IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO 21 OF 2010

RHINO PLANT EQUIPMENT AND

TRANSPORT LTD.....PLAINTIFF

VERSUS

POWER ROAD (T) LTD.....DEFENDANT

JUDGEMENT

Bukuku, J.

The plaintiff, represented by Mr. Kamugisha, Advocate is in this court praying for judgment and decree against the defendant, who is represented by Mr. Ukongwa, Advocate as follows:-

"(i) An order for payment of US$ 93,369.00 or its equivalent in Tanzanian shillings being outstanding hire and demobilization charges.

(ii) Payment of 21%on the sum above being interest from the dates the payment was due to completion of the suit and thereafter at the court's rate of 12% up to payment in full.

(iii) General damages as shall be assessed by the court.

(iv) An order for payment of 30% interest on the sum at c above from the date of judgment up to payment in full.

(v) Costs of the suit be provided for

(vi) Any other orders or reliefs the court will deem fit to grant".

Circumstances leading to the controversy at hand are as follows:

On diverse dates between 11th September, 2008 up to 30th April, 2009, the plaintiff rendered facilities services related to the hire and demobilization of various equipment to the defendant's Buzwagi site. These services include hiring of various Hamm Rollers and Tipper Truck (Volvo NL12). The daily rate for hire inclusive of VAT was US$ 280 VAT for each Tipper Truck (Volvo NL 12),and US$ 310 for each single drum compactor (Hamm Roller) and US$ 1,850 for mobilization and demobilization costs for each Tipper Truck (with one compactor loaded).

It is the testimony of both PW1 and DW1 that, the contract was made orally. It is pleaded at paragraph 6 of the plaint that, it was the understanding of the parties that, they maintain a time sheets which would be signed everyday or even after a few days that would record the time that the machines worked and signed by the defendant who are operating

the relevant equipment and that the time sheet would be used to raise invoice. It is further alleged that, in the course of doing business, the plaintiff raised various tax invoices for hire of service provided to the defendant which were duly settled by the defendant except for three tax invoices worth US$ 93,369.00 which remains unsettled. That, despite the various demands and promise to pay by the defendant the same remains due, hence the base of this claim.

The defendant denied the claim, and put the plaintiff to strict proof, save for the acknowledgement of some invoices from the plaintiff which he however stated that he was not under any obligation to settle and thus the defendant prays for dismissal of the suit and that the plaintiff to pay costs.

Replying on the defendant's defence, the plaintiff in a nut shell insists that the defendant is aware of the outstanding claim and has been communicating with the plaintiff for settlement of the same and there are email correspondences between one Douglas Claxton the Managing Director of the defendant and one Akram Aziz, the Managing Director, of the Plaintiff.

The issues framed for the determination of the court are:

(i) Whether there was any contractual relationship between plaintiff and the defendant regarding to hire of the plaintiff construction equipment by the defendant ,and under what terms.

(ii) Whether there was a breach of any terms of the contract.

(ii) To what reliefs are the parties entitled to.

In the course of hearing this case, the plaintiff called three witnesses (PW1-PW3) and tendered in evidence four, Exh. P1-P4 respectively. On the defence side, only one witness gave his testimony an did not tender any documentary evidence.

Mr. Akram Aziz, PW1, testified on how the plaintiff and the defendant got into business. PW1 further stated that, it was the defendant's company which requested to hire his equipment at Buzwagi. He further stated that, there was an oral contract between the plaintiff and the defendant for hire of the equipments to be used at the defendant's site in Buzwagi area in Kahama and that the agreement was made with one Antony Christian Frederick Badenhorst site manager of the defendant's company. PW1 stated that, it was after agreeing on the oral agreement that he supplied the equipments to the defendant. It is the testimony of PW1 that, having agreed on the rate of hire, the defendant took two Tipper Trucks for dollars 310 per day and two compactors for 280 dollars per day. When PW1 was asked why there is nothing to evidence the agreement, he pointed out that they entered into an oral agreement with the defendant taking into account the reputation of the defendant company.

In order to corroborate his testimony, PW1 tendered as evidence, Exh.P1 which was e-mail correspondences between PW1 and DW1 trying to resolve the issue of the claim. Upon close scrutiny of this piece of evidence it clearly shows involvement of DW1 of trying to settle the outstanding amount. It is the testimony of PW1 that, it is evident fro Exh.

P1 that defendant's director, Mr. Claxton and himself were trying to compromise settlement of the claim out of court. It is upon this evidence that there is a clear testimony that at all times the defendant was aware of the outstanding claim against him contrary to what was stated by the defendant in his written statement of defence that he knows nothing about the debt.

