

IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB-REGISTRY)

AT DAR ES SALAAM

CIVIL CASE NO. 27256 OF 2023

CHARLES ALFRED MARWA PLAINTIFF

VERSUS

THE SKY HORSE GROUP COMPANY LIMITED..... 1ST DEFENDANT

MATHIAS MUGENDI BISENDO 2ND DEFENDANT

ALLY OTHMAN SAMA 3RD DEFENDANT

FRANK CHRISPIN LIKOTIKO 4TH DEFENDANT

JUDGMENT

8th April & 6th June, 2024

MWANGA, J.

Charles Alfred Marwa, the plaintiff in this case, has filed a lawsuit against The Sky Horse Group Company Limited and its directors, Mathias Mugendi Bisendo, Ally Othman Sama, and Frank Chrispin Likotiko. The lawsuit seeks the recovery of Tshs. 500,000,000/=, which represents the consideration and loss incurred by the plaintiff due to the defendants' clear and undeniable failure to fulfill their agreement to deliver the mining equipment as per the agreed terms.

The plaintiff, a prominent businessman with a primary mining license in Kahama District within Shinyanga Region, urgently required the mining equipment from the supplier to support his gold mining excavation, which forms the basis of the cause of action.

Subsequently, the plaintiff, demonstrating his resourcefulness, secured a loan facility of Tshs. 300,000,000/= from NMB PLC, specifically intended to purchase the mining equipment from the defendants. The loan facility, by banking law and practice, necessitated collateral. As a result, the plaintiff mortgaged his properties in Plot No. 156 Block "B" located in the Magaka area and Plot No. 935 Block "A" Semba Street, in Mwanza City. The loan facility agreement was set for 18 months.

On 29th November 2021, the second defendant herein served the plaintiff with two proforma invoices with Nos. 225 for the backhoe and 226 for the Dump Truck and air compressor to transfer money to purchase the mentioned equipment. Under the agreement, once the NMB PLC makes payment to the 1st Defendant's account, the plaintiff would be liable to the payment schedule in the installment (monthly payment installment) starting from 22nd February, 2022.

Given the agreed terms, the plaintiff transferred funds totaling Tshs. 252,100,001/= to the first defendant's CRDB account. Despite the

funds transfer, the defendants have not delivered the equipment as per the agreed terms and conditions, nor has the loan been paid. According to the agreement, the defendants had to deliver the equipment within 14 days from the date of the payment for consideration, and the second defendant would supply the Plaintiff with the machines and register them in the name of the plaintiff, Charles Alfred Marwa so that the NMB Bank PLC would also use the equipment as collaterals.

The NMB PLC has initiated the loan recovery, in which the plaintiff's properties have been put on sale. Henceforth, the plaintiff filed this suit against the Defendants, claiming the following reliefs;

- i. This Honorable Court orders Defendants to pay the Plaintiff the amount of Tshs. 500,000,000/= being the recovery of the consideration and loss incurred by Plaintiff.
- ii. This Honourable Court orders the Defendants to pay Tshs. 150,000,000/= being the General damages.
- iii. This Honourable Court orders the Defendants to pay interest at 8% from the date of judgment until the final payment.
- iv. This Honourable Court orders the Defendants to pay the Cost of this suit.

- v. Any other relief(s) this Honourable Court deems fit and to grant.

Based on the facts above and depositions in the plaint, the Defendants were called to appear to enter their defense; however, they failed to do so as they could not be located. The publication was then made in Mwananchi Newspaper dated 22nd February, 2024. Still, the defendants did not enter an appearance. Thus, the case proceeded ex parte. In determining the dispute at hand, the court framed four issues.

- 1. Whether the plaintiff and the defendants entered the contract to supply the equipment machines.*
- 2. Whether the defendants breached the contract.*
- 3. Whether the plaintiff suffered damages or any loss.*
- 4. Whether the defendants are liable to pay the plaintiff the compensation for the breach of contract or any losses.*

To prove his case, the plaintiff called one witness, Charles Alfred Marwa, and also tendered four exhibits. He testified as PW1. He told the court that he had been dealing with gold mining excavations in the Kahama District in the Shinyanga Region since 2001. He came to know the Defendants through his brother, Yohana Alfred Marwa. He then

agreed with the 1st defendant to procure equipment machines for him in 2021. He testified that he deposited an amount of Tshs. 252,100,101/= into the 1st defendant's account, which he had borrowed from the NMB Bank Kahama-Branch to purchase equipment machines for mining purposes. The equipment was a backhoe loader and Dumper truck. According to him, the Bank visited his assets on 11th November, 2021, agreed to give him the loan facility, and entered into the agreement in PE1.

