

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM SUB REGISTRY

AT DAR ES SALAAM

Civil Case NO. 189 OF 2022

WHITE STAR INVESTMENT LTD..... PLAINTIFF

VERSUS

PRIME FEI SHANG TRADING SARL.....1st DEFENDANT

FATMA HASSAN2nd DEFENDANT

EX-PARTE -JUDGMENT

25th April & 30th May 2024

MKWIZU, J: -

The plaintiff is a limited liability company registered under the laws of Tanzania dealing with transportation business within and outside the country. She was in this case engaged by the defendants to carry the first defendants' goods (logs) from Lubumbashi, Democratic Republic of Congo to Dar es salaam where the cargo would be transshipped to China. In this business the second defendant positioned herself as an agent of the principal, the 1st defendant. The plaintiff performed her party of the contract but not the defendant hence this suit.

The plaintiff claim against the defendants jointly and severally is for specific damages of 431000 USD, being USD 64,000 the outstanding transport charges plus 367,000USD detention charges; interest,

containers demurrage charges arising from the shipping line from the date of loading to the handover date, general damages, and costs of the suit.

The first and second defendant attendance could not be procured even after service upon them through publication prompting for an *ex-parte* trial on 27/03/2023 under Order VIII Rule 14(1) of the Civil Procedure Code [CAP 33 R: E 2019].

Three issues framed before the commencement of the hearing are as hereunder:

1. *Whether there was a transport contract between the plaintiff and the defendants.*
2. *Whether the defendants breached the contract.*
3. To what relief are the parties entitled.

At the hearing, the Plaintiff enjoyed the legal services of Mr. Mafuru Mafuru advocate. And in proof of her case the plaintiff called a total of two witnesses.

PW1 is one Ismail Abutwalib Mvamba, the manager of the plaintiff's Company. His evidence went to establish that on 20th July 2022 Fatuma Hassana, the 2nd defendant entered into a contract with the plaintiff for transportation of logs belonging to the 1st defendant from Lubumbashi to Dar es salaam where they would be transhipped to China using twenty trucks, 12 at the rate of USD 6,500 equal to USD 78,000 total and the rest 8 trucks were contracted for USD 700 total of USD 56,000 making a grand Total of USD 134,000 transportation costs for all the 20 trucks. USD 70,000 was paid in advance while USD 64,000 remained as a balance.

He went further clarifying that the logs were loaded from 29/7/2022 and the suit was filed on 25/10/2022 after the delay in loading the logs by the defendant that attracted the detention charges commenced after the expiry of an allowance of 14 days agreed in the contract charged at USD 200 per day per each truck up to 25/10/2022 making a total delay charged of USD 367,500 but up to 15/2/2023 the delay charges had accumulated to USD 749,000 USD.

Speaking on the whereabouts of the consignment at issue, PW1 said, all the containers with the goods are currently retained at The Tanzania Revenue Authority Customs NASAKO ACD Kurasini Dar es salaam after the order of the court in Misc Civil Application No 480 of 2022 High Court Dar es salaam. And that the demurrage charges agreed is USD 60 per container from 15/2/2023 to date which is 420 days equal to USD 504,500 pegging the total claim at USD 1,317,000.

PW2 is one Twalib Karim Mbowe a Managing Director of the plaintiff Company. His testimony was more less like that of PW1. He said, The Prime Fai Shang was introduced to them by the 2nd defendant. He personally went to Lubumbashi where he met 2nd defendant to verify the business. They agreed on the transportation business, and he initially tried the business with 8 trucks in log transportation from Lubumbashi to Tanzania Dar es salaam before he added another 12 trucks.

According to PW2, they had a written contract where the agreed transport charges for the 12 trucks was USD 6500 per truck which gave a total of USD 78,000, and 8 trucks were charged at USD 7000 equal to USD 56,000 making a grand total of USD 134,000. USD 70,000 was paid in advance and the balance was USD 64,000. The contract had also a provision for

the delay. Any delay after 14 days the defendant would pay USD 300 per day per each truck and detention charges was USD 60 per day per each container. He tended in court the transport contract, Exhibit P2 and the original cards for vehicles with the trailer involved (exhibit P3), the list of the vehicles with the delayed period per each truck.

PW2 further testified that, on 25 /10/2022 they raised a delay charge of around USD 367,500 and from 20/7/2020 to 15/2/2023 the delay charges have accumulated to USD 749,000. The detention charges was USD 60 per each container and up to 15/2/2023 the accumulated detention charges is USD 504,000 raising the total claim to USD 1,317,000.

He complained that due to the detention of the trucks by the defendant they remained for seven months without working, they could not service their bank loans, and the logs in question were retained and held at TRA customs by the order of the High Court of Dare es salaam in Application No 480 of 2022 pending the determination of the main suit. He also pressed for costs.

