**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**DAR ES SALAAM DISTRICT REGISTRY**

**AT DAR ES SALAAM**

**CIVIL CASE NO. 121 OF 2022**

**TANZANIA PORTLAND CEMENT PLC.....PLAINTIFF**

**VRS**

**SIGORI INVESTMENT TANZANIA LTD.....DEFENDANT**

**JUDGMENT**

*Date of last Order:13-11-2023*

*Date of Judgment:26-1-2024*

**B. K. PHILLIP, J**

This case arises from business transactions between the plaintiff and the defendant herein involving sales of cement. Both the plaintiff and defendant are companies incorporated in Tanzania. The plaintiff deals with the production of cement whereas the defendant was a middleman. It was dealing with sales of cement produced by the plaintiff to retail stores. Thus, the defendant used to purchase cement from the plaintiff in bulk. It is alleged in the plaint that on 14th April 2018, the plaintiff agreed with the defendant to purchase cement from the plaintiff on credit. The outstanding amount was agreed to be cleared within 30 days from the date of the delivery and the overall credit amount was not supposed to exceed Tshs. 200,000,000/=.10% charge was agreed to be applied to all overdue payments. The defendant was required to furnish a Bank Guarantee from a recognized Bank throughout the tenure of the agreement. To comply with the terms of the agreement, the defendant obtained a Bank Guarantee from Equity Bank which was valid up to 13th April 2019. Up to the expiry of the

contract (13th April 2019), there was an unpaid amount to the tune of Tshs 92,500,654.34 Despite being demanded to pay the aforesaid outstanding amount the defendant refused to heed the plaintiff's demands. The plaintiff's prayers in this case are hereby reproduced verbatim hereunder;

A) Payment of specific damages amounting to Tshs. 101,750,719/= (Tanzanian Shillings One Hundred and One Million Seven Hundred and Fifty Thousand and Nineteen), being damages for breach of contract, loss of income and business

B) Interest on item (A) above at the commercial rate of 15% per month from the date of filing the suit till the date of Judgment/Decree.

C) Interest on item (B) above at the commercial rate of 12% from the date of the decree till the final payment.

D) An order that the defendant pay general damages to the plaintiff Tzs. 20,000,000/=.

E) Costs of the suit.

F) Any other reliefs this court deems just and fit to grant.

In its written statement of defence, the defendant denied all of the plaintiff's claims and stated that none of the documents mentioned in the plaint were served to the defendant. However, the court's records reveal that the issue of the missing annexures to the plaint was resolved by the court order and the same was later on served to the defendant.

During the final pre-trial conference the following issues were framed for determination by the Court.

i) Whether the plaintiff and the defendant entered into an agreement for the supply of cement on credit.

ii) Whether the defendant breached the cement supplies agreement.

iii) To what reliefs are the parties entitled?

During the hearing of this case, the learned Advocates Elinihaki Kabura and Joyce Sojo appeared for the plaintiff whereas the defendant was represented by the learned Advocates, Alphonce P. Kubaja.

Starting with the first issue, to wit; *Whether the plaintiff and the defendant entered into an agreement for supply of cement on credit,* both the plaintiff and defendant brought in court one witness each. The plaintiff's principal officer, ( Commercial Area Manager for Lake Zone), Mr. Davis Tery testified as PW1. His testimony was to the effect that on 14th April 2018, the plaintiff agreed with the defendant to supply the defendant cement on credit on the conditions that the agreement would be covered by a Bank Guarantee from a reputable Bank, the outstanding money would be paid within 30 days from the date of delivery of the cement and the overall credit limit should not exceed Tshs.200,000,000/=. A 10% charge would be applied to all payments overdue for more than 30 days. The defendant obtained a Bank Guarantee from Equity Bank which was valid up to 13th April 2019. On 16th May 2018, the defendant entered into another agreement with the plaintiff to supply cement to the defendant on credit in which it was agreed that the outstanding amount would be paid within 30 days from the date of delivery of the cement and the overall credit limit should not exceed Tshs.100,000,000/=. A 10% charge would be applied to all overdue amounts for more than 30 days. PW1 tendered in court two agreements titled Cement

Supplies on credit. The first one is dated 14th August 2018 for a credit limit to the tune of Tshs.2000,000,000/= secured by Equity Bank Guarantee. The 2nd one is dated 16th May 2018 for a credit limit to the tune of Tshs.100,000,000/= ( exhibit P1 collectively), A Bank Guarantee from Equity Bank ( Exhibit P2).

