IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB-REGISTRY

AT ARUSHA

CIVIL CASE NO. 42 OF 2023

STANCE TECHNIC AND CIVIL ENGINEERS LTD .... PLAINTIFF

VERSUS

HANIL JIANGSU JOINT VENTURE LIMITED .... DEFENDANT

JUDGMENT

10th & 24th June 2024

MKWIZU, J:

The plaintiff in this case is the owner of a BOMAG PAVER MACHINE with Reg No. T. 904 CAR, worth USD 231,988 acquired for commercial use. On August 25, 2016, the defendant orally sought to hire the said machine. Following debate, they agreed that the machine would be rented for Tsh. 1,000,000 per day. It is alleged that the paver was moved from Dar es Salaam to the defendant's location in Tengeru-Arusha at the defendant's request and expense. Despite multiple demand notifications, the defendant has yet to pay the rental payments or return the paver machine to the plaintiff's yard in Dar es Salaam, resulting in loss and damages. It

is on this background that the plaintiff is in court seeking judgment and decree as follows:

i. An order for the defendant to pay the plaintiff the total of Tsh. 2,592,000,000/= (Two billion, five hundred ninety-two million Tanzania Shillings) being the rental costs of the machine make BOMAG PAVER with Reg No. T.904 CAR from 25th August 2016 to 25th September 2023.

ii. An order for the defendant to pay the plaintiff TSh 1000,000/=(one Million Tanzania Shillings) per day from the date of signing this plaint (25th September 2023) being the rental costs of a machine make BOMAG PAVER with Reg No. T.904 CAR until the same is transported back to Dar es Salaam as agreed.

iii. An order to the defendant to transport to Dar es Salaam the plaintiff's machine makes BOMAG PAVER Reg No. T.904 CAR

iv. In alternative to prayer No iii above, the defendant be ordered to refund the Plaintiff the total of USD 231988 (Plus 21% lending interest for 36 months at Stanbic Bank) as compensation for BOMAG PAVER with Reg No T.904 CAR

v. The Defendant be ordered to pay General Damages to the plaintiff due to the disturbances caused by the Defendants as

well as the loss of income incurred due to the Defendant's act of retaining the Machine without paying the rental costs.

vi. An order for the Defendant to pay the plaintiff the interest of 7% at the commercial rate to the awarded amount from the date of filing the suit to the date of full payment

vii. Costs of the suit be provided for by the defendants

viii. Any other and further relief(s) this Honourable court deems to grant.

The defendant refuted the claims and filed a counterclaim, along with her written defence statement, claiming that the equipment was not in working order when delivered and that the plaintiff abandoned the machine at her premises knowing it was not functioning. She sought a declaratory order that the plaintiff's paver machine was delivered with defects, an order compelling the plaintiff to retrieve the machine from her location, specific damages amounting to 1,294,000,000/= security and storage costs of the machine, general damages, interest at 12% from the filing date of the suit until full payment and costs of the suit.

The plaintiff was represented by Mr. Fortunatus Muhalila, a learned advocate while the defendant had the services of Mr. Agrey Kamazima also a learned advocate.

In his testimony, Mr. Slanslaus Tarimo, the managing director of the plaintiff's company, testified in court as PW1. He explained how the machine was purchased by the plaintiff and the subsequent agreement with the defendant to rent it for a project in Arusha. He said, that on 21/5/2012, the plaintiff purchased two machines: a BOMAG Paver, Model BF600P with serial number 821837 490023 from DEUTZ and a Caterpillar 320 D excavator for USD 231,988 through a bank loan from Stanbic Bank Tanzania. Mr. Tarimo submitted a Proforma invoice from Achelis addressed to STANCE TECHNIC AND CIVIL ENGINEERS LIMITED dated May 21st, 2012, as well as the Letter of Credit with reference number VAL/STANCE/2011/12/15 dated 15/11/20111 as exhibits P2 and P3.

