of general damages to the tune of Tshs. 100,000,000/= resulted in the loss of customers and trust as well as business from the consignee.
iii. Interest on the decretal sum at the court's rate from the date of the judgment to the date of full payment.

iv. Cost of the suit

v. Any other reliefs that this court may deem fit to grant.

In so far as the contentions of the plaintiff and defendant regarding this case, two sets of issues were framed. The first set of issues framed were for the plaintiff's case, which are as follows;

1. ***Whether the payment of the first consignment was paid in full by the defendant.***
2. ***Whether the plaintiff is entitled to late payment charges.***
3. ***To what reliefs are parties entitled to?***

The second set of issues framed for the Defendant's /plaintiff's case in the counterclaim case are as follows:-

1. ***Whether the defendant in the counterclaim breached the contract.***
2. ***Whether the plaintiff in the counterclaim is entitled to claim for damages for breach of contract***
3. ***To what reliefs are parties entitled to?***

At the hearing, the plaintiff was represented by Ms. Clara Mramba assisted by Mr. Toba Mohammed, both learned counsels. The defendant enjoyed the service of Mr. Japhet Mmuru, also learned counsel. The plaintiff presented one witness (PW1-Neema Chamy) and two exhibits. **Exhibit PE1** is an affidavit as to data accuracy sworn by PW1 and Exhibit **PE2(a)-**

(r) are email correspondences between the plaintiff and the defendant about their agreement. The defendant produced one witness (DW1-Fred Abdallah) and three exhibits. **Exhibit DE 1** is an Affidavit as to Data Accuracy signed by PW1. **Exhibit DE 2** is demurrage receipts by Seven Seas Shipping Agencies and **Exhibit DE 3A – 3L is** storage invoices from TICTS.

Apart from the evidence presented during the hearing, the learned counsels filed final submissions I shall not reproduce in my judgment but rather consider where necessary in the course of determining the issues at hand.

Now, the first issue raised in the plaintiff's case is **whether the payment of the first consignment was paid in full by the defendant**. In answering this issue, the plaintiff will have to prove that they made certain proposals and that the proposal was accepted, and the defendant paid only 70% upfront and refused to pay the remaining balance of 30% within 15 days after submission of the invoice.

Needless to say, there is no dispute over the existence of an agreement between the plaintiff and the defendant for the transportation of the first shipment of goods (the bulk of sulfur) involving 29 trucks from

Dar es Salaam Port, Tanzania to Likasi, Lubumbashi, Katanga province in the Democratic Republic of Congo. There is also no doubt that the first phase was entered on 11th October 2018 through job quotation number - AGQ-6865 and job confirmation No. AG-JC-180 which was admitted in court as Exhibit PE 2(a) and Exhibit PE 2(b) respectively. That was for the transport of 29 trucks of bulk Sulphur at the agreed rate of USD 6,900 for each truck which makes a total of USD 200,100. DW1 in his witness statement said this in paragraph 22, and I quote;

> *"That, as I said in the 1st shipment, the defendant paid the plaintiff upfront advance of* ***USD 140,070 as 70%*** *of total transport cost where* ***USD 60,030 which is 30% remained unpaid".***

During the hearing, DW1 also testified that the failure of the defendant to pay the 30% balance in the first shipment was caused by the plaintiff's lack of submission of the proof of delivery as agreed. It is a trite law under section 37(1) of the Law of Contract Act, Cap 345 that parties to the contract are obliged to fulfil their promises. The relevant section provides, thus;

"The parties to a contract must perform their respective promises unless such performance is dispensed with or excused under the provisions of this Act or any other law"

The above position was re-affirmed in **Abually Alibhai Azizi vs Bhata Brothers Ltd** [2000] TLR on page 288 and **Philipo Joseph Lukonde vs Faraji Ally Said** [2020] 1 TLR on page 556. It was emphasized that,

"Once parties have entered into a contract, they must honor their obligations under their contract. Neither this court nor any other court in Tanzania for that matter should allow a deliberate breach of the sanctity of contract."