On the other hand, Mr.Moses Stephen Sigori (DW1), the defendant's principal officer, testified that between 14th April 2018 and 13th April 2019, the defendant had a contractual relationship with the plaintiff for the supply of cement on credit with a credit limit to a tune of Tshs.200,000,000/ only, covered by a Bank Guarantee from Equity Bank. The defendant was not capable of obtaining cement worth more than Tshs. 200,000,000/= from the plaintiff as per the terms of the agreement.

Looking into the evidence adduced by both sides, I am of a settled opinion that the 1st issue has to be answered in the affirmative since the evidence adduced by the parties proves to the standard required by the law that the plaintiff in this case, agreed to the supply cement to the defendant on credit. However, PW1's testimony is to the effect that parties entered into two different contracts. One was for a maximum credit facility to the tune of Tshs.200,000,000/=, secured by a Bank Guarantee issued by Equity Bank, and the second one was for a maximum credit limit to the tune of Tshs. 100,000,000/= which was not secured by any Bank Guarantee. I find it apposite to point out here that as stated at the beginning of this judgment, the plaint indicates that the plaintiff signed a contract with the defendant for the supply of cement on credit, and according to the terms and conditions of that contract, the credit limit was not supposed to exceed

Tshs.200,000,000/=, and the same was secured by a Bank Guarantee. For clarity let me reproduce hereunder the relevant paragraphs in the plaint.

*"4. That on 14th April 2018 the plaintiff entered into an agreement with the defendant to supply cement on credit to the defendant. It was agreed that the credit amount be paid within 30 days from the delivery date and the overall credit amount should not exceed Tshs.200,000,000/=. A copy of the agreement of cement supplies on credit is attached herein and marked as Annexture TPC-1, leave of the Court is craved for it to form part and parcel of the plaint.*

*5. It was further agreed that a 10% charge would be applied to all payments overdue for more than 30 days and that the defendant was supposed to furnish a bank guarantee from a recognized bank throughout the agreement tenure. That the defendant obtained a guarantee from equity bank which was valid until 13th April 2019."*

From the foregoing, I am inclined to agree with the position expressed by Mr. Kubaja in his closing submission that this case is founded on the contract secured by the Bank Guarantee as stated in the plaint, not the second contract which was not secured by the Bank Guarantee as contended by Mr. Kabura in his closing submission. It is noteworthy that all of the plaintiff's allegations in the plaint refer to the contract in which the agreed credit amount was not supposed to exceed Tshs.200,000,000/=. It is explicitly alleged in the plaint that there was one contract between the plaintiff and the defendant, dated 14th August 2018, which is why even the way this issue is framed, refers to one contract not contract(s). As correctly pointed out by Mr. Kubaja in his closing submission, it is a cardinal principle of the law that parties are bound by their pleadings and there is a plethora of case laws to that effect. In the case of **Gloria Irira Vs Sudi Mrisho Ngwambi and**

**two others, Civil Appeal No.27 of 2021,** (unreported), cited by Mr. Kuboja in his closing submission the Court of Appeal said the following;

*"... In civil cases, parties are bound by their own pleadings, and not allowed to travel beyond their pleadings. .....In Civil cases, parties to the litigation are the ones who set up agenda ...It is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made."*

On the fate of the evidence adduced at variance with the pleadings, the Court had this to say;

*"Since the pleadings are the basis upon which the claim is founded, it is settled law that, parties are bound by their own pleadings and that,* ***any evidence adduced by any of the parties which is not based on or is at variance with what is stated in the pleadings must be ignored"***

*( Emphasis is added)*

In addition to the above, in the case of **Astepro Investment Co. Ltd Vs Jawinga Co Ltd, Civil Appeal No. 8 of 2015** ( unreported). The Court of Appeal said the following;

*"...proceedings in a civil suit and the decision thereof, has to come from what has been pleaded,*

To avoid doubts, let me make it clear that I have taken into consideration the arguments raised by Mr. Kabura that the defendant had signed with the plaintiff two agreements for the supply of cement on credit, which were running concurrently, the 1st one was for the credit limit to a tune of Tshs 200,000,000/= which was secured by the Bank Guarantee and the second

one was for a credit limit of Tshs.100,000,000/= which was unsecured. I do not need to be repetitive, Mr. Kabura's submission concerning the second contract for a credit limit to the tune of Tshs.100,000,000/= is not supported by the pleadings. Therefore, Mr. Kabura's arguments raised in his closing submission that the defendant's defence is evasive, hence, the defendant has to be taken to have admitted the existence of two contracts, dated 14th August 2018 and 16th May 2018 is misconceived. I have reproduced part of the relevant paragraphs in the plaint earlier in this judgment which indicate clearly that the allegations on the existence of the contract for the supply of cement dated 16th May 2019 are not pleaded at all. Similarly, the allegations that two contracts were running concurrently are not pleaded. On the strength of the decision of the Court of Appeal in the case of **Gloria Irira** (supra), I am duty-bound to ignore the evidence in respect of the allegedly unsecured second contract dated 16th August 2019.