PW2, one Mr. Jignesh Bhavsar, a Finance Manager of the plaintiff also testified. Basically he complemented the evidence of PW1 and insisted that, he was the one who was personally involved in this business. It was PW2 who raised invoiced to the defendant and deposited cheques drawn in favour of the plaintiff. He testified that, out of the seven invoices raised three invoices amounting to US$ 93,369.00. remained unsettled. PW2 also tendered in court EXH. P2 as one of the several tax invoices which were settled by the defendant. As an attachment to the tax invoice, there was a so called time sheet which showed how the settled amount in the tax invoice was arrived at, in terms of the rate of hire, and hours spent at work by the relevant equipment. Also attached to the tax invoice was the cheque deposit slip which indicated that the drawers' name was the defendant. PW2 also tendered as evidence tax invoices which were raised but not paid (Exh. P.3). Attached to them, were the time sheets which showed the type of equipment hired, hours worked and the rate used. PW2 testified further that, he prepared the invoices based on information received from the logbooks.

The last witness to testify on the part of the plaintiff was one, Dadkarim Amin. His testimony was brief. He told the court that he was a supervisor of the work on the plaintiff's side. His duties including overseeing that the equipments were being kept in good condition, he maintained the logbook and kept work records of work done on a daily basis and at the end of the month he would compile a report of computation and send it their headquarters in Dar es Salaam where invoices were being raised. PW3 went ahead and tendered Exh. P4 which were the log books for the months of February, March and April, 2009. He said that the said logbooks showed the name of the equipment, the dates and time when a particular equipment started being used and when it ended. There was a provision for the supervisors signature where defendants' supervisor signed. He mentioned to the court some of the names of some of the supervisors from the defendant as Jerome and Petroce, and the court was shown their signatures which later Jeromes' signature was identified by DW1.

The sole defence witness, one Mr. Anton Christian Frederick Badenhorst (DW1) also testified. He introduced himself as the managing Director of the defendant company. He told the court that, he knows the plaintiff's company. He also told the court that, he had a contract with Barrick Gold in Buzwagi mine. Narrating his story, DW1 they had their own equipment to do the contract. They had four vibrating compressors. During the implementation of the contract, 2 new dyna packs broke down and

were not working. The plaintiff had some equipments close to the site they were working.

In order to implement the contract they had, DW1 testified that, they were forced to hire two roller compactors from the plaintiff. When asked in examination in chief whether there was a contract or not, DW1 said that, there was no contract with the plaintiff they just agreed on the terms. DW1 further testified that, to his recollection, every single cent was paid in full. Asked if they hired other equipments, DW1 said that he could not remember that there were other hired equipments apart from the rollers. About the terms of the hire, DW1 again maintained that there was no contract but later on admitted that they had agreed on the hire price of the equipments on a daily rate of US$. 310. When Shown Exh. P4, DW1 admitted that there was a logbook and that they used to sign it for each hire. Asked about the signatures in the log book, DW1 identified the signature of two of his employees, Mr. Wikus Wyderman who was a construction clerk and one Mr. Jerome. However, DW1 testified that although Mr. Wyderman signed the log book, he was not authorized to do so. They had already suspected him of foul play and are still investigating for the foul play.

Having given a brief background of this suit, the testimonies of the witnesses together with the evidence which was tendered during the trial, let me move to the issues framed.

As regards the first issue, whether there was a contractual relationship between the parties and under what terms. I will not hesitate

to answer the same in the affirmative. When DW1 was asked whether there was a contract or not, he said that there was no contract with the plaintiff but they just agreed.

Let me pause here and expose the position of the law regarding contract. This is provided in Section 10 of the Law of Contract Act Cap 345 R.E 2002 as follows;

"10- *All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.*

Of course, the word contract comes in interchangeably with the word agreement under this section. In principle, an agreement enforceable by law is a contract. A contract therefore, is an agreement the object of which is to create a legal obligation between the parties. A contract essentially consists of two elements; the agreement and the legal obligation i.e duty enforceable by law. With regard to the first element, it is a fact that, every promise and every set of promises, forming the consideration for each other, is an agreement. A promise, is made the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise. An agreement therefore, comes into existence only when one party makes a proposal or offer to the other party and that other party signifies his assent (i.e gives his acceptance) thereto. Briefly stated, an agreement is the sum total of *'offer'* and *'acceptance.'*

Apart from the offer and acceptance, there are other characteristics of an agreement, such as plurality of person; in that, there must be two or more person to make an agreement because one person cannot enter into an agreement with himself and also there must be *consensus –ad –idem*; both parties must agree about the subject matter of the agreement in the same sense and at the same time.