Admittedly, both parties acknowledge that the proof of delivery was one of the fundamental elements of the agreement. So, for the defendant to effect payment of unpaid 30% depended on the submission of proof of delivery by the plaintiff. The plaintiff orally told the court that the POD was submitted to the defendant. However, on cross-examination, the plaintiff's witness (PW1) failed to produce any proof of submission of delivery to the defendant before demanding payment from the defendant. As the law put it right, failure to cross-examine the court is deemed to hold that the parties have accepted the existence of certain facts. Seet the case of

Nyerere Nyague v R, Crim. Appeal No. 67 OF 2010, [CAT-unreported) where it was held that;

> *"Unfortunately, the appellant did not cross-examine PW1 on this to shake her credibility.* ***As a matter of principle, a party who fails to cross-examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said.*** *(See Cyprian A. Kibogoyo v R Criminal Appeal No. 88 of 1992, 18 Paul Yusuf Nchia v National Executive Secretary, Chama Cha Mapinduzi and Another, Civil Appeal No. 85 of 2005 (both unreported)".* ***(emphasis is mine).***

For the avoidance of doubt, in my view, the plaintiff's failure to submit proof of delivery amounted to a failure to perform such core terms of the agreement which was aware of. In that regard, the defendant was, in law, justifiable to withhold the payment of the remaining 30%. The plaintiff's counsel seems to take the position that since the defendant agreed that the sad 29 trucks were delivered, lack of proof of delivery does not have any effect on the circumstance. The view, to me, does not sound legal. Parties must strictly adhere to the terms and conditions agreed upon, otherwise, there will be no need to set the terms and conditions in the agreement. In **Real Estate Developers LTD vs Serengeti Breweries**

Ltd, Commercial Case No. 3 of 2020 (HCT – Unreported) my brother Nangela, J. had this to say;

> ***"Essentially a breach of contract is wrong, a failure to comply with legal obligations arising from the Contract for which the innocent party has bargained for and provided consideration. Where a party to a contract repudiates or fails to perform one or more of his obligations under that contract that repudiation or failure is what constitutes breach of contract"***

Be it as it may, even though there was no submission of proof of delivery as agreed, still the plaintiff is entitled to unpaid 30% from the defendant upon fulfilling the conditions.

In view of the above, therefore, the first issue is answered in the negative that the payment of the first consignment was not paid in full by the defendant, though there was a valid reason for doing so, that is the plaintiff failed to submit the proof of delivery.

Moving to the second issue, that is, **whether the plaintiff is entitled to late payment charges.** The genesis of this issue is an attachment in exhibit PE2(b) where the plaintiff alleges that when the email dated 3rd October 2018 was sent, DW1 was informed about the attached terms and conditions on late payment charges. For this issue to

sail through, the plaintiff must satisfy the court that this was one of the terms and conditions of the agreement and in fact, there was late payment.

The defendant though DW1 testified that he had never accepted or confirmed the plaintiff's quotation in AGQ-6950 and AGQ-6865 in the plaintiff's witness statement annexures AJC 7 and AJC2 dated 15th October 2018 and 3rd October 2018 respectively. According to him, the defendant and the plaintiff had no term of contract which imposed a monthly 10% interest rate for the delayed payment of the remaining 30% after expiration of 15 days from the date when the plaintiff submitted to the defendant proof of delivery.

The plaintiff on the other hand through PW1 produced exhibits PE2(a) and PE2(b) which are the email correspondences basically between PW1 and DW1 concerning information on loading, offloading location, contacts, and clearing agent (PE2(a). This email was referring to quotation AGQ-6865-CJ Smart which the defendant (DW1) denies to have come to his attention. Exhibit PE2 (b) refers to quotation AGQ-6865 drawing attention to DW1 about the 1st shipment involving the transportation of 29 trucks with the value of USD 200,100. Besides the description of the cargo,

DW1 is informed that full terms and conditions are attached. Subsequently, the plaintiff (PW1) wrote to the defendant (DW1) informing him that once he has accepted the terms and conditions, they will begin to allocate resources for the job. Then, DW1 accepted job confirmation AG-JC-180 quoted ID Reference AGQ-6865.