On how the plaintiff and defendant first met, PW1 said, the defendant approached the plaintiff at her yard in Mwenge, Dar es Salaam, looking to hire a paver machine for a project in Arusha. They agreed to hire the plaintiff's BOMAG Paver machine, tested it at the Dar es Salaam Yard, and found it in good working condition. From there, PW1 said, he was personally contracted to transport the machine to Arusha. He used his own Lowbed to transfer the equipment for an agreed price of 4000,000 as a transport cost from Dar es Salaam to Arusha.

He first served the defendant with invoice No 0113 by STANCE TECHNIC & CIVIL ENGINEERS LIMITED dated 18/4/2017 (exhibit P5) claiming for both mobilization and demobilization costs worth 8000,000/=; 4000,000/= mobilization costs and another 4000,000/= for demobilization. The mobilization costs were paid by cheque No 419722 on 21/4/2017 to Stanislaus Remmy Tarimo via Bank Account No 01J1033336000. A bank statement from 7/6/2024 was submitted and admitted as exhibit P4. When asked why the mobilization fees were paid in 2017, PW1 explained that he was waiting for the trial session to evaluate the machine's operational condition

He in 2019, invoiced the defendant requesting for the accumulated 988,000,000/= rental charges from 2016 to 2019. He later received a letter from the defendant dated 1/9/2023 with reference No HJVL/EST/DL001/2023 addressed to Eng. Stanislaus Tarimo (Exhibit P6) in which the defendant acknowledged the receipt of the machine in the year 2016-2017. He also tendered in court a letter dated 27/8/2020 written to the plaintiff company by the defendant's advocate (Exhibit P7) in which the defendant acknowledged the oral contract for the hire of the Machine- BOMAG PAVER. He denied being informed of any mechanical defects in the machine. He thus claimed for the rental charges, the legal

costs, damages and an order for the demobilization of a working machine and if the machine is faulty, the defendant should be ordered to compensate the plaintiff for a brand new machine.

During cross-examination, he conceded that the Loan agreement was entered into in 2012 repayable in 36 months ended in 2015. The credit facility was USD 231,988 plus bank interest funding for the paver machine only.

DW1 is SU BAOCHENG, a country representative for the defendant company. He said, that in 2017 they had a shortage of machines for their projects in Arusha. They were then linked to the plaintiff and hired a paver machine from the plaintiff, but they could not use it as after the test, the machine was found with a mechanical problem, the sensor was faulty. Accompanied by his boss Mr. Giang they met Mr. Tarimo,(PW1) the plaintiff's company representative and they agreed that since the machine was not fit for use plaintiff should take his machine out of the defendant's campsite and agreed to support the demobilization costs because they had not used the machine. Mr. Taimo requested they keep the machine for a while before he demobilizes the same. They paid the demobilization costs of 4000,000 by cheque around April 2017 through

the bank but the plaintiff did not pick up the machine and he identified exhibit P4 to contain the paid amount as demobilization costs.

They sent PW1 a message to remind him about picking up the machine, but he never responded and their efforts to contact the plaintiff could not bear fruit. In August 2020, they decided to use a lawyer to contact the plaintiff through exhibit P7. The plaintiff received the letter but did not respond. They then shifted the machine from Tengeru to the Kisongo site to wait for the plaintiff to come. In a plan to reduce their camp size in 2023 at Kisongo, they again instructed their lawyer to remind the plaintiff to come and collect the machine. A reminder letter exhibit P6 was again sent to the plaintiff without a response.

He denied completely having ever received any invoice or demand letter from the plaintiff claiming any amount of money stating that had there been any document sent to them, the same would have been stamped by their secretary and signed to acknowledge receipt as per the company's rules. He for that reason doubted if exhibit P5 was ever sent to them for lacking any receipt acknowledgement.

During the cross-examination, he insisted that they only rent a working machine already brought to the site. Before signing a contract, they give the machine a trial run at the site to determine its suitability for the

project. The owner is responsible for mobilizing and demobilizing the machines. He claimed that the plaintiff's machine was faulty in this instance, which is why they chose not to sign a contract. The plaintiffs were made aware of the defect and consented to demobilize the machine. However, she requested assistance with the demobilization costs and they agreed to cover for it because no business was done.