In addition, after agreeing, the defendants sent him a proforma invoice to purchase back hole loader valued Tshs. 112,100,000/=, and another proforma invoice was for a Dump truck valued at Tshs. 140,001,100/= as shown in exhibits PE2 (a) and (b). He said that, after issuing proforma invoices, the defendants communicated with the Bank to satisfy themselves and agreed to make the transfer of money to the defendants. Also, on 1st December, 2021, he deposited Tshs. 252,100,101/= to the defendant's CRDB Bank account No. 0150545071700 in the name of the 1st Defendant through exhibit PE3 (a) and (b). PW1 added that they entered an online agreement with the defendants, whose offices are in Dar es Salaam. Still, before that, he managed to visit the 1st Defendant's office at Machimbo-Ukonga in Dar

es Salaam, where he found the Directors of the 1st Defendant, namely Mathias Mugendi Bisendi, Ally Othman Sama and Frank Chrispin Likotiko, who are the first, second and third respondents respectively.

He pointed out further that they agreed that after the deposit and inspection of the equipment, the transfer of the equipment to his place would be done within 14 days. However, no equipment has been delivered so far, and no registration card for the blackhole loader through exhibit PE4 (a) (b), (c), and (d) has been delivered.

PW1 further stated that his business has gotten worse as he has stopped mining activities, and his capital is exhausted because he had to take his remaining little money to pay part of the loan facility. He prayed to the court for the defendants to pay him Tshs. 350,000,000/= as a specific claim, Tshs. 150,000,000/= for loss suffered, and Tshs. 150,000,000/= for filing the case, including advocates' payments and transport costs.

I have reviewed the evidence provided in favor of the plaintiff's case. The first issue is whether the defendants entered the contract to supply the equipment and machines. Under section 2 (1) (e) and (h) of the Law of Contract Act, Cap. 345, [R.E. 2022], the contract is defined

as every promise and every set of promises, forming the consideration for each other, which is enforceable by law. In other words, it is an agreement enforceable by law. Section 10 of the Act provides that all agreements are contracts if they are made by the free consent of parties competent to contracts, for a lawful consideration and with a lawful object. The said contract may be written or oral. On top of that, Section 5 (1) of the Sales of Goods Act, Cap. 214 [R.E. 2022] provides;

*"Section 5(1)- Subject to the provisions of this Act and of any other written law on that behalf, a contract of sale may be made in writing (either with or without seal) **or by word of mouth; or may be implied from the conduct of the parties.** "(emphasis is mine).*

Based on the legal position above, it is clear that the contract may take the forms of written, oral, or by conduct. Based on these premises, no express written contract was produced by the plaintiff to prove the existence of a written contract to prove the plaintiff's claims. However, exhibits PE2 (a) and (b), the proforma invoices from the defendants, and exhibit PE3, the fund transfer request from the plaintiff to the first defendant, show that there were transactions done creating a legal relationship between the parties. The documentation indicates the

equipment to be supplied by the defendants and the cash deposited in the first defendant's account. The absence of any contrary explanation offered regarding the claims on the part of the defendant does signify that there was a contractual obligation between the parties herein. To put it in the named exhibits, such transfer of money was for purchasing one unit of a backhoe loader and one unit of a dump truck. Exhibit PE4(D) is the letter from NMB Bank to the Managing Director of the SKY HORSE GROUP LIMITED informing the defendants that her client, who is the Plaintiff herein, has the Drump truck that has not been delivered to him to date, which was part of collateral neither the registration card and has also not been able to service the loan facility as agreed. The letter also noted that the backhoe loader was delivered late and malfunctioning to date. Exhibit PE3 (a) and (b) show that the plaintiff transferred money from NMB to the CRDB account of the first defendant to the tune of Tshs. 252,101,100/=.

In my view, the evidence suffices to say that there was a contract for the supply of the mining equipment machine between the parties. In the case of **Mollel Electrical Contractors Limited v. Mantrac Tanzania Limited**, Civil Appeal No. 394 of 2019 (CAT-unreported), the court held that;

*"Besides, it will be instructive to restate the trial court's reasoning on this aspect that, in terms of section 5(1) of the SGA, **the proforma invoices (Exhibit P5) and the purchase orders (Exhibits PI and P4), exhibiting an offer and an acceptance by the appellant, constituted the contract. That fact is further supported by the emails (Exhibit P6) exchanged by the parties over the respondent's claim for payment of the alleged balance. Our impression from the emails is unmistakable that the parties acknowledged the existence of the contractual relationship between them while they wrangled over the alleged delayed payment of the balance.**"*

It is undisputed that issuing proforma invoices PE2 and the fund request transfer PE3 between the parties perfectly creates a contractual obligation. Therefore, the first issue is answered in the affirmative.

The 2nd issue now is whether the defendants breached the contract. The Law of Contract Act, Cap 345 R.E 2022, provides in section 37 (1) that 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. Thus, the parties to the contract are bound to perform their respective promises. Failure to perform the contract is a breach, and its effect is the possibility of ending it.