As already stated before, an agreement to become a contract, must give rise to a legal obligation i.e a duty enforceable by law. If an agreement is incapable of creating a legal duty enforceable by law, it is not a contract. It must be remembered that *"all contracts are agreements but not all agreements are contracts."* (emphasis mine). It will be appropriate to point out here that the law of contract deals only with such legal obligations which springs from agreements. Obligations which are not contractual in nature are outside the purview of the law of contract. These include obligations of moral; such as an obligation which leads to prostitution, religious; such as attending to a house of worship, or social nature; e.g. a promise to lunch together at a friend's house or to take a walk together, are not contracts because, they are not likely to create a duty enforceable by law. On the other hand, in business agreements, like the one at hand, the presumption is usually that the parties intend to create a legal relationship.

Now, back to the facts before us. Having canvassed the testimonies adduced by the witnesses and the evidence tendered, I can now safely say that indeed there was a contractual relationship between the parties. I say so because, *one*, it is the defendant (DW1) himself who admitted that there

was an agreement between the parties. Indeed, the defendant hired the plaintiff's equipment. So here, there was offer and acceptance. *Two,* there was some lawful consideration. Exh. P2 shows that, the defendant made some payments for the services rendered by the plaintiff which was also admitted in evidence by DW1 who admitted as correct that the equipments were hired at different charge rates per day, i.e for the Tipper Truck (Volvo)- US$. 280; Hamm Rollers US$. 310 and for the excess hours US$. 38.75. This signifies one of the elements of a contract. A lawful consideration, past, present or future, is an essential element of a valid contract. Consideration is the price paid by one party for the promise of the other. Normally, an agreement is legally enforceable only when each of the parties to it gives something and gets something. The something given or obtained is the price for the promise and is called "consideration".

Three, the parties in this matter agreed for a lawful object, hire of equipment. The agreement they entered into was not fraudulent or illegal or immoral or opposed to public policy. Had it been one of them, the agreement could have been void.

Having answered that, I now turn to the question of the terms of the contract which were entered. This one does not need to task my mind. In my considered opinion, the terms can be gathered from the charges the parties to contract agreed upon to be paid out per each hire per day, of the equipment, that is ,US$ 280.00 for tipper truck and US$310.00 for Hamm Rollers, also DW1 did not object to the use of the log books tendered as Exh. P4. All this goes to show that the parties had agreed on the terms of

the agreement. In support of his case, the plaintiff cited the case of **Merali Hirji and Sons v. General Tyre (E.A) Ltd (1983) TLR 175,** where it was he that, when there is no written contract to make reference to as to what parties were intending to be the terms, it was the duty of the court to imply such reasonable terms.

From the analysis above, I am satisfied that, in this case there exist all the necessary ingredients which forms a contractual relationship between parties and that, the parties had a consensus on the terms of the contract.

I now turn to the second issue: whether there was a breach of any of the terms of the contract. Looking at the plaint and the pleadings, it is the plaintiff who claims that the defendant has breached the contract by not adhering to the terms of the payment of the hired equipment. Since it is the plaintiff who has alleged, he must prove. The burden of proof in civil cases is given in section 110 (1) of the Law of Evidence Act, 1967-

> *"110-(1) Whoever desires any court to give judgment as to any legal rights or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

In an effort to prove its case plaintiff tendered in court Exh. P2 which was an invoice paid, and also tendered Exh. P3 (1) (2) (3) which are invoices raised by the plaintiff to the defendant for settlement, and which were yet to be settled. Both these invoices demonstrated how the amount was arrived at. But for whatever reason, the defendant through the

testimony of DW1, which is not embedded in his written statement of defence intended to escape his liability of paying the debt by introducing meaningless requirements of authority to the effect that the person who signed the log book was not authorized to do so. With due respect, this argument cannot find purchase in me. If at all the issue of lack of authority for the one who signed the logbooks was an issue, it could have been raised by the defence at its earliest stage and thus making it an issue to be determined by this court before even laboring much power if indeed there was a contract. This was not done and therefore, the defendant cannot come through the back door to claim something which was not controverted earlier on.

It is a fact that, throughout his testimony, the defendant has been alleging that there is a foul play as from 1st February, 2009 to 30th April, 2009, in that, documents were signed by a person not authorized. The thing which troubles my mind here is that the defendant has failed to shake the evidence put against him. Now, instead of laboring his power to address the issue that he did not enter into a contract with the plaintiff, he is raising an issue which is not before this court. In my opinion, that allegation notwithstanding, still the defendant is not relieved from the onus of putting a strong defence against him. By defendant alleging that there is foul play is not enough. He was duty bound to call evidence to cement what he thinks supports his defence. He has not done so, What happened was that, DW1 just said they suspected foul play and they are still

investigating. Unfortunately, again, I am not going to buy this for interest of justice to survive.