Given the above, in my considered view, there can never be acceptance of job confirmation AG-JC-180 by the defendant without accepting the quoted ID Reference AGQ-6865 inserted in the said job confirmation. Further to that, the basis of confirming AG-JC-180 quoted ID Reference AGQ-6865 is the quotation AGQ-6865 in which the defendant was informed that terms and conditions are attached. That being said and done, in the absence of evidence to the contrary, the defendant (DW1) cannot be heard saying that he does not know that delayed payment attracted additional charges as enclosed in part A of the general terms, clause 5 of the Terms and conditions were not put to his attention. My take is that, Exhibit PE2(a) (b) and (c) ought to be read together as documents forming part of one transaction. For ease of reference, the protested Clause 5 on delayed payments charges provides;

"In cases where credit terms have been agreed the company reserves the right to charge late payment charges on any account which remains unpaid 30 days or more such interest to be calculated by the Company at 10% per month."

Despite my holding in the above position, the above terms and conditions as it stands would have been relied upon by the plaintiff in this case, if the delayed charges had occurred after the plaintiff had fulfilled all the terms and conditions of the agreement including **submission of proof of delivery** to the defendant. In other words, the time for delayed charges should have started running from the date of the submission of proof of delivery and the defendant defaults thereafter. Failure of the plaintiff to provide proof of delivery to the defendant stopped the running of time to justifiably claim for late payment charges. If this court orders payment of late charges, it would amount to benefit the plaintiff out of her wrongs. See the case of **Haji Hassan Chimbo Vs. Mshibe Iddi Ramadhani** [1995]

In furtherance to the above, the plaintiff should be mindful that the burden of proof never shifts to the adverse party until the party on whom the onus lies discharges his and that the burden of proof is not diluted on account of the weakness of the opposite party's case. See the case of

Paulina Samson Ndawavya versus Theresia Thomasi Madaha, Civil Appeal No. 45 Of 2017 **(**CAT-Unreported).

For the foregoing, the second issue is answered in the negative, that Plaintiff is not entitled to late payment charges.

The third and last issue is **what reliefs are parties entitled to.** PW1 prayed for the payment of USD 64,135.00 as the unpaid transportation cost, USD 275,781.00 being charged for the late payment and general damages to be assessed by the court.

The plaintiff asserts that the Defendant never fulfilled her contractual obligation for failure to pay the remaining 30% for the 1st shipment, a fact that the defendant admits and this court has resolved in favor. The plaintiff also contends that the defendant failed to pay the late payment charges thereto.

The resolution of the first issue has the answer to the third issue, that the plaintiff is entitled to specific damages only. It is a trite law that specific damages must be pleaded and strictly proved. See the case of **Bamprass Star Service Station Limited vs. Mrs. Fatuma Mwale, [2000] T.L.R 390** where Rutakangwa J, had this to say;

"It is trite law that special damages being "exceptional in their character" and which may consist of "off-pocket expenses and ioss of earnings incurred down to the date of trial must not only be claimed specifically but also "strictly proved".

In the present case, the plaintiff's claim against the defendant is USD 64,135 as specific damages. However, having examined the evidence on record, the plaintiff has managed to prove the specific damages to the tune of USD 60,030 for the 1st shipment and USD 705 for the second shipment, making a total of USD 60,735. This is because, as acknowledged by both parties, in the 1st shipment, the defendant paid the plaintiff an upfront advance of USD 140,070 as 70% of the total transport cost whereas USD 60,030 which is 30% remained unpaid. And that, in the 2nd shipment the plaintiff paid an upfront advance of 182,595 as 70% for which USD 78,255 as 30% remained unpaid. More or so, the defendant paid an upfront advance of USD 182,595 in the 2nd shipment while the plaintiff made full delivery of 26 containers making a total of USD 183,000 which when subtracted from the already paid advance of USD 182,595 makes a total of USD 705 unpaid for the 2nd shipment. And that, adding up to the unpaid 1st shipment of USD 60,030 to the 2nd shipment, the total unpaid for two shipments becomes USD 60,735.