I have considered the evidence and the presented exhibits. The plaintiffs evidence presented in court affirms the first issue. The PW1 and PW'2 evidence is to the effect that there was entered a written contract between the plaintiff and the defendant for the hire of twenty (20) trucks to transport cargo in 1x40FT containers from Lubumbashi to Dar es salaam (exhibit P2). In that contract, 12 trucks were hired at 6500 USD while the 8 trucks were hired at the rate of 7000USD. Again, the defendant was to be accountable for any costs resulting from any delay on her part rated at 300 USD per each delayed truck per day, and any demurrage charges arising from the shipping line. The contract presented in court

(exhibit P2) was signed by the transporter's representative and the second defendant on behalf of the cargo owner on 20th July 2022. In the absence of any contradicting evidence, I find the first issue established.

The major issue is whether the defendant breached the said contract. Normally breach of contract happens when one party in a binding agreement fails to deliver according to the terms of the agreement. This position was expressed by the Court in Vitus **Lvamkuyu vs. Imalaseko/Investment**, Civil Case No.169 of 2013(Unreported) that:

"A breach occurs in contract when one or both parties fail to fulfil the obligations-imposed terms..."

I have reviewed the parties contract dated 20th July 2022 (exhibit P2). According to this document, the transport charges were of two category, the first one involved twelve (12) trucks which were to carry the agreed goods(logs) in a 40 ft container at the agreed rate of 6,500USD and the second category involves 8 trucks hired at the rate of 7000 USD each making a total transport charges of 134,000.00 USD. The 50 % of the transport costs that is 70,000 USD was paid in advance and the remaining balance was to be paid before the cargo in containers are transshipped to last destination, (China).

The parties 's contract had other clauses. It gave the cargo owner 14 free days for documentation after loading the cargo and any further delay caused by lack of responsibility by the Cargo owner after the 14 days period would attract detention charges at 300.00 USD per day per truck payable by the cargo owner immediately before the truck is released or with the transporters outstanding balance. The 1st defendant was also

responsible for any demurrage charged arising from the shipping line from date of loading. The relevant party of the parties' contract reads.

"Payment of 50% in advance as soon as the trucks load and balance 50% payment will be paid before the containers are transhipped to destination.

a) The transporter gives the cargo owner 14 free days for documentation after loading further delays caused by lack of responsibility of the Cargo owner after the given free days, transporter can raise detention charges of 300.00 USD per day per truck, which will be paid by the cargo owner immediately before the truck is released or with the transporters outstanding balance.

b) All containers are deemed to be booked as soon as they are loaded as soon as they are loaded in DRC, hence any container demurrage charge arising from the shipping line from date of loading will be catered by the cargo owner. "

Those are the parties' covenants. Section 37 of the Law of Contract Act [CAP 345 R: E 2019] is relevant to the matter. It provides:

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

Emphasising the above position, The Court in **Simon Kichele Chacha vs Adeline M. Kilawe**, Civil Appeal No.160 of 2018 (Unreported) held:

“It is settled law that parties are bound by the agreement they freely entered to, and this is the cardinal principle of the law of Contract”.

The plaintiff in this case blames the defendants for failure to fulfil their contractual obligation **one**, by not paying the outstanding sum of USD64 000 arising from the USD 134000 total contractual transportation costs for all 20 Trucks minus USD 70,000 paid in advance. According to the evidence, the outstanding balance above was to be paid before the containers are transhipped to Last destination (China). This fact is supported by the transport agreement (exhibit P2). **Two**, by delaying the releasing the trucks from Lubumbashi contrary to the agreed terms. It is the plaintiff's evidence that the goods were loaded in the respective Trucks, but the trucks were without explanation by the defendants detained in Lumbubashi to 25th October 2022 and 5 trucks out of 20 were further detained by the defendant at Lubumbashi attracting a detention charges of 367,500 calculated at 300 USD per day per each Truck. By this detention, the plaintiffs trucks were kept out of operation for seven month's without any reasonable cause . This fact is well particularised in exhibit P1, a list of trucks involved with the details of the period of the delay for each Trucks.

Thirdly, the defendant is also charged for abandoning the containers with the logs which are now retained at the TRA Customs- NASAKO ICD Kurasini Dar es salaam by the order of the court in Misc Civil Application No 480 of 2022 pending final determination of this suit hence raising a demurrage charges of 60 USD per container up to date. The analysis above, without any other evidence to the contrary, establishes the alleged

breach by the defendants in this case. The second issue is also answered in affirmative.

