**IN THE HIGH COURT OF TANZANIA**
**COMMERCIAL DIVISION**
**AT DAR ES SALAAM**

**COMMERCIAL CASE NO.6 OF 2008**

**USANGU LOGISTICS (T) LTD.......................................PLAINTIFF**

**VERSUS**

**SODETRA SPRL LIMITED......................................1ST DEFENDANT**

**BENSON MWALUSAMBA......................................2ND DEFENDANT**

Date of Hearing: 4th March 2010, 2nd July, 2010, 8th & 21st September, 2010, and 1st August 2011
Date of closing submissions: 20/09/2011
Date of Judgment: 06/03/2012

## JUDGMENT

**MAKARAMBA, J.:**

This judgment arises from a lawsuit the Plaintiff lodged in this Court on the 22nd day of January, 2011. The claim of the Plaintiff is against the Defendants jointly and severally for the following reliefs:-

(a) *For a declaration that the arrangements and negations made between the Defendants were unlawful;*

(b) *The Defendants to pay the Plaintiff the sum of Tshs. 500,000,000/= (Five Hundred Million Shillings Only) being general damages sustained;*

(c) *The Defendants to pay the Plaintiff the sum of Tshs. 1000,000/= (One Million Shillings Only) per day as mesne*

*profits from the 13th day of March, 2007 to the date of release of the truck in question;*

(d) *An interest of 28% at (b) and (c) from the date of towering the said truck, the 13th day of March 2007 to the date of judgment;*

(e) *Decretal interest at the rate of 10% from the date of the decree until satisfaction in full;*

(f) *Costs of this suit be borne by the Defendants;*

(g) *Any other relief (s) this Court may deem fit and/or equitable to grant.*

In this suit, both defendants were duly served. However, only the 1st Defendant filed his defence vehemently denying all the claims set out by the Plaintiff in the Plaint. The 2nd defendant neither filed any defence to the plaintiff's suit nor against the 1st Defendant's counter claim. In its defence, the 1st Defendant incorporated a counter-claim against the Plaintiff, seeking judgment and decree for the following reliefs:-

(a) *Payment of USD 62,392.13;*

(b) *General damages to be assessed by the Court;*

(c) *Payment of the Commercial Bank interest on the sums in (a) and (b) above at the rate 30% per annum from 23rd March, 2007 to the date of judgment;*

(d) *Payment of Court's interest at the rate of 12% per annum from the date of judgment till payment in full;*

(e) *Costs of this Counter claim; and*

(f) *Any other relief as the Honourable Court deem fit to grant be so granted.*

The Plaintiff in this suit is represented by Mr. Masaka, learned Counsel. The 1st Defendant is represented by Mr. Buberwa, Learned Counsel. The 2nd Defendant did not enter appearance. At the close of the trial, learned Counsel for the Plaintiff and the 1st Defendant sought leave to file their closing submissions, which this Court granted. Initially however, only Mr. Buberwa, learned Counsel for the 1st Defendant filed his closing submissions within the prescribed time. Later, Mr. Masaka learned Counsel for the Plaintiff, sought leave for extension of time to file his closing submissions, which this Court accordingly granted.

The legal and practical significance of this case is best understood against a complete recitation of the underlying facts. In February 2007, the 2nd Defendant in his capacity as the Plaintiff's driver was duly authorized to transport certain cargoes belonging to the Plaintiff's client from Dar es Salaam to Burundi. The permission was restricted to transporting the concerned cargoes for which the Plaintiff had contracted thereof. In March 2007, while on his return trip from Burundi to Dar es Salaam, the Plaintiff's driver met, negotiated and made arrangements with the 1st Defendant's officials to transport the 1st Defendant's cargoes and/or consignments from Bujumbura to Dar es Salaam. The cargo comprised of a total of 400 bags of Burundi coffee and was loaded into the Plaintiff's truck with registration

number **T893 AFD/T948 ALW** at Burundi, allegedly without any permission and/or any arrangements with the Plaintiff herein. The Plaintiff claims that it had demanded from the Defendant(s) to remedy the breach but the Defendant(s). Cunningly the Plaintiff claims, the Defendants kept quiet as they did not want to heed to the demands. The Plaintiff had no option but to come to this Court and hence the instant lawsuit.

As per law and practice in civil litigation derived from Order XIV Rule 5 of the Civil Procedure Code Cap.33 R.E. 2002, at the first hearing of the suit, the following issues were framed and recorded by this Court for the determination, namely:-

1. *Whether the Plaintiff's driver (the second Defendant hereof) had authority of transporting the first Defendant's consignment/goods from Bujumbura to Dar es Salaam.*

2. *Whether there was any agreement/contract between the Plaintiff and the 1st Defendant to transport the later consignment from Bujumbura to Dar es Salaam.*

3. *Whether the Plaintiff's truck in question loaded with the 1st Defendant's consignment was towered by TANROADS.*

4. *Whether the Plaintiff had knowledge of the consignment loaded in its truck by the Second Defendant from the beginning from Bujumbura to Dar es Salaam.*

5. *Whether expressly or impliedly the Plaintiff's motor vehicle T 893 AFD with truck No. T 948 ALW had authority of transporting the first Defendant's goods from Bujumbura to Dar es Salaam.*

6. *What was the reason behind for withholding the Plaintiff motor vehicle T.893 AFD with truck No.948 ALW at Kahama by TANROADS.*

7. *Whether the 1st Defendant rightly claims the sum of USD 62,392.13 from the Plaintiff.*

8. *What relief(s) are the parties entitled to.*

In establishing its case, the Plaintiff brought only one witness, **Mr. IBRAHIM MOHAMED ISMAIL**, the Managing Director of the Plaintiff's company, USANGU LOGISTICS CO. LTD. who testified as **PW1**. The 1st Defendant on its part brought three witnesses, **Mr. FELIX NITERETSE** representing the 1st Defendant's Company, SODETRA SPL LTD. who testified as **DW1; Mr. NITESH PATEL,** the Executive Director of UNITED YOUTH SHIPPING CO. LTD. who testified as **DW2; and Mr. JERRYSON RWIZA** from TANROADS who testified as **DW3.** The 2nd Defendant, Mr. **BENSON MWALUSAMBA,** a former driver of the Plaintiff's Company, did not enter appearance at all.

In analyzing the evidence on record I propose to deal first with the 2nd, 1st, 4th, and 5th issues jointly in that order. I shall then address the 3rd and 6th issues jointly and finally, the 7th and 8th issues separately. I therefore join hands with Mr. Buberwa, learned Counsel for the 1st Defendant in his closing submissions, that the 1st, 2nd, 4th and 5th issues essentially concern the same matter and therefore are worth joint canvassing. I am also in agreement Mr. Masaka learned Counsel for the Plaintiff in the main suit in his closing submissions that issues No. 3 and 6

should be canvassed jointly, as they form the basis of the 1st Defendant's counter-claim thereof.