As to the general damages, the law is settled in our jurisdiction that general damages are awarded by the trial judge or magistrate after consideration and deliberation on the evidence on record able to justify the award. The judge or magistrate has the discretion in awarding general damages although he has to assign reasons for awarding the same. The position was discussed in the case of **P.M Jonathan vs. Athumani Khalfan [1980] TLR 175,** Lugakingira, J, as he then stated that;

> *"The position as it is therefore emerges to me is that general damages are compensatory in character.* ***They are intended to take care of the plaintiff's loss of reputation,*** *as well as to act as a solarium for mental pain and sufferings."* ***(emphasis is mine).***

In our case, the court should have considered awarding the general damages which in our jurisdiction falls under the discretion of the court and in consideration of the circumstances of a particular case. However, since the Plaintiff is the source of the breach by not submitting proof of delivery is not entitled to any of the general damages.

After concluding with the plaintiff's case, let me revert to the defendant's case in the counterclaim. For easy reference in the counterclaim, the plaintiff and defendant in the main case shall be

regarded as the defendant and the plaintiff respectively. As I have noted earlier, the first issue is **whether the defendant in the counterclaim breached the contract.**

The case of the plaintiff in the counterclaim is that the defendant, **Alistair James Company Limited** agreed to transport from Dar es Salaam port to Likas Katanga DRC in 37 flatbed trucks of 40 feet containers at a consideration of USD 7,050 each truck making a total of USD 260,850. Out of 37 flatbed trucks which the plaintiff agreed, the defendant was able to provide 26 flatbed trucks only, leaving behind 11 containers lying at the port. According to the plaintiff, such delay caused additional charges of Tshs. 315,000,000/= being the costs of demurrage and storage charges.

The defendant, on the other hand, refused the contention of the plaintiff providing reasons for her failure to source the 11 trucks. **One** is the plaintiff's failure to timely pay an upfront payment of 70% of credit terms. **Two,** the plaintiff's failure to clear the consignment at the port in time. **Third**, due to political instability in the DRC involving Katanga province.

I have carefully gone through the pleadings and examined evidence on record and submissions of the learned counsels. The agreement between parties in the second shipment is exhibited in the job confirmation

in exhibit P2E- G. According to the said exhibit, the plaintiff was to pay an advance payment of 70% after the loading of the consignment and the remaining 30% was to be paid within 15 working days after the submission of the PoD.

Given the above terms, I do not agree with the defendant that the plaintiff failed to pay the 70% upfront in time. Because as per the credit terms, the defendant was supposed to pay 70% after the loading. Given this, therefore, the plaintiff's action was contrary to the agreed credit terms. Further to that, I have refused the contention of the defendant that the failure to transport the 11 trucks-containers of sulfur was due to political instability in the DRC-Katanga province. Much as we agree that when there is political stability in the country that can disrupt the daily life of the citizens in the areas of economy social as well as political, the existence of such instability must come from the relevant and recognised authority. As pointed out by the plaintiff, there is no notification or report from the recognized authority on the occurrence of political instability in DRC. Hence, having election violence within the country alone with unstated magnitude is not sufficient to call off a contract.

We all know DRC has experienced armed conflict for decades, however, since then trading has been taking place without disruption. In my view, if there had been serious political instability as the defendant wanted this court to believe the same would have been communicated by the recognized and trusted source of authority. Section 110(1) of the Evidence Act, Cap. 6 [R.E 2022] provides that whoever desires any court to give judgment on legal rights or liability dependent on the existence of facts which he asserts must prove that those facts exist. This is also emphasized in **Sarkar's Law of Evidence, 18th Edition M.C. Sarkar, S. C.**, **published by Lexis Nexis** and quoted the following words: -

> ***"the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof. It is an ancient rule founded on the consideration of good sense and should not be departed from without strong reason…. Until such burden is discharged the other party is not required to be called upon to prove his case. The Court has to examine whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed based on the weakness of the other party…"***