In conclusion, it is the finding of this court that the 1st issue is answered in the affirmative, that is, the plaintiff and defendant had entered into a contract for the supply of cement on credit, dated 14th April 2018.

Coming to the second issue, that is, *Whether the defendant breached the cement supplies agreement,* PW 1 testified that the defendant breached the agreement dated 16th May 2019 for failure to pay to the plaintiff the outstanding amount to the tune of Tshs.92,500,654.34, upon its expiry on 13th April 2019. Furthermore, he testified that despite being requested to pay the outstanding amount to the tune of Tshs. 92,500,654.34 the defendant refused to pay the same. The said outstanding amount attracted 10% interest which is equivalent to Tshs. 92,500,654.34, hence making the

total amount payable by the defendant to be Tshs. 101,750,719.77. PW1 tendered in court the defendant's account statement as per the plaintiff's record for the period between 1st January 2018 to 4th February 2020 (exhibit P3) together with the demand letter from the plaintiff addressed to the defendant and the defendant's reply (exhibit P4 collectively). In response to questions posed to him during cross-examination, PW1 told this court that the plaintiff recovered Tshs. 200,000,000/= from Equity Bank in respect of the contract which was secured by Bank Guarantee and a sum of Tshs.92,500,654.34 in respect of the unsecured contract dated 16th May 2018 remained unpaid.

On the other hand, DW1 testified that according to the agreement for the supply of cement on credit which was guaranteed by the Equity Bank, there was no way the defendant could obtain cement from the plaintiff on credit worth more than Tshs.200,000,000/= in contravention of the terms and conditions stipulated in the contract and the Bank Guarantee. He admitted that the defendant obtained cement from the plaintiff and failed to pay the purchase price as agreed, consequently, the Bank paid the plaintiff the outstanding amount as agreed in the Bank Guarantee. Thus, the outstanding amount which was Tshs.200,000,000/= was paid by the Bank and the defendant was discharged from the debt. He denied the plaintiff's allegations that the defendant did admit that it owed the plaintiff the said sum of Tshs.92,500,654.34.

As I have alluded to earlier in this judgment, the pleadings show that the plaintiff sued on the contract that was entered into on 14th April 2018 and secured by the Bank Guarantee. Both PW1 and DW1 are at one that the

defendant breached that contract for supply of cement and the plaintiff was compelled to demand the Bank to pay the outstanding amount. Therefore, it is not in dispute that the defendant was in breach of that contract. It is also not in dispute that the amount secured by Bank Guarantee (Tshs. 200,000,000/=) was paid by the bank. The same is reflected in the defendant's statement of account (exhibit P3). I have confined my analysis in this issue to the contract dated 14th August 2018, secured by Bank Guarantee since in the determination of the first issue I made a finding that this case is founded on the contract dated 14th August 2018.

Finally, about the reliefs the parties are entitled to since I have already made a finding that this case is founded on the contract that was secured by a Bank Guarantee, and upon the defendant's failure to pay the outstanding amount as agreed, the plaintiff demanded from Equity Bank the payment of the guaranteed amount to a tune of Tshs.200,000,000/= and the same was paid to the plaintiff by the Bank. Therefore, as far as that contract is concerned the defendant does not owe the plaintiff any amount of money. For the sake of clarity, even at the risk of being repetitive, let me point out that most of the evidence adduced by PW1, in particular, the contract dated 16th May 2018 for a credit limit to the tune of Tshs. 100,000,000/=, the statement of account (exhibit P3) which indicates that there is an outstanding amount to the tune of Tshs.92,500,654.34 after the Bank had paid the sum of Tshs. 200,000,000/= to the plaintiff, the demand letter addressed to the defendant and response thereto (Exhibit P4) as well as the letter titled settlement of outstanding debt of Tshs. 92,500,654.34 addressed to the plaintiff (exhibit P.5) are not in support of the plaintiff's case as per

the pleadings which indicate that the case is founded on the contract dated 14th April 2018.

In the final analysis, it is the finding of this court that the outstanding amount to the tune of Tshs.200,000,000/= in respect of the contract dated 14th August 2018 on which this case is founded, was paid in full by Equity Bank in the discharge of the Bank Guarantee offered by the Bank in favor of the plaintiff. The plaintiff is not entitled to any payment as far as the aforesaid contract is concerned. Thus, this suit is hereby dismissed with costs.

Dated this 26th day of January 2024


**B.K. PHILLIP**

**JUDGE.**