I gather from the testimonies of **DW1** and **DW2** that SODETRA SPRL LTD, the 1st Defendant in the main suit, deals with clearing and forwarding business in Tanzania and that the 1st Defendant also consigns the cleared cargoes to the neighbouring countries of Rwanda and the Democratic Republic of Congo (DRC) among others. It is the testimony of DW1 that in March 2007, the 1st Defendant entered into **an agreement** with **USANGU LOGISTICS CO. LTD.,** the Plaintiff herein, of transporting coffee from Bujumbura to Dar es Salaam. DW2's further testimony is that it is UNITED YOUTH SHIPPING COMPANY CO. LTD., not a party to the instant suit, which had entered into contract with SODETRA SPRL Ltd. to transport coffee from Bujumbura to Dar es Salaam. SODETRA SPRL Ltd. in turn subcontracted to USANGU LOGISTICS CO. LTD, the Plaintiff herein. DW2 testified further that the agreement of 2007, assigned to SODETRA SPRL LTD. to bring 800 bags of coffee from Bujumbura to Dar es Salaam, out of which SODETRA SPRL Ltd. managed to deliver only 400 bags of coffee. It was DW1's testimony that the coffee cargo was solicited/searched for by the Plaintiff's driver. In his testimony PW1 maintained very strongly that the coffee cargo was loaded into the Plaintiff's trucks without the knowledge of the Plaintiff's Company or consent as required and that the Plaintiff's driver, Mr. Mwalusamba, the 2nd Defendant herein, in accepting and loading the coffee cargo into the Plaintiff's trucks did not follow the Company's procedures. During cross examination however, PW1 conceded that it was a general term of agreement between a driver and the Plaintiff's

Company as evinced under Clause 6 of the "***Mkataba wa Safari***', ***Exhibit P1***, that if a driver has solicited/searched for cargo he is entitled to a bonus of 10% of the total charges of the cargo loaded. I have had a look at the "***Mkataba wa Safari***', ***Exhibit P1.*** On its reverse side titled "***SHARTI YA KAZI KWA DEREVA***" Clause 6 thereof stipulates as follows:

> *"Bonus ya 10% ya thamani ya mzigo wote itatolewa kwa mzigo utakaotafutwa na dereva"*

Clause 14 thereof stipulates as follows:

> *"Dereva haruhusiwi kupakia mzigo wowote nje ya ridhaa ya ofisi."*

And Clause 16 thereof states as follows:

> *"Dereva atatoa taarifa mara kwa mara kupitia Simu na Radio ili Ofisi iweze kurekodi na kupangia kazi bila kuchelewesha gari kwa sababu yeyote."*

Literary, Clause 14 of the "***Mkataba wa Safari***' Exhibit P1 prohibits a driver from loading any cargo without the ***consent*** of the Company, and Clause 16 thereof imposes an obligation on the driver of communicating from time to time with the Company to enable it record and plan for work without delaying a vehicle. The issues which arise are in this regard are *whether the Plaintiff's driver searched for the said cargo or at all,* and

*whether there was any communication of any sort between the driver and his employer Company concerning such cargo.*

On the face of the "***Mkataba wa Safari***", **Exhibit P1** it is shown that the trip started on **24/11/2007**, which is also indicated therein as the date of the "contract" (*tarehe ya mkataba*). The Vehicle with Registration Number is shown on ***Exhibit P1*** as **T893 AFD** with its trailer Number **T946 ALW,** and the name of the driver shown therein is that of BENJAMINI MWALUSAMBA, the second defendant herein. The name of the turnboy is also shown therein. In my view, the "***Mkataba wa Safari***", ***Exhibit 1*** was only an agreement between the Plaintiff's Company, USANGU LOGISTICS (T) LTD and its driver, BENJAMIN MWALUSAMBA, the 2nd Defendant herein, and the turnboy named therein for handing over to them the Plaintiff's motor vehicle described therein as **T893 AFD** with its trailer number **T946 ALW**. In the "***Mkataba wa Safari", Exhibit P1***, the type of cargo which was to be loaded into the vehicle with Registration Number **T893 AFD** with its trailer Number **T946 ALW** named therein is not described. This makes it plausible the contents of Clause 6 of the "***Mkataba wa Safari***", which in my view, apart from making it possible for a driver who searches or solicits for a cargo to be entitled to a 10% bonus of the total value of the solicited/searched for cargo, does not impose any contractual obligation on the part of the driver and/or or the owner of the cargo so solicited or searched for. In my view, the "***Mkataba wa Safari***", ***Exhibit P1***, merely turns the driver, who is an employee of the Plaintiff's Company in the event he solicits and or searches for cargo and loads it unto the Plaintiff's truck, into an agent of the Plaintiff's

Company. In my view, much as per Clause 6 of the "***Mkataba wa Safari" Exhibit P1,*** the driver had full authority to search for cargo and load it on the Plaintiff's truck, the Plaintiff did not bother to bring the driver to testify at the trial as to whether indeed the driver solicited for and loaded the said coffee cargo on the said truck of the Plaintiff on its return trip from Bujumbura to Dar es Salaam, and whether the driver informed the Plaintiff's Company about such cargo.

In my view however, much as the "***Mkataba wa Safari***' **Exhibit P1** could perfectly qualify as a contract of employment between the Plaintiff's Company and the driver and the turn boy for a specified trip with a specified vehicle, it does not pass as a contract between the driver and the consignee of the coffee cargo so solicited or searched. In order for this to have happened, there had to be some other documents such as a ***Consignment Note*** showing the kind of cargo and the description of the vehicle loaded with such cargo on its return trip from Bujumbura to Dar es Salaam. There is no evidence of such thing in this case. PW1's testimony is that the Defendants' cargo was loaded into the Plaintiff's truck without authority or Company consent because the driver did not follow the procedure in that, he must sign an agreement and **Consignment Note** before starting to load the cargo into the Plaintiff's truck. In his closing submissions Mr. Buberwa submitted that nothing was concluded or signed for the trip from Bujumbura to Dar es Salaam. The driver ought to confirm by way of phone, fax or email to the offices of USANGU LOGISTICS CO. LTD. before loading the cargo in the truck and payment for the cargo loaded on the truck in the return trip and must be made directly to the

Plaintiff's office. DW1's testimony is that the cargo was solicited for by the Plaintiff's driver and that there is ***an agreement*** between the 1st Defendant and the Plaintiff's Company to transport coffee from Bujumbura to Dar es Salaam and for this DW1 gave the driver an advance of **USD 300** as transportation costs. DW1's further testimony is that Mr. IBRAHIM ISMAIL, the Managing Director of the Plaintiff's Company, USANGU LOGISTICS CO. LTD., communicated with DW2 through phone and told DW2 that the Plaintiff's driver had informed the Plaintiff about the cargo. DW2 having confirmed, started to load the cargo in the Plaintiff's truck No.T893 AFD. In his closing submissions Mr. Buberwa argued that the Plaintiff cannot therefore turn around now and claim that he was not aware of the cargo loaded in his truck on its return trip from Bujumbura to Dar es Salaam, which cargo was solicited/searched for by his driver.