According to him, the plaintiff asked for storage for a short while but was unable to return to pick up the machine despite multiple letters and phone calls. As a result, security and storage costs amounted to USD 200 per day, equivalent to 500,000/= per day from 2017 to before October 1, 2023, plus the transportation costs from Tengeru to Kisongo, Tsh 2000,000/=.

At the end of the trial, the parties' counsels were ordered to file their closing submissions. I would want to thank advocates for their active participation in the matter including a prompt filling of their final submissions. Though the submissions will not be repeated in this decision, they will be considered in making decisions on the issues presented, where necessary.

Before the commencement of the trial, the following issues were framed for resolution by the court assisted by the parties' counsel,: -

On the main suit:

i. Whether parties had a valid contract for the rental of the paver machine
ii. Whether the defendant breached the contract
iii. Whether the plaintiff suffered damage from such a breach
iv. To what reliefs are the parties entitled to

On the counterclaim

I. Whether the plaintiff abandoned his paver machine at the defendant's premises
II. Whether the machine was delivered with defects
III. To what reliefs are the parties entitled to

Before delving into the issues' analysis, let me reiterate the fundamental tenet of civil cases: the burden of proving claims on the required standards of proof rests with the claimants. Stated differently, each party in this case must establish, by a preponderance of the evidence, the accuracy of her claim.

The first issue is whether the parties had a valid contract for the rental of the paver machine. To address the issue at hand, it's important to first grasp contract law and the significance of fulfilling agreements. In our jurisdiction, the term "contract" refers to any agreement made with the

free assent of parties competent to contract, for a lawful purpose and a legitimate objective, that is not on the verge of being declared void. That is the essence, of section 10 of the Law of Contract Act, (Cap. 345 of the R.E, 2019).

It is also a trite law that, when parties decide to agree, their mutual conduct usually reflects a willingness and consent to be bound by the agreement, and each party is expected to uphold the commitments or duties that come with it to the letter. In this sense, each party has an entitlement under the agreement as a result of the other party's undertakings, and it is for this reason that contract law is used to enforce the obligations resulting from the legitimate transfer of rights that each party has already acquired.

Back to the suit at hand. There appears to be an established contractual relationship between the parties in this case. The plaintiff's evidence tells it all that they had an oral contract with the defendant for the hire of the paver machine at issue to facilitate the defendant's Tengeru Sakina project in Arusha at an agreed rental fee of 1000,000/= a day. The machine was delivered to the defendant while waiting for the testing session.

The defendant witness, DW1, formally acknowledged that at some point in 2016, the defendant had contacted the plaintiff in need of a paver machine for their Arusha project. That, the plaintiff was only supposed to deliver the machine site, and a formal agreement would have been made once the defendant had evaluated the machine's operational state. He clarified that following delivery, a technician by the name of WHUNG checked the machine and discovered that it had mechanical flaws, including a malfunctioning sensor. They alerted PW1, the plaintiff's corporate representative. He explained that normally the machine's owner handles both mobilization and demobilization. However, in this instance, the owner complained about the transport after the defect was discovered, and since the plaintiffs had not done business with them, they agreed to cover the demobilization costs to facilitate the return of the Machine to Dar es Salaam. The plaintiff's representative urged them to keep the machine while preparing to pick it up. They used PW1's account to pay the transportation expenses, but the plaintiff declined to pick up the machine despite multiple reminders, citing exhibits P6 and P7.

This evidence gives an impression that, though parties had intimated to enter into a hire agreement, the agreement could not be effected due to the malfunctioning of the machine at issue. Given the nature of the

dispute, I have resorted to a thorough analysis of the party's testimony to separate the wheat from the chaff. PW1 seems to be a crucial witness in this case. In contrast to DW1, he was involved from the beginning of the oral contract, which in his testimony, was started by the defendant's project manager, not DW1. He mobilized the machine and delivered it to the defendant's site. He kept on communicating with the defendant to finalize the testing of the machine and served the Defendant with demand notices as alleged. He is, to me, a person knowledgeable of what had transpired in this transaction.