In the present case, Plaintiff and Defendants agreed to deliver mining equipment within 14 days of payment. In his testimony, PW1 stated that they also agreed with the defendants that the equipment should be registered in the plaintiff's name and the cards should be handed over to the NMB bank since the equipment was part of the collaterals. He said only the backhoe loader was delivered and registered but has been malfunctioning since its reception. Despite several follow-ups by the bank through exhibit PE4 'D,' the dump truck and compressor have not been delivered nor registered. It is a cardinal principle of law that parties are strictly bound to the terms and conditions of an Agreement. That was the position in the case of **Simon Kichele Chacha vs Aveline M. Kilawe**, Civil Appeal No. 160 of 2018 [2021] TZCA 43 (26th February, 2021). It was stated that:

"It is settled law that parties are bound by the agreements they freely entered into, and this is the cardinal principle of the law of contract..."

For the preceding, I am inclined to state that the Defendants failed to honor the contract terms because they failed to deliver the equipment to Plaintiff's place and register them into Plaintiff's name, ultimately failing Plaintiff's mining activities. The agreement was to provide all functioning equipment within the prescribed time. Because of that, it is

undisputed that Defendants breached the deal. Hence, the second issue is also answered in the affirmative.

The 3rd issue and 4th issues can be answered together. It is about whether the plaintiff suffered damages or any loss and whether the defendants are liable to pay the plaintiff compensation for the losses that occurred. From the evidence adduced, PW1 stated that the failure of the Defendants to deliver the equipment made him suffer the loss of Tshs. 351,000,000/= as the specific claim of the loan facility to procure the equipment and Tshs. 150,000,000/= being the loss suffered since he had to exhaust his capital to pay the loan facility. According to section "73 - (I) of the Law of Contract;

"73.-(I) When 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

(2) The compensation is not to be given for any remote and indirect loss or damage sustained because of the breach".

Taking the totality of the testimony of PW1, it is undoubtedly that he has suffered a loss since he paid for the purchase of the equipment listed through a loan facility, and the same has not been delivered as agreed. The plaintiff told the court that on 1st December, 2021, he deposited Tshs. 252,101,100/= as evidenced in exhibit PE3, but the equipment was not delivered as agreed, and still, the bank loan has not been paid. This alone is termed a specific loss, which I am satisfied has been duly proved. It is a trite law that specific damages must be pleaded and strictly proved. This was the position in the case of **Bamprass Star Service Station Limited vs. Mrs. Fatuma Mwale, [2000] T.L.R 390**, where it was held that;

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

Given that, it is seen in the Plaint that the Plaintiff had pleaded the amount of Tshs. 500,000,000/= as the total amount of the consideration

and loss caused by the Defendants. However, even in exhibits PE3 (a) and (b), the amount given to the defendants for equipment purchase was **Tshs. 252,101,100/=** is part of the loan facility, and the interest accrued makes the total of Tshs. 325,867,524.53/= as shown in exhibit PE4 (b). For that matter, the Plaintiff proved the outstanding amount of Tshs. 325,867,524.53/= as a specific claim plus interest. Therefore, it is entitled as such.

Concerning general damages, PW1 stated that his capital is exhausted since he had to pay the loan facility. The law is settled in our jurisdiction that the trial judge or magistrate awards general damages after consideration and deliberation on the evidence on record that justifies the award. The judge or magistrate can award general damages, although he has to assign reasons for granting the same. The position was discussed in the case of **P.M Jonathan vs. Athumani Khalfan** [1980] TLR 175, where it is 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 suffering."

In this case, due to the sufferings of the Plaintiff, the court has to consider awarding the general damages, which in our jurisdiction falls under the court's discretion to be granted, and the same has to be done considering the circumstances of a particular case. The meaning of the general damages does not need proof as it is awardable at the court's discretion after the court has determined and quantified the damages suffered by the party. Only what the claimant is supposed to do is to plead in the plaint. This position of law is assembled from **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 where it is said that;

"If the damage is general, then it must be averred that such damage has been suffered, but the quantification of such damage is a jury question."

As the law does not require the Plaintiff to prove the claimed neural damage, I have taken into consideration the fact that it is not in dispute that the defendant breached the contract by failing to deliver the

equipment and caused business inconveniences to the Plaintiff, as he had to exhaust a portion of his capital to pay the loan facility.

After considering all the relevant factors of this case justice, this court dictates the general damages of Tshs. 50,000,000/= (to say Fifty million shillings) would mitigate the suffering.

For better clarity of the reliefs granted, this court orders the defendants to pay the plaintiff as follows;

- i. The defendant is to pay the plaintiff **Tshs. 325,867,524.53/=** as specific claims being the recovery of the consideration, including arrears and interest.
- ii. The defendant is to pay the plaintiff **Tshs. 50,000,000/=** as general damages.
- i. The defendant is to pay the plaintiff interest at 8% from the date of judgment to the final payment date.
- ii. Cost of the suit.

Order accordingly.



H. R. MWANGA

JUDGE

06/06/2024