In light of the above, it becomes evident that the assertion presented regarding the existence of political instability is not only perplexing but also unsupported. It is, therefore, the uncontroverted fact that the defendant breached the contract for failing to provide the 11 trucks to the plaintiff's respective destination. See what it entails in the case of **Real Estate Developers LTD vs Serengeti Breweries Ltd(supra).**

Notwithstanding, the contention raised by the defendant that the plaintiff failed to clear the consignee at the port in time needs also to be looked at by this court. It can be recalled that the parties confirmed the second shipment on 20th October 2018, and on 25th October 2018, the cargo was released from customs. However, it was not ready for collection at the port as the plaintiff was dealing with port charges. This is evidenced in an email from the defendant dated 29th, October 2018 when PW1 wrote to the DW1 as to when they could start loading. In the said email, the defendant also informed the plaintiff that the already allocated trucks would be pulled out to avoid further standing charges and loss of revenue to the defendant. On the same day, DW1 emailed PW1 that, they would start loading from 30th October 2018 because they were still **processing some port charges**. Eventually, the loading started on 7th November

2018 to 22nd November 2018 presumably that it started after the completion of the payment of port charges by the plaintiff.

Because of that, although the plaintiff delayed the clearance of the consignment at the port, such a failure, notwithstanding, had no impact on the accrued storage and port charges. The plain fact is that on 7th November 2018, the consignment was ready for collection at the port, and by 22nd November 2018 the defendant managed to load 20 trucks. And later loaded and transported 6 trucks. By 27th November 2018 parties had a meeting about sourcing the remaining 11 trucks. Nothing in their correspondences or meetings showed that there was political instability. Ultimately, the 11 trucks were transported by the plaintiff through wagon. This alone, tells that the issue was not political stability or late clearance but rather the defendant's failure to source the remaining 11 trucks. The email dated 3rd December 2018 PW1 informed the DW1 that they are experiencing challenges in sourcing the trucks to uplift the balance shipment. In this situation, therefore, the first issue in the counterclaim is answered in the affirmative that the defendant had breached the contract.

The second issue is whether the plaintiff in the counterclaim is entitled to claim damages for breach of contract. The law is settled. Where

there is a breach of contract a party who suffered is entitled to damages. Section 73(1) of the Law of Contract Act cap. 345 [RE 2022] provides;

> ***"Where a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it".***

This Court has amplified the rule in section 73 (1) of the Act in the case of **Amandus Ziky Masinde Versus Nyamsera Marumba,** Civil Appeal No.88 Of 2016[HCT], where Mkaramba, J. held that;

> ***"On the strength of section 73(1) of the Law of Contract Act, a party who suffers from a breach of contract is entitled to receive compensation for any loss which naturally arose in the usual course of things from such breach or which the parties knew, when they made the contract, to be likely to result from the breach of it".***

In this case, the Plaintiff testified that, since the 11 trucks were not transported, made him incurred additional costs of demurrage and storage charges as reflected and acknowledged by the defendant in exhibit PE2-O

and PE2-P. The plaintiff claimed Tshs. 315,000,000/= being the amount of charges as evidenced in exhibit DE 1 and DE3 A to L.

Per contra, the defendant contends that the additional charges were caused by the Plaintiff for his late clearance of the consignments at the port. He added that Plaintiff failed to pay the upfront payment of 70% and further to that, the storage and demurrage invoices have no proof of payment and the invoices have no proof that they relate with the Job quotation No. 2.

Having considered the testimonies and final submissions of both learned counsels, I hasten to state that the obverse of the principle of freedom of contract is the doctrine of *pacta sunt servanda*: a fundamental principle of law that requires the provisions of agreements concluded properly must be observed. This means that once parties have exercised their freedom to enter into a contract, they have the legal rights and obligations they have agreed to and are entitled to, and if either of the parties has suffered loss as a result of the breach is entitled to the damages. The plaintiff tendered exhibit receipts of demurrage charges and storage invoice issues by port, TICS. The demurrage charge is USD 12,240 whereas the storage charge is Tshs. 91,849,859,7=.