The signatures of the driver and the turn boy which appear on the "***Mkataba wa Safari***", ***Exhibit P1*** have not been disputed. As I intimated to earlier, the Plaintiff however, did not produce the driver or the turnboy to testify at the trial. In his closing submissions, Mr. Buberwa, learned Counsel for the 1st Defendant invited this Court, to draw an adverse inference on the basis of the decision in **HEMEDI SAIDI v MOHAMEDI MBILU [1984] T.L.R. 113 (HC),** that "if the *if the driver and/or the turnboy were called to testify for the Plaintiff they would have given evidence contrary to the Plaintiff's interest.*" However, before this Court embarks on such course of action, it is trite to examine the circumstances obtaining at the time of the alleged transaction. In this regard this Court

asks itself whether the coffee cargo was loaded into the Plaintiff's truck with the authority and knowledge of the Plaintiff.

DW1 tendered in this Court a ***Consignment Note***, ***Exhibit D1.*** The ***Consignment Note, Exhibit D1*** originates from USANGU LOGISTICS (T) LTD, the Plaintiff herein. It is dated 16/03/2007. The name of the driver which appears on the Consignment Note is that of **ALLY SALIMIN,** and the truck named therein bears registration **No.T243 ALW** and its trailer with registration **No.T703 ALT.** The cargo the subject of the ***Consignment Note, Exhibit D1*** is described as "400 ***sacs de café Arabica***", literary 400 bags of Arabica coffee, which was to be ferried from Bujumbura to Dar es Salaam. The ***Consignment Note, Exhibit D1*** also bears the name and signature of the receiver of the coffee cargo on behalf of the consignee to be UNITED YOUTH SHIPPING CO. LTD, which certified receipt of the goods described therein "*in good order and condition.*" The said ***Consignment Note, Exhibit D1***, bears the rubber stamp of the consignee and the date of its being signed on behalf of the consignee is indicated as **18/03/2007**. With due respect to Mr. Masaka I am not at one with his submission that the ***Consignment Note***, ***Exhibit D1*** has nothing to do with the instant case. The ***Consignment Note, Exhibit D1*** in my view confirms the testimony of DW1 that only 400 bags of coffee out of the 800 bags reached Dar es Salaam. Furthermore, the Consignment Note, Exhibit D1 confirms the fact that the rest of the 400 bags of coffee which were loaded into the vehicle at the centre of the dispute in the present suit which bear registration **No.T 893 AFD** with its trailer no. **T948 ALW** and which was being driven by Mr. Mwalusamba did not reach

Dar es Salaam as there would have been a signed Consignment Note confirming that fact as was the case for ***Consignment Note, Exhibit D1*** relating to the cargo of 400 bags of coffee which was loaded into the vehicle with registration No. **T243 ALW** and its trailer with registration **No. T703 ALT,** which reached Dar es Salaam and receipt was accordingly acknowledged by the Consignee, UNITED YOUTH SHIPPING CO. LTD. The Consignment Note Exhibit D1 renders credence to the fact that the motor vehicle with registration ***No.T.893 ALW*** with its trailer ***No.T948 ALW*** which was loaded with the remaining 400 bags of coffee cargo was actually towered by TANROAD, which towering this Court declared in Commercial ***Case No.58 of 2007*** to have been unlawful, a fact which neither the Plaintiff nor his Counsel seriously contest. In the present suit, one of the issues framed for determination is ***whether the plaintiff's truck in question was loaded with the first defendant's consignment was towered by TANROAD***. This issue is also interrelated with the other issue framed in this suit, which is ***what was the reason behind TANROADS withholding of the Plaintiff motor vehicle with registration No.T.893 ALW with its trailer No.948 ALW at Kahama TANROADS?*** I shall revert to this in due course.

In his closing submissions Mr. Buberwa submitted that, 400 bags of coffee were loaded in the motor vehicle **T 893 AFD** with trailer **T 948 ALW** in order to be transported from Bujumbura to Dar es Salaam on 9th March, 2007, which consignment has never been delivered to the 1st Defendant. PW1's testimony under cross examination is that there is another case which has been instituted in this Court as **Commercial Case**

**No.58 of 2007** between **USANGU LOGISTICS CO. LTD.**, the Plaintiff herein, **TANROADS, MINISTRY OF INFRASTRUCTURE DEVELOPMENT and ATTORNEY GENERAL**, involving trucks with registration numbers **T 893 AFD; T 948 ALW; T 151 AEM; and T 716 AHR** respectively. PW1's further testimony is that the truck **No.T 893 AFD** with its trailer **No.T 948 ALW** which was apprehended while in the process of pulling another truck with registration No. **No.T151 AEM/T 716 AHR**, which had been stuck in the mud, is also involved in the present suit. These facts confirm that indeed the trip by the truck with registration No. T893 AFD with its trailer No. T948 ALW ended at the Mwendakulima weighbridge.

DW1's testimony is that DW1 entered into agreement with USANGU LOGISTICS CO. LTD. of transporting coffee from Bujumbura to Dar es Salaam in March, 2007. DW1's further testimony is that the coffee cargo was loaded into two vehicles, **No.T 243 ACW** with trailer **No.T 703 ALT**, and **No.T 893 AFD** with trailer **No.T948 ALW,** each loaded with 400 bags of coffee. DW1's further testimony is that only one vehicle, that with registration **No.T 243 ACW** and its trailer with **No.T 703 ALT** successfully brought the cargo to the 1st Defendant's godown in Dar es Salaam, but the second truck with registration **No.T 893 AFD** with its trailer **No.T948 ALW** did not deliver its cargo. DW1 tendered the claim for non-delivery of the 400 Burundi coffee bags dated 27/12/2007, and the profoma invoice, **Exhibit D5** collectively. DW1's further testimony is that he (DW1) was then told by Mr. IBRAHIM ISMAIL, the Managing Director of USANGU LOGISTICS CO. (T) LTD., that a truck with the coffee cargo had been

impounded by TANROADS. DW1 tendered in this Court other letters the Plaintiff wrote to TANROADS and the Permanent Secretary of the Ministry of Infrastructure dated 3rd May 2007 and 24th July 2007 respectively, concerning the impoundment of truck **No.T 893 AFD, Exhibit D3** collectively. The fact of the impoundment by TANROADS of the Plaintiff's truck **No. T 893 AFD** and its trailer **No.T 948 ALW** is also confirmed by PW1's testimony during cross examination, that the said vehicle was involved in another case the Plaintiff instituted in this Court in **Commercial Case No.58 of 2007** against **TANROADS, MINISTRY OF INFRASTRUCTURE DEVELOPMENT and ATTORNEY GENERAL**, where also another of the Plaintiff's truck with Nos. T 151 AEM and its trailer T 716 AHR, was involved, which fact is also confirmed by PW1's testimony.