In his evidence, PW1 agrees that the machine was subjected to a trial session by the defendant. Testifying in chief on 7/6/2024 PW1 was recorded to have said:

> *"The payment was delayed because I had to wait for the testing session to verify the working condition of the machine and to see if it works before payment is made."*

He went further during cross-examination to tell the court that the rental charges were to be paid after the trial session on which the machine was to be tested by the defendant. And further, during re-examination, he confirmed knowing of the defects in the machine when he said:

"The information of the delay of the payment due to the imperfection of the machine was brought to me by the defendant's project manager"

This information does not only contradict PW1's prior claims that he was unaware of the machine's flaws but also corroborates the defendant's evidence that after its delivery to the site, the machine was found faulty and unable to perform the project hence the agreement to demobilise the machine that came with the requirement for them to support the demobilisation costs paid in 2017.

I am confident that there is no other reliable evidence except the plaintiff's unambiguous admission of the accuracy of the facts. As a result, there would be no basis for the defendant to call a witness to establish the same machine testing, as urged by the plaintiff's counsel in his closing submissions.

Further corroboration is found in exhibit exhibit P4, an invoice issued by the plaintiff claiming among other costs demobilization costs in April 2017 suggesting that, at this moment, the plaintiff was responding to the defendant's information on the deficiencies of the machine at issue. I say

so because one would not have requested to demobilize the machine before the end of the project or the agreed term of use.

Also, a letter dated August 27, 2020 (exhibit P7) reminding the plaintiff to pick up their machine from the defendant's campsite, further supports this determination. Despite initially denying receiving the letter in his evidence-in-chief, PW1's response to the questions put to him during cross-examination by the defendant's counsel discloses the truth of the matter. And here is the PW1 answer which I quote for convenience: -

> *"Exhibit P7 was addressed to me personally.*
>
> *It is true that exhibit P7 is not addressed to the plaintiff company. Here is Stance Technic & Engineering Company Ltd. I* ***received the letter in 2020****. I did not respond to the letter because the name of my company was not correctly written.* ***The contents are all correct, containing what we had agreed upon but the company name was incorrectly written****.*
>
> *Yes,* ***exhibit P7 contains exactly what we had agreed with the defendant****, but* ***the problem is the name of the company which was misspelt****. It came out as a new*

company. My Company is Stance Technic Engineers Company Limited, but the letter was addressed to Stance Technic Engineering Company Limited. This is not my company's name..." (Bold is mine)

In the above evidence, Pw1 admits to receiving the letter- exhibit P7 in 2020. He also admits the truthfulness of the contents of the letter when he said, the letter contained exactly what they had agreed with the defendant and that the only reason he did not respond to it was because of the misspelling of his company's name. This takes me to the substance of the said exhibit: Exhibit P7 partly reads:

*"...It is common ground that our client duly entered into an oral agreement with your company for the hiring of Bomag Power Machine with Registration No. T904CAR for Construction of Sakina-Tengeru for one month and **duly paid for a sum of Tanzanian Shillings Four Million(4,000,000) for demobilization***

*Much to our shock and consternation of our Client the said **machine was defective to the effect of not performing the specific project as agreed and or at all**. That ever*

*since, our **client** severally and interalia **instructed your company to demobilise and transport your machine from their campsite but your company refused and or ignored to do the same**"*(Emphasis added)

The PW1's admission of the foregoing contents indicates that the plaintiff was well aware of her machine's technical difficulty; she was advised of it and paid the demobilization fee, but he purposely left the machine at the defendant's campsite. This explains why the plaintiff did not demand the payment of the rental expenses for the entire duration of the alleged project until after the defendant's last demand letter, dated January 9, 2023 (exhibit P6).

I agree with the defendant's counsel's arguments in his closing submissions that if the intended contract had been fulfilled, the plaintiff would have sought payment for her rental expenses from the defendant. It is surprising and very peculiar that the Plaintiff is claiming financial hardship with bank loans while failing to write even a demand letter to the defendant to claim for his rent arrears of more than 7 years until she was jolted awake by the defendant's notice.

I am thus convinced that, while the parties had agreed to enter into a hiring contract, that contract could not be fulfilled at the end of the day due to faults discovered on the equipment in question, which the plaintiff was fully aware of followed by another agreement to demobilise the machine from the defendant's site. This leads to the conclusion that the parties did not enter into a legitimate contract for the rental of the aforementioned Paver Machine as claimed.