The last issue is on the reliefs sought. Before I go to analyse the issue, it is pertinent may be to stress the settled principle in adversarial system that parties are bound by their own pleadings and any evidence produced by any of the parties which is not supportive or is at variance with what is stated in the pleadings cannot be allowed to form party of the court's decision. See **Makori Wassaga v. Joshua Mwaikambo & Another** [1987] T.L.R, 88 where the Court stated that:

"A party is bound by his pleadings and can only succeed according to what he has averred in his plaint and proved in evidence; hence he is not allowed to set up a new case."

On that line of thinking therefore I will go by the prayers in the plaint and nothing else.

The first relief sought in the plaint is a specific damage of 431,000 USD which is USD 64000 the outstanding transport costs and USD 367,500 retention charges calculated to 15/2/2023 plus interest from the date of default to the date of judgment and interest at court's rate from the date of judgement to the full payment.

I have no problem with the amount of USD64,000, the transport charges. The problem lies on the delay charges of USD 367,500 claimed. Being the specific damage claim, needs to be specifically pleaded and strictly proved. See **Anthony Ngoo and Another versus Kitinda Kimaro**; Civil Appeal No. 25 of 2014 Court of Appeal of Tanzania at Arusha (Unreported).

According to exhibit P1, the amount of USD 367,500 was arrived at by the rate of USD 300 per each day of the delay, however in his evidence PW2's informed the court that, that rate was by agreement reduced to 200 USD per each day of the delay per truck. Thus, the amount claimed on this item, having stemmed from exhibit P1, is beyond the agreed sum. Relying on the same exhibit, the appropriate amount changeable in this item would be calculated from the number of days of delay per each truck times USD 200 which is equal to USD 245,000 detention charges making the established amount on item (i) to be only USD 309,000 being the total of USD 64,000 outstanding transport charges and USD 245,000 detention/delay charges. The rest remains unestablished.

The second item is on container demurrage charges. These charges are under clause (d) of the contract to be catered by the cargo owner from the date of loading to the date of handling the containers. The uncontroverted agreed rate in this item is USD 60 per day per each container. This being the case, I award the prayer. The amount to be calculated from the date of loading the containers as indicated in exhibit P1, that is five trucks on 29/7/2022, two trucks on 9/8/2022; one Truck on 10/8/2022; four Trucks on 12/8/2022; three Trucks on 18/8/2022 and five Trucks on 23/8/2022 to date.

The other prayer made in the Plaint is for general damages. The law is settled that general damages are awarded after consideration and deliberation on the evidence on record able to justify the award. The general principle was well illustrated by the Court of Appeal in **Cooper**

Motor Corporation Ltd v. Moshi/Arusha Occupational Health Services [1990] T.L.R. 96 that:

"The fundamental principle by which the courts are guided in awarding damages is "restitutio in integrum". By this is meant that the law will endeavour, so far as money can do it, to place the injured person in the same situation as if the contract had been performed".

And in **Tanzania Saruji Corporation vs. Africa Marble Co. Limited** **2004 TLR 155** at page 157 the court observed that.

"The position is that general damages are such as the law will presume will be directed, natural or probable consequence of the act complained of. The defendant's wrongdoing must therefore have a cause, if not the sole or particularly significant, cause of damage".

It went on to state that:

"Damages that the law presumes follow from the type of wrong complained of. General damages do not need to be specifically claimed or proved to have been sustained".

Gathered from the above authorities is that general damages can only be awarded where the damages sought are direct, foreseeable from the defendant's act and reasonable. See also Tanganyika **Bus Services Co. Ltd vs. The National Bus Service Ltd** [1986] T.L.R. 204 and **Kibwana and Another vs. Jumbe** [1990 – 1994] E.A. 223.

A strict review of the evidence places the plaintiff on the disadvantaged side of the breach. The delay in releasing the vehicles from Lubumbashi has certainly inconvenienced not only the plaintiff but all his employees, mostly the drivers who engaged in the business. The holding of her commercial trucks for seven months period from July 2022 when the contract was signed to 25th February 2023, is a commercial sabotage resulted to wear and tear of the trucks, loss of business, superfluous operational costs by sustaining drivers for no reasons and psychological torture that needs to be compensated. In that regard, I award the plaintiff general damages to the tune of Tshs. 50,000,000/=.

Plaintiff is also awarded interest at the commercial rate of 20 % on the specific damages awarded from the date of filing the suit to the date of the judgment and the decretal amount shall attract interest of 12% from the date of judgment to the date of full satisfaction of the decree. The defendants are in addition to the above condemned to pay the costs of the suit. For avoidance of doubt, the awarded amounts above are to be borne by the 1st and 2nd defendant jointly and severally.

It is so ordered.

Dated at Dar es Salaam, this 30th day of May 2024.



E.Y. Mkwizu
E.Y. MKWIZU

JUDGE