DW1's further testimony is that after loading the cargo into the Plaintiff's trucks, DW1 paid the Plaintiff's driver an advance of **USD 300** to cover for transportation costs and to clear weigh bridge charges. DW1's further testimony is that Mr. IBRAHIM ISMAIL (PW1), the Managing Director of USANGU LOGISTICS CO. (T) LTD confirmed to DW1 through phone that his (Mr. Ibrahim's) driver had informed him (Mr. Ibrahim) about such cargo. It is interesting to note that despite Mr. Mwalasumba being a party to this suit, not only that he did not appear to defend himself in this suit but the Plaintiff did not even bother to produce that driver who is a material witness to testify on the fact of searching/soliciting the cargo, the fact of receiving payment of USD 300 for transportation costs, and the fact of informing Mr. Ibrahim about the cargo.

Let me state here that the truck with registration **No. T.893 AFD** with its trailer **No.948 ALW** was impounded by TANROADS for the reasons that it was trying to escape from the weigh bridge at Mwendakulima weighbridge while on the way from Bujumbura to Dar es Salaam. PW1's testimony is that the said truck was apprehended while towering another truck with registration **No.T151 AEM/T 716 AHR** belonging to the Plaintiff's Company by pulling it from the mud in which it was stuck. This issue as Mr. Buberwa rightly submitted in his closing submissions has nothing to do with the 1st Defendant. On the evidence on record, PW1 does not contest the fact that the vehicle with registration **No.T893 ALW** and its trailer **No.948 ALW**, whose towing by TANROADS was declared by this Court in **Commercial Case No.58 of 2007** to have been unlawful was loaded with the remaining consignment of the 400 bags of coffee of the 1st Defendant who is now claiming to be compensated for its loss by the Plaintiff. PW1 only contest that the cargo was loaded into his truck without the Plaintiff's Company authority or consent, a fact which Mr. Masaka also seems to agree with. Mr. Masaka suggested that if this Court determined the impoundment to have been unlawful, then the Plaintiff hereof is not liable to pay the damages (if any) the 1st Defendant claims to have sustained as demanded by the 1st defendant in these proceedings by way of a counter claim. Mr. Masaka went further in his submissions even to suggest that if there are any damages, the 1st defendant sustained as he claims, then the liability falls somewhere else but not on the Plaintiff at all, and therefore if the defendant was mindful enough he ought to have counterclaimed for such damages against TANROADS to recover them

rather than claiming them against the Plaintiff who never occasioned such damages. With due respect to Mr. Masaka, this argument is too simplistic. It does not take into account the transaction which the 1st Defendant claims to have undertaken between the Plaintiff's driver and the 1st Defendant's company and the fact that PW1 himself does not contest the fact of the coffee cargo being loaded into his trucks but question the authority and consent behind such loading, which facts also flies in the face of the evidence on record. The fact is that the 400 bags of coffee were loaded in the motor vehicle **T 893 AFD** with trailer **T 948 ALW** in order to be transported from Bujumbura to Dar es Salaam on 9thMrach, 2007, which consignment was never delivered to the 1st Defendant. As I intimated to earlier, neither the Plaintiff's former driver (Mr. Mwalusamba), the 2nd Defendant herein, nor the turn boy of the said truck **No.T 893 AFD** with trailer **T 948 ALW** were called by the Plaintiff to testify in this Court on the matter.

I wish to point out here that much as the Plaintiff who had employed the 2nd Defendant had a duty to ensure that the 2nd Defendant is honest and faithful, any misconduct on the part of the 2nd defendant in performing his duties has nothing to do with the 1st Defendant. The Plaintiff having failed to prove before this Court that the 1st Defendant conspired with the driver to load the said coffee cargo in the Plaintiff's truck, the 1st Defendant cannot be blamed under such arrangement. Curiously though, while Mr. Masaka was also one of the Counsel in Commercial Case No.58 of 2007, he has questioned the logic of DW1 tendering in this Court only a copy of the Plaint, Exhibit D4, in **Commercial Case No. 58 of 2007**, but not a copy

of the judgment in that case. It is equally perplexing that the Plaintiff despite being the one who brought the suit culminating into the decision in Commercial Case No. 58 of 2007, did not bother to bring a copy of the judgment to this Court either. Instead the learned Counsel for the Plaintiff elected to serve the Defendant with a "Notice to Produce" that decision. In his closing submissions Mr. Masaka learned Counsel for the Plaintiff singled out the learned Counsel for the 1st Defendant for blame apparently due to his failure to honour the Notice to Produce. Nevertheless, Mr. Masaka proceeded in his closing submissions to cite one issue in that case, for obvious reasons, since this Court decided in favour of the Plaintiff on that issue, that the impoundment of the Plaintiff's truck with registration no. **No. T 893 AFD** and its trailer **No.T 948 ALW** was unlawful. It is this particular finding of fact that Mr. Masaka has elected to throw all his weight around contending that this Court having held in **Commercial Case No. 58 of 2007** that the seizure by TANROADS of the Plaintiff's truck with nos. **No. T 893 AFD** and its trailer **No.T 948 ALW** was unlawful, then the Plaintiff should be absolved from any liability for the loss and damage in the coffee cargo and also that the 1st Defendant should have pursued TANROADS for damages and not the Plaintiff.

Let me state here that the decision of this Court in **Commercial Case No.58 of 2007** against **TANROADS, MINISTRY OF INFRASTRUCTURE DEVELOPMENT and ATTORNEY GENERAL** was a matter which under the Law of Evidence Act come within the ambit of category of evidence whose existence should be taken judicial notice of by courts, and therefore does not need to be proved as a fact. This therefore

settles the squabble as to whether the 1st Defendant should have produced a copy of the judgment in this Court to prove what it was alleging instead of relying only on the Plaint.