For the reasons stated above, I find the first issue in the plaintiff's case in the negative. And, since the rest of the issues in the main suit were contingent on the success of the first issue, which was determined in the negative, I believe dealing with the remaining matters would be superfluous.

I attempted to assess the rest of the plaintiff's evidence, and I am afraid to say that its validity is uncertain. It is marred by severe discrepancies that get to the heart of the subject. PW1 explanation was that Plaintiff expected to use the machine's rental earnings to return the loan, convincing the court that the defendant's retention of the machine to date resulted in her failure to repay the bank loan. However, an examination of the evidence discloses that the 36-month -loan period specified in exhibit P1 had expired even before the parties had agreed to engage in

the rental agreement. This was admitted by PW1 under cross-examination, where he stated:

> *"The Loan agreement was entered into in 2012 repayable in 36 months.*
>
> *You are right that the three-year loan term ended in 2015*
>
> *It is also true that the contract between the plaintiffs and defendant was entered into in 2016"*

Finally, he agreed that there was no connection between the bank loan and the rental arrangement. This type of discrepancy calls into question the credibility of the witness, PW1. I am not persuaded by the plaintiff's counsel that the defendant's breach of contract is a justification for her inability to service her bank loan. To say the least, the plaintiff's evidence is insufficient to sustain her claims. I proceed to dismiss the plaintiff's suit in its entirety.

I now turn to the counterclaim. The defendant's counterclaim raises three issues to be resolved. The discussion above has resolved the 1st and 2nd issues. As intimated above, the parties' evidence has proved that a defective machine was delivered to the defendant by the plaintiff, a fact which was well in the plaintiff's knowledge as explained above. The

plaintiff abandoned her paver machine at the defendant's campsite after being found defective for more than 7 years.

I thus proceed to grant the first, second, and fourth prayers in the counterclaim by declaring that the plaintiff's Paver Machine BOMAG with Reg. No 904 CAR was not in working order at the time of delivery, and the plaintiff decisively abandoned her machine at the defendant's premises knowing that it was not working. As a result of this verdict, the plaintiff is required to collect her Machine as soon as possible from the defendant's encampment in Kisongo.

The third claim is for specific damages totalling 1,294,000,000/= as security costs borne by the defendants. According to DW1's evidence, the abandonment of the machine by the plaintiff has resulted in storage and security costs of 200 USD per day, equivalent to 500,000/= per day from 2017 to the end of last year before October 1st, 2023, plus 2,000,000/= transport costs from Tengeru to Kisongo. However, in his evidence, the defendant's witness did not go further to state exactly the period they used to pay the USD 200 storage and security costs and to whom both the security, storage and transport costs were paid, and no receipts were tendered to establish the same.

It is a trite law that specific damages must be specifically pleaded, particularized and proved. See **Zuberi Augustino Mugabe vs. Anicet Mugabe** [1992] T.L.R. 137. In **Xiubao Cai and Maxinsure (T) Ltd vs. Mohamed Said Kiaratu**, Civil Appeal No.87 of 2020, the Court Held:

> *"Special damages are such a loss as **will not be presumed by law**. They are **special expenses incurred or monies lost**. For example, the expenses which a plaintiff or a party has incurred up to the date of the hearing are all styled as special damages; for instance, in personal injury cases, expenses for medical treatment, transportation to and from a hospital or treatment centre, etc... Unlike general damages, a claim for **special damages should be specifically pleaded, particularized and proved**. ..."*

As explained above, although the specific damages in the counterclaim were effectively pleaded. The evidence presented was insufficient to determine how the reported figures were calculated. The defendants' claim for specific damages in the counterclaims fails. I also don't find an anchor to build the rest of the defendant's prayers.

Consequently, the defendant's counterclaims partly succeed as explained above. Plaintiff to bear the costs of the suit.

Order accordingly.

DATED at **Dar es Salaam** this **24th June** 2024

E.Y. Mkwizu

JUDGE

24/6/2024

COURT: Right of Appeal explained

E.Y. Mkwizu

JUDGE