The third and final issue raised is as to what relief(s) the parties are entitled to. Having determined that indeed there was a breach of contract, the plaintiff is therefore entitled to some reliefs. My argument is complemented by section 73(1)(2) of The Law of Contract Cap 345 of R.E 2002, in that, when a contract has been broken, the party who suffers by such breach is entitled to receive compensation. The said section provides:-

> *"(1) 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 by reason of the breach."*

Under normal circumstances, damages are monetary compensation allowed to the injured party for the loss or injury suffered by him as a result of the breach of contract. The fundamental principle underlying damages is not punishment but compensation. By awarding damages the court aims to put the injured party into the position in which he would have been, had

there been performance and not breach, and not to punish the defaulter party. As a general rule, compensation must be commensurate with the injury or loss sustained, arising naturally from the breach. If actual loss is not proved, no damages will be awarded.

In the case at hand, it has been established that indeed there was a contract between the parties. It has also been established that, the plaintiff discharged its duties by providing the agreed services to the defendant. The said services were not intended to be gratuitous but rather there was some consideration. As a result, the plaintiff discharged his obligation knowing that he is going to receive some considerations, and the defendant enjoyed the benefits of the contract without paying any consideration. Under such circumstances, and as rightly submitted by Learned Counsel for the plaintiff, the defendant is duty bound to compensate the plaintiff in terms of section 70 of the Law of Contract Act (supra), which provides:

> *"Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefits thereof, the latter is bound to make compensation to the former in respect of, or to restore the thing so done or delivered"*

Among the reliefs claimed in the plaint, the plaintiff is claiming for payment of interest at 21% on the decretal amount from due date to date of completion of the suit and thereafter at the court's rate of 12% up to

the payment in full. I am alive on the case in **Eastern radio services V. R.J Patel (1962) E.A 818 and Y.F Gulam Hussein V. French Somaliland Shipping Co. Ltd. (1959) E.A 25,** both of which establish the principle that where a successful party was deprived of the use of the goods or money by reason of wrongful act on the part of the defendant, the party who has been deprived of the use of the goods or money to which he is entitled should be compensated for such deprivation by the award of interest.

The plaintiff is also asking for payment of general damages by the defendant. The general principle as to damages is that such damages need not be specifically pleaded, and may be asked for by mere a statement or prayer of claim. This was established in the case of **The Coopers Motors Corporation Ltd. V. Moshi/Arusha Occupational Health Services (1990) TLR 96 (CA).** The plaintiff in this case is praying for general damages for breach of contract. They pray the court to look into the inconveniences caused to the plaintiff as a result of the defendant's default. Much as I sympathies with the plaintiff, they have failed to prove to the court the quantum of the inconvenience caused by the defendant. What they have managed to do is just lamentations as such, this court finds it difficult to assess the suffering caused by the defendant to thby the non payment of the outstanding amount, this court is unable to assess and exercise its discretion to award general damages, would be doing so from a vaccum.

The plaintiff prayer for costs of the suit is qite in order since as a general rule of practice costs should follow the event where the plaintiff succeeds in the main suit. **(see Dembenictis & Others V. Central Africa Co. Ltd & Another (1967) E.A 310.**

On the evidence adduced in and the evidence tendered in court during the hearing of this suit, this Court finds that the plaintiff has managed to prove its case against the defendant.

In the upshot, judgment and decree is hereby entered against the defendant as follows:

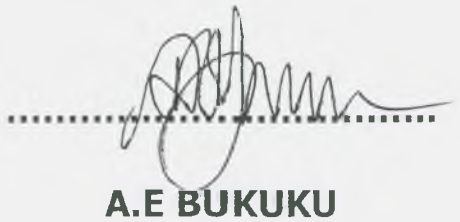
(i) The defendant shall pay the plaintiff the sum claimed that is US$93,396.00 or its equivalent in Tanzania Shillings, being the outstanding amount due in respect of the contract for hire of the equipment.

(ii) The defendant shall pay interest at the rate of 21% on the decretal sum from the date the payment was due to completion of the suit and thereafter, at the court's rate of 7% up to payment in full.

(iii) This court makes no orders as to general damages and thus, the 30% interest thereon as prayed by the plaintiff do also go in vain.

(iv) The defendant shall pay the costs of the suit.

It is accordingly ordered.

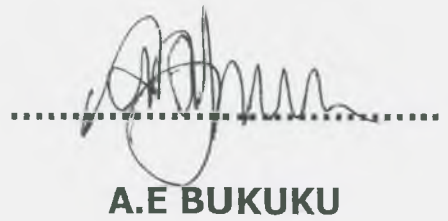


A.E BUKUKU

JUDGE

24 NOVEMBER, 2011.

Judgment delivered in Chamber this 24th November, 2011, in the presence of Mr. Msafiri, Learned Advocate, holding brief of Mr. Kamugisha, Learned Advocate for the plaintiff and Mr. Ukongwa, Learned Advocate for the defendant



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JUDGE

24 NOVEMBER, 2011.

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