DW3 testified as to the fact of the release of the Plaintiff's truck from Mwendakulima weighbridge. DW2 also testified as to this fact. In my view the issue as to whether the Plaintiff's truck with registration **No. T 893 AFD** and its trailer **No.T 948 ALW** was apprehended by TANROADS, and the reason for its seizure and the fact of its being released should not detain us longer than is necessary. In any event these issues have already been adjudged upon by this Court in **Commercial Case No.58 of 2007** against **TANROADS, MINISTRY OF INFRASTRUCTURE DEVELOPMENT and ATTORNEY GENERAL. In that case this Court made** an order for the release of the said vehicle to the Plaintiff having determined that the seizure of that vehicle was unlawful. That said therefore, the third issue ***whether the Plaintiff's truck in question loaded with the 1st Defendant's consignment was towered by TANROADS*** is considered as settled. Similarly the sixth issue as ***to what was the reason behind for withholding the Plaintiff motor vehicle No.T.893 AFD with truck No.948 ALW at Kahama by TANROADS*** has also been settled. I wish to add here that as correctly stated by Mr. Buberwa in his closing submissions that issue apart from being irrelevant for determination of the present suit, it has already been settled by this Court in **Commercial Case No.58 of 2007** against **TANROADS, MINISTRY OF INFRASTRUCTURE DEVELOPMENT and ATTORNEY GENERAL**.

PW1's further testimony is that the coffee which was loaded in the truck **No. T 893 AFD** and its trailer **No.T 948 ALW** which was seized by TANROADS had already been destroyed and that the seized truck is still at the Mwendakulima weighing station. DW2's testimony is that due to seizure of the truck, he (DW2) requested the cargo to be brought to Dar es Salaam by an alternative way. Thereafter he (DW2) was told by the Plaintiff that there was a case in this Court concerning the seized truck. PW1's testimony is that as a result of the seizure by TANROADS of the Plaintiff's truck, the Plaintiff's company has suffered loss because the seized truck failed to perform other profitable works. For this, PW1 is seeking payment of **TZS 1,000,000/=** per day from the date on which the vehicle was seized by TANROADS. It is rather surprising for the Plaintiff to claim for this payment from TANROADS which is not a party in the present suit. In my view, the Plaintiff is trying to bark the wrong tree. PW1 maintained that the Plaintiff is not liable to pay for the destroyed or damaged coffee that was loaded in the seized vehicle belonging to the Plaintiff's Company. I shall revert to the issue of liability of the Plaintiff's Company in due course.

DW1's further testimony is that since March, 2007, the coffee cargo which is worth **USD 62,000** has not been delivered to the 1st Defendant. As per DW1's testimony, the 1st Defendant is not the owner of the cargo; but was merely an agent for **UNITED YOUTH SHIPPING CO. LTD**. As per DW1's testimony, **UNITED YOUTH SHIPPING CO. LTD** is now claiming from the 1st Defendant for the balance of **USD 38,119.07** resulting from the non-delivery of the said cargo by the Plaintiff and

tendered a letter dated 15th day of January 2008 for the claim for non-delivery of the 400 Burundi Coffee bags attached with invoices, **Exhibit D6** collectively. The Plaintiff did not dispute this fact but stated that the blame should not be thrown at the Plaintiff's Company but on TANROADS who seized the truck carrying the cargo thus leading to its loss and damage. Mr. Masaka maintained very strongly in his closing submissions that the Plaintiff, USANGU LOGISTICS CO LTD claims that TANROADS, not a party in the instant suit, is the one which should be held responsible to pay damages to the 1st Defendant for the alleged lost and/or destroyed coffee cargo for the reason that it was held by this Court in **Commercial Case No.58 of 2007** that TANROADS unlawfully apprehended and detained the Plaintiff's truck. While the Plaintiff's Company however, trying to distance itself from the coffee cargo alleged to have been solicited and/or searched for by the Plaintiff's Company driver, it has thrown the buck at TANROADS claiming that it is the one which is to be held responsible for the damaged coffee as a result of seizing and detaining the Plaintiff's vehicle.

In my view, much as the 1st Defendant did not tender at the trial any written agreement evidencing the transport arrangement between the carrier, USANGU LOGISTICS LTD and the vendor, SODETRA SPRL Ltd, the acts of the Plaintiff and the 1st Defendant point more to the existence of a contractual relationship of carriage of goods for the period of the year 2005 until about the year 2007 when things went wrong following loss and non delivery of 400 bags of coffee of the 1st Defendant by the carrier, the Plaintiff's Company, to the vendor, the Plaintiff's Company. In a contract of

carriage of goods, from the time the coffee cargo is loaded on to the carrier's vehicle, up to the time when the cargo is discharged from the carrier's vehicle, it is considered to be within the contractual period in the contract of carriage of goods by road and the carrier has a duty to ensure that the cargo is delivered safely and in good state to the vendor. The facts in this case and the conduct of the parties in my view have established on a balance of probabilities the existence of a contract of carriage of goods by road between the carrier, USANGU LOGISTICS LTD, and the vendor SODETRA SPRL LTD. The Plaintiff's Company cannot therefore deny liability for such undertaking under the contract of carriage of goods by road on the pretext that there was no written agreement for such transaction. The Plaintiff did not dispute the fact of the agreement whereof the Plaintiff's company was to consign 800 bags of coffee from Bujumbura to Dar es Salaam. The Plaintiff does say either if the 400 bags of coffee reached the vendor but simply contend that the coffee cargo which has been destroyed as a result of seizure by TANROADS of the Plaintiff's vehicle with registration **No. T.893 AFD** with its trailer **No.948 ALW** was loaded into his trucks without authority and consent of the Plaintiff's Company. The Plaintiff and its Counsel Mr. Masaka have been kind enough to this Court to point to the existence of **Commercial Case No.58 of 2007** where this Court held that TANROADS unlawfully apprehended and detained the Plaintiff's truck with registration **No. T.893 AFD** with its trailer **No.948 ALW**. This case in my view assists the 1st Defendant's case more than the Plaintiff's case, and confirms further the fact of the breach of the contract of carriage of goods by the carrier, the Plaintiff's Company, and that the

cargo which was loaded into the Plaintiff's vehicle did not reach Dar es Salaam, its intended port of destination as per the contract. In his testimony PW1 even insisted on the fact of the said vehicle still being held at Mwendakulima until it was released following the order of this Court in Commercial Case No.58 of 2007.

On the evidence on record, this Court finds that the failure by the common carrier (Plaintiff's Company) to deliver the cargo of coffee to the 1st Defendant's godown in Dar es Salaam as agreed constituted a "*fundamental breach*" of the contract of carriage. This takes me now to a consideration of the seventh issue ***whether the 1st Defendant rightly claims the sum of USD 62,392.13 from the Plaintiff*** and the eighth issue *as to* ***what relief(s) are the parties entitled.*** Before I delve into determining these two issues let me albeit very briefly take an excursion on the law in Tanzania on the liability of a common carrier.