Having said that, the argument of the defendant that the additional charges were caused by Plaintiff for his late clearance of the consignments at the port and that Plaintiff failed to pay the upfront payment of 70% does not hold water. This, as explained above, the upfront payment of 70% was to be paid after the loading and not before. But the plaintiff insisted payment before contrary to the agreement. Again, clearance was completed before the charges started to accrue, and further to that, the storage and demurrage invoices are related to invoices in exhibit DE2 and DE3(a)-(L) reflects the bill of leading reference Nos. which was issued by the shipping line. Therefore, the 2nd issue is answered in the affirmative that the plaintiff is entitled to specific damages. The demurrage charge is USD 12,240 and the storage charge is Tshs. 91,849,859,7=.

As to the third issue**, what reliefs are parties entitled to?** I wish to state that, the Plaintiff has claimed several reliefs as enumerated in the counterclaim. Under this issue, the defendant under item 7 of his Counterclaim sought Tshs. 315,000,000/= being demurrage charges and storage charges of USD 12,240 that occurred due to the defendant's breach of contract.

There is no dispute that the claims of demurrage and storage charges are specific in nature and were to be specifically pleaded and proved. This amount was pleaded in paragraph 7 of the Counterclaim. It is apparent that, under the provisions of **section 110 of the Tanzania Evidence Act, [Cap 6 R.E. 2019]** is very clear that he who alleges has a legal burden to prove what he alleges before a court can decide in her favor. Further guidance can be gathered from the case of **Zuberi Augostino vs. Vicent Mugabe [1992] TLR 137** in which the apex court in the land categorically held that it is a trite law in our jurisdiction that, specific claims must be strictly pleaded and strictly proved for the claimant to be given.

Guided by the evidence adduced in Exhibit DE3 A to L and DE2 the total amount of loss suffered by the plaintiff is USD 12,240 (DE2) as Demurrage Charges and Tshs. 91, 849,859.7 (DE3 A to L) as storage charges. This is the amount that has been proved by the Plaintiff. Having noted that the Plaintiff is entitled to the specific damages of USD 12,240 and Tshs. 91,849.859.

Also, Plaintiff in item (ii) of the counterclaim prayed for the general damages and in paragraph 8 claimed that the failure of the defendant to

provide 11 tracks to the destination, has caused him the loss of future business, image, and trust. And from the meaning of the general damage they are awarded at the discretion of the court after determination and quantification of the damages suffered by the party. Only what the claimant is supposed to do in this category of damages is just to plead in the plaint. This position is clearly stated in the case of **Peter Joseph Kilibika vs Partic Aloyce Mlingi**, Civil Appeal no. 30 of 2009 [CAT - Unreported] when the court quoted with approval the words of Lord Dunedin as stated in the case **of Admiralty Commissioners vs. SS Susquehanna** [1950] 1 ALL ER 392 on the award of general damages held that;

> "***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 so far as the law does not require the Plaintiff to prove the claimed general damage, I have taken into consideration the fact that the defendant failed to discharge his duty as per the contract, and further enough the defendant insisted in terms of the contract not agreed on, hence this court after taking into account all the relevant factors of this

case, justice dictates that general damages of TZS 20,000,000 (Twenty million shillings) is enough to mitigate the sufferings. Consequently, the suit of the Plaintiff in the counterclaim is partly allowed to the extent hereinabove.

For the foregoing, to be more precise and specific, the defendant in the main suit is ordered the following;

i. To pay the plaintiff **USD 60,735** the outstanding balance of the first and second shipment.

ii. Based on the findings in the two suits, each part has to bear its costs.

As a result of the findings, the defendant in the counterclaim is ordered to pay the Plaintiff in the counterclaim the following;

i. The defendant is ordered to pay the plaintiff **USD 12,240** as demurrage charges.

ii. The defendant is ordered to pay the plaintiff **Tshs. 91849,859** as the storage charges.

iii. The defendant is ordered to pay the plaintiff General damages of **Tshs. 20,000,000/=**

iii. Based on the findings in the two suits, each part has to bear its costs.

It is so ordered, accordingly.

H. R. MWANGA

JUDGE

16/02/2024