The law regarding the liability of a common carrier in Tanzania is not regulated by statute. There is no any specific statute in Tanzania providing for the rights and duties of parties to a contract of carriage of goods by road or limiting the liability of common carriers as is the case with carriers of goods by sea, which is governed by the ***Carriage of Goods by Sea Act,*** Cap.164 R.E. 2002 (in force since 1st of April 1927), and carriage of goods by inland waters, which is governed by the ***Inland waters Transport Act***. In my considered opinion, it is high time now for the concerned and relevant authorities in Tanzania to take immediate and necessary remedial action of ensuring that a statute regulating the carriage by road is in place. This is particularly critical considering the growing

number of incidences in this country of loss of property and life on our roads almost on a daily basis largely resulting from acts of gross negligence on the part of common carriers. Such law when in place would help to put a check on such situation by setting the minimum standard of care required of common carriers and their limit of liability in event of any loss of or damage to goods and life resulting from lack of exercise of due care and skills by such carriers.

Let me also point out here that the law on carriage by road in vogue in Tanzania is still largely based on common law principles, which traces its origins in Roman law and the law of bailment. The common law imposes a strict liability on a common carrier. In carrying passengers or delivering goods a common carrier exercises a public employment. In Lord Colt words in ***Coggs vs. Bernard*** (1702) 2 Ld. Raym 900, 918:

> *"...and he is to have a reward, he is bound to answer to the goods at all events.....The law charges this person thus entrusted to carry goods against all events but acts of God, and of the enemies of the King."*

The above quotation is drawn from an article titled "*The Liability of the Common Carrier as Determined by Recent Decisions of the United States Supreme Court*" by Edwin C. Goddard appearing in the ***Columbia Law Review*** Vol. 15, No. 5, May, 1915 at page 399 of 399-416 which can be downloaded at http://www.jstor.org/stable/1110303. Inspiration in this area of the law can also be drawn from the ***Convention on the Contract for the International Carriage of Goods by Road (CMR) (Geneva,***

***19 May 1956), United Nations (UN)*** which as per Article 1 it applies to every contract for the carriage of goods by road in vehicles for reward, when the place of taking over of the goods and the place designated for delivery, as specified in the contract, are situated in two different countries, of which at least one is a contracting country, irrespective of the place of residence and the nationality of the parties. Although the Convention is applicable in inter-country situation, which could be very relevant in our case, it also codifies most of the common law principles on common carrier liability. The Convention introduces the standard of "***utmost care and diligence***" for safe carriage exercise of "***reasonable degree of skill***." In the USA where most States provide for specific statutes on common carriers, a Court in ***Squaw Valley Ski Corp. v. Superior Court*** (1992) 2 Cal. App.4th 1499, citing with approval, ***Convey-All Corp. v. Pacific Intermountain Express Co.*** (1981) 120 Cal.App.3d 116, 120-121) had this to comment on the elevated standard of care for common carriers as follows:

> *"This elevated standard of care for common carriers has its origin in English common law. It is based on a recognition that the privilege of serving the public as a common carrier necessarily entails great responsibility, requiring common carriers to exercise a high duty of care towards their customers."*

The Plaintiff's Company as a common carrier therefore had a duty of care towards the vendor, the 1st Defendant's Company. This duty involved among other things of conveying the cargo safely to its intended port of destination and in event of what happened in this case where the Plaintiff's

vehicle was seized, to look for an alternative means of delivering the coffee cargo. The Plaintiff's Company did not search for such alternative means of transporting the coffee cargo. Instead he elected to sue the intended Consignee demanding compensation for failing to make good use of his vehicle as a result of its seizure by TANROADS, itself not a party in the instant suit. The argument by Mr. Masaka in his closing submissions that the 1st Defendant should have sued TANROADS to recover damages for the loss suffered in my view not only is highly untenable but equally flies in the face of the common law duty of care and strict liability placed on the Plaintiff's Company as a common carrier.

DW2's testimony is that actually the UNITED YOUTH SHIPPING COMPANY CO. LTD. is not the real owner of the cargo, but TEO UK LTD, which has already issued UNITED YOUTH SHIPPING COMPANY CO. LTD. with a Debit Note DN 264 of **USD 55,525.22** for the 400 bags of coffee dated 20/09/2007, **Exhibit D7**. DW2's further testimony is that UNITED YOUTH SHIPPING COMPANY CO. LTD has debited the 1st Defendant with **USD 62,092** but the 1st Defendant has never paid back such amount of money. DW2's further testimony is that the value of the coffee as per **Exhibit D6** was **USD 55,525.22,** while the amount claimed by the 1st Defendant in the counter-claim is **USD 62,092**, which includes other expenses. DW2's further testimony is that the 1st Defendant has paid some amount of money to UNITED YOUTH SHIPPING COMPANY LTD. It is now claiming from the 1st Defendant the balance to the tune of **USD 32,000**. In re-examination DW2 told this Court that, UNITED YOUTH SHIPPING COMPANY LTD. is not a party to this suit and agreed that the 1st Defendant

is not prevented from claiming **USD 62,392.13** from USANGU LOGISTICS CO. LTD. DW2's further testimony is that the actual value of the coffee is **USD 55,535.22**, and that this amount plus the expenses which were used to recover the coffee brings the total of the amount claimed by the 1st Defendant from the Plaintiff to **USD 62,392.13**. DW1's testimony is that the 1st Defendant was issued with a **Consignment Note** from USANGU LOGISTICS CO. (T) LTD. dated 18th day of March, 2007, which DW1 had signed on it, **Exhibit D1**.

Canvassing the 7th issue ***whether the 1st defendant rightly claims the sum of USD 62.392.13 against the plaintiff***, Mr. Masaka argued in his closing submissions that the claim of **USD 62.392.13** by the 1st Defendant against the Plaintiff in the counterclaim is highly fabricated. Mr. Masaka offered the following reasons. That there is no evidence to show that the coffee that was loaded in the Plaintiff's Motor Vehicle had a value of **USD 62.392.13** at all since none of the three witnesses the 1st Defendant called to testify, **DW1, Mr. FELIX NITERETSE**; **DW2, Mr. NITESH PATEL**; and **DW3, Mr. JERRYSON RWIZA** gave any evidence to show that the goods had such value. That the witnesses never said how much the value for a single bag of coffee was so as establish that the value of the 400 total bags of coffee was indeed **USD 62,392.13**. It was the further submission by Mr. Masaka that the 1st defendant wanted to rely on paragraph 8 of the Plaint in **Commercial Case No.58 of 2007** to tell this Court that the value of the coffee is about **TZS 98,000,000/=** (say ***ninety eight million shillings only***), which amount or value was dismissed by this Court in that case, the reason being that the claim of TZS

98m/= as special damages was not specifically proved by the plaintiff to be an actual value of the said coffee. The Plaintiff does not dispute the fact of loading into its Motor Vehicle with such quantity of coffee belonging to SODETRA SPRL COMPANY Ltd. What is being disputed by the Plaintiff is that the said 400 bags of coffee were loaded into its Motor Vehicle aforesaid without its knowledge and/or consent, and that the loaded consignment has no such value of **USD 62,392.13**, and further that there were no such piece of evidence adduced during the trial to established such value at all. The 1st defendant did not rightly claim the aforesaid sum as it was not proved by evidence that the actual value of the coffee was **USD 62,392.13** Mr. Masaka surmised and added that the witnesses only testified on the ownership of the coffee and the delay which occurred in the process of transporting the coffee in question.

In buttressing his point further Mr. Masaka sought refuge in the decision of the Full Bench of the Court of Appeal in **AUGUSTINE ZUBERI VERSUS ANICET MUGABE [1992] T.L.R. 137**, that "*special damages must be specifically pleaded and proved*", and pointed out that the word "*proved*" entails adduction of evidence by the party alleging that fact. In this case such special damages were specifically pleaded by the 1st defendant but not proved, Mr. Massaka reiterated. The 1st defendant ought to attach receipts to show that the goods loaded in such trucks of the plaintiff had such value of **USD 62,392.13** as special damages, but there is no such piece of evidence, and therefore the quantity of 400 bags by itself does not establish its actual value at all. There must be receipts tendered in evidence to substantiate its value, Mr. Masaka concluded.

**DW2, NITESH PATEL** did not even show that he had contractual documents to show that the coffee belongs to TEO LTD of UK or itself as the chief Executive Officer of UNITED YOUTH COMPANY LTD., Mr. Masaka insisted. Mr. Masaka submitted further that Mr. NITESH PATEL (DW2) relied on various correspondences and invoices tendered most of which do not refer to the Motor Vehicle in question because the wagons shown in part of **annexture "E"** do not include the Motor Vehicle in question at all, and therefore all the 1st defendant's witnesses DW1 and DW2 are not credible witnesses worth to be believed. There must be receipts either for purchasing the goods from Bujumbura to prove its actual value but there is nothing to prove its value, Mr. Masaka insisted.

The argument by Mr. Masaka in his closing submissions on the lack of evidence to establish the claim by the 1st Defendant to be **USD 62,392.13** as special damages is quite tempting. However, I do not, with due respect to Mr. Masaka, ascribe to his view that there had to be evidence to establish ownership of the coffee by the 1st Defendant. The evidence on record established that SODETRA SPRL LTD, the 1st Defendant herein was not the owner of the disputed coffee but was acting as agent for UNITED YOUTH SHIPPING COMPANY LTD. In any case since the relationship between the 1st Defendant and the Plaintiff was that of carriage of goods by road, the most important thing was the existence of that relationship between the common carrier of the coffee cargo by road, which is the Plaintiff's Company, and the vendor, the 1st Defendant. Ownership of the cargo the subject of the contract of carriage for purposes of establishing the liability of the carrier in my view is immaterial. The

critical issue here in my considered view is whether there was cargo of coffee which was loaded in the Plaintiff's trucks. And this fact is not disputed. Mr. Masaka attempted to make long submissions on the issue of failure by the Plaintiff's driver to abide by procedures for undertaking to take consignment of cargo as narrated by PW1 in his testimony. However, the Plaintiff failed to produce the driver as witness which failure Mr. Buberwa rightly submitted this Court on the basis of the decision in **HEMEDI SAIDI v MOHAMEDI MBILU [1984] T.L.R. 113 (HC)** should draw adverse inference against the Plaintiff.

I am also at one with Mr. Buberwa in his closing submissions that paragraphs 5, 7 and 8 of the Plaint in ***Commercial Case No. 58 of 2007***, **Exhibit D4,** show that the Plaintiff had full knowledge of the 1st Defendants' cargo being transported by the Plaintiff's truck with Registration **No.T 893 AFD** with its trailer **No.T948 ALW,** which truck, as per the testimony of PW1, DW1, DW2 and DW3 was the one which was apprehended by TANROADS at the Mwendakulima weighbridge. The letters drafted by the Plaintiff, **Exhibit D3** also show that the Plaintiff had knowledge of the coffee loaded in his truck. The Plaintiff cannot therefore turn around at this stage and deny the existence of those facts.

In his closing submissions Mr. Masaka submitted further that there are some fabrications in this case by the 1st Defendant and gave examples for instance that in his submissions the learned Counsel for the 1st defendant contends that the goods were loaded in the Plaintiff's Motor Vehicle at Bujumbura on 9th March, 2007, while the letter with reference No.729/UN/SOD which is dated the 27th December 2007, shows the loading

date of the said coffee as the 12th March 2007. Mr. Masaka queried that if that letter is part of **annexture "E"** to the 1st defendant' written statement of defence, why there are such contradictions, as this leaves much to be desired. Most unfortunately Mr. Masaka did not take this matter at the trial. It is only now it has emerged from the bar during the closing submissions. The fact of loading of cargo coffee in the Plaintiff's vehicle and the fact of the Plaintiff's vehicle being seized by TANROADS and the cargo on board being destroyed are not in dispute.

Furthermore, Mr. Masaka submitted, that although the 1st defendant contended that it was debited by the said UNITED YOUTH SHIPPING COMPANY LTD. and that it had already paid **USD 32,000** there was no evidence adduced at the trial to show that the said UNITED YOUTH SHIPPING COMPANY LTD. had debited the 1st Defendant with the said sum of **USD 32,000** at all. Mere correspondence does not suffice to prove such payments at all, Mr. Massaka insisted, and concluded that sincerely there is no any evidence which will lead this Court to believe that the 1st defendant was debited the sum of **USD 32,000** at all. These are mere allegations in the 1st Defendant's counter claim, which allegations are baseless and which should be discarded for want of substance, Mr. Massaka prayed. I have failed with due respect to follow the argument by Mr. Masaka on proof of the indebtedness of the 1st Defendant to UNITED YOUTH SHIPPING COMPANY to the tune of USD 32,000 and that the 1st Defendant has already settled this amount with the UNITED YOUTH SHIPPING COMPANY. Whether the 1st Defendant has settled its score with UNITED YOUTH SHIPPING COMPANY does not absolve the Plaintiff's Company from liability

for the damage the vendor has incurred as a result of the loss and/or damage of the coffee cargo. The most crucial thing for me in this case is for the 1st Defendant to establish the value of the damaged and/or lost cargo and whether the Plaintiff is liable to compensate the 1st defendant for such loss and/or damage.

Mr. Masaka submitted further that DW2 told this Court that the UNITED YOUTH COMPANY LTD of which company DW2 is the Chief Executive Officer (CEO), that they have business relationship with the 1st defendant of transporting its coffee, and that they assigned to the 1st defendant particular duties during the months of February or March, 2007, and that the assignment of transporting the 400 bags of coffee assigned to the 1st defendant was not performed for the reasons that the vehicle loaded with the said consignment was impounded by TANROADS. Mr. Masaka submitted further that when DW2 was cross examined on whether he (DW2) had any contract or any assignment deed with the 1st defendant for the assignment, he (DW2) replied that he had nothing. It is therefore inconceivable for a re-known company like UNITED YOUTH COMPANY LTD to assign duty to the 1st defendant without reducing their relationship into writing, which could make this Court to believe on the existence of such duty, and therefore in the absence of such any evidence the whole exercise become futile and not specifically proved, Mr. Masaka retorted.

Again with due respect to Mr. Masaka I have failed to get the gist of his argument on this particular point. I must stress here that the most critical relationship in this case is that between the Plaintiff's Company as a common carrier of goods by road and the 1st Defendant as the vendor. The

existence or otherwise of contract of assignment between the 1st Defendant and the UNITED YOUTH SHIPPING COMPANY LTD is immaterial in establishing the liability of the Plaintiff's Company as a common carrier of goods.

I am at one with Mr. Masaka that the claim of **TZS 98,000,000/=** which is claimed to be the value of the said coffee as stated in the Plaint which was tendered in **Commercial Case No.58 of 2007** having been refused by this Court in that case it was not specifically proved. It cannot therefore with any amount of stretching, imagination of creativity be resorted to in the instant case.

It is without dispute that the consignment of 400 bags of coffee has never been delivered to the 1st Defendant by the Plaintiff's Company. The value of 400 bags of coffee which was to have been transported by the Plaintiff's Company was **USD 55,525.22** as per Debit Note DN 264, **Exh.D7**. DW2 testified under oath that in the counter claim the 1st Defendant is claiming for a total amount of **USD 62,092** on the ground that, the actual value of the coffee being **USD 55,535.22** plus other expenses for the recovery of coffee which makes a total of **USD 62,392.13**. Curiously these "other expenses" as claimed by the 1st Defendant in the counter-claim which brings the total of the 1st Defendant claim against the Plaintiff to USD 62,392.13 are not known. The 1st Defendant pleaded that **USD 300** was paid to the Plaintiff's driver as advance to cover transportation costs. This therefore makes a total of **USD 55,835.22.** The 1st Defendant has not adduced any evidence to substantiate any "other expenses" which would make a total of **USD**

**62,392.13.** I wish to emphasize here that it trite law as per **<u>ZUBERI AUGUSTINO v ANICET MUGABE</u> [1992] TLR 137 (CA)** and **<u>TIMBER ENTERPRISES LTD VERSUS TANZANIA ELECTRIC SUPPLY CO. LTD</u>, CIVIL APPEAL NO.26 OF 2000 (unreported)** that *specific damages must be specifically pleaded and proved*. It is for that reason that this Court finds that the 1st Defendant has sufficiently proved a total loss of **USD 55,535.22** being the value of the 400 bags of coffee plus **USD 300** being an advance to cover the transportation costs, thus making the total amount of the claim by the 1st Defendant against the Plaintiff to be **USD 55,835.22.** This therefore settles the 7th issue ***whether the 1st Defendant rightly claims the sum of USD 62,392.13 from the Plaintiff*** in the affirmative.

Let me now turn to consider the last issue *what reliefs are the parties entitled to*? The 1st Defendant is asking for the payment of general damages by the Plaintiff to be assessed by this Court. I am alive to the general principle as to general damages which was succinctly restated by this Court in the case of **<u>MASUMIN PRINTWAYS & STATIONERS LTD V. THE SAVINGS AND CREDIT COOPERATIVE UNION</u>, Commercial Case No. 11 of 2010 (Unreported)** that "*such damages need not be specifically pleaded and may be asked for by a mere statement or prayer of claim*." In the instant case the 1st Defendant has not told the Court how much the 1st Defendant has been earning in its business, so as to provide the basis for this Court to assess the general damages. There has to be a basis for such calculation otherwise this Court cannot exercise its discretion to award general damages based on unsubstantiated figures. Considering

that as a matter of prayer general damages need not be specifically proved, it is difficult for this Court to assess the loss in income the 1st Defendant's company has suffered in its business. In the absence of evidence of the loss of earnings as a result of the loss suffered by the 1st Defendant from the income otherwise it would have earned from the contract had it not been breached by the Plaintiff's Company, this Court is unable to assess and exercise its discretion to award general damages since doing would be acting from vacuum.

In the whole, the Plaintiff in the main suit has failed to establish its case on a balance of probabilities. I hereby dismiss the Plaintiff's main suit with costs. On the other hand, the 1st Defendant's claim in the counter-claim succeeds to the extent as indicated above in this judgment.

For the foregoing reasons this Court hereby enters judgment and decree against the Plaintiff in the main suit. The 1st Defendant shall be entitled to the following reliefs:-

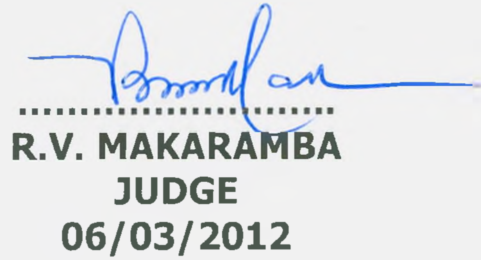
(a) *The Plaintiff in the main suit shall pay the 1st Defendant **USD 55,835.22** (Say Fifty Five Thousand Eight Hundred Thirty Five and Twenty Two Cents Dollars) being the value of the coffee and other expenses.*

(b) *The Plaintiff shall pay the 1st Defendant interest at bank rates on (a) of 18% per annum from 23rd of March 2007 to the date of judgment.*

(c) *The Plaintiff shall pay the 1st Defendant interest at Court's rate of 7% per annum on the decretal sum from the date of judgment till payment in full.*

*(d) The Plaintiff shall pay the 1st Defendant the costs of this suit.*

Order accordingly.



**..........................**
**R.V. MAKARAMBA**
**JUDGE**
**06/03/2012**

Judgment delivered this 06th day of March, 2012 in the presence of Mr. Magusu, Advocate for the Plaintiff, Mr. Buberwa, Advocate for the 1st Defendant and Exparte for the 2nd Defendant.

**..............................**
**R.V. MAKARAMBA**
**JUDGE**
**06/03/2012**

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