

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM
COMMERCIAL CASE NO. 86 OF 2011.

VITA FOAM (T) LIMITED.....PLAINTIFF

VERSUS

SENATOR E. LYOTO t/a WISDOM GM

SHOPPERS.....DEFENDANT

EX PARTE JUDGMENT

BUKUKU, J.

The plaintiff is a limited liability company incorporated and duly existing under the laws of Tanzania carrying on the business of manufacturing, production and sale of foam mattresses and other bedding products. The defendant is a natural person living and working for gain in Mbeya Municipality and trading in the name and style of Wisdom GM Shoppers, mattress shop in Mwanjelwa, Mbeya.

The facts of this case are simple and straight forward: The defendant was at all material times, a major dealer of the plaintiff's products in Mbeya region. Due to satisfactory business relationship between the parties, on 30th May, 2007, the defendant applied to the plaintiff, and the plaintiff agreed to grant the defendant, credit facilities to purchase goods and products from the plaintiff. Having agreed so, the plaintiff opened a dealership credit account, (ledger account) in the name of the defendant, and the defendant was allowed to purchase goods from the plaintiff on credit. According to the conditions of the sale on credit, the defendant agreed to make payment within a period of 30 days from the date of credit supply, and upon failure to make such payment, the plaintiff had a right to charge the defendant default interest at the rate of 3% per month, and the plaintiff to retain ownership of the goods supplied until paid in full.

In compliance with terms and conditions of the credit facility agreement, between 1st January, 2008 and 31st December, 2010, goods and products worth T.shs. 341,835,211.39 were supplied by the plaintiff to the defendant in which, a payment of T.shs. 295,219,555.39 was made thereby, leaving unpaid balance of T.shs. 66,552,576.34 as of October, 2011. This being the value of goods supplied plaintiff to the defendant and interest payable thereon computed at the reduced rate of 2% per month, a percent less than the contractual rate of 3% per month.

Despite the plaintiff's demand, and several efforts taken, including entering into a debt settlement agreement, the defendant totally failed/neglected to pay the outstanding amount as per the express terms and conditions of the agreement and the debt settlement agreement, as a result the plaintiff claims to have suffered, and continue to suffer unnecessary costs, expenses and damages. All the plaintiff's averments considered, he now claims against the defendant for the following:

- (i) Payment of a total sum of T.shs. 66,552,576.34 being the amount outstanding and remaining unpaid in respect of the purchase of goods loaned by the plaintiff and supplied to the defendant as per the terms of the agreement for the purchase of the mattresses on credit (the agreement), entered into between the plaintiff and the defendant dated 21st April, 2008, signed by the parties on the 16th June, 2008, including interest accrued up to and including the month of October, 2011.
- (ii) Payment of interest computed at an agreed rate of 3% per month from October, 2011 or the date of filing this suit whichever is latest, to the date of judgment computed on the entire outstanding amount referred in prayer (a) above;

- (iii) Payment of general damages suffered by the plaintiff for loss of business and other resultant losses and damages suffered by the plaintiff;
- (iv) Payment of interest on the decretal sum at court's rate computed from the date of judgment till full satisfaction of the entire decretal sum;
- (v) Costs of the sum;
- (vi) Any other relief (s) the court may deem fit to grant.

The defendant in this case did not enter appearance, neither did he apply for leave to defend on time, as the suit was filed under Order XXXV- Summary Procedure. The court records shows that, the plaintiff assisted by a process server, one Said Ntika, from Harvest (T) Limited of Mbeya, tried at different dates to serve summons to the defendant but failed to do so because, allegedly, according to the defendant's wife, the defendant was in Malawi transacting his businesses and his wife had refused to acknowledge the summons. Mr. Ntika swore an affidavit of process server which reads in part as under:

" Nathibitisha kwamba tarehe 8/11/2001, 9/11/2011, 13/11/2011 na 16/11/2011 huku maeneo ya Mwanjelwa jijini Mbeya huwa namkuta mke wa mdaiwa Senator E. Lyoto katika duka lao lijulikanao kama Wisdom M. Shoppers huwa nanajataa kupokea nyaraka za Mahakama, anasema mpaka mume wake mwenyewe apokee na anasema yuko nchini Malawi anafanya biashara"

Despite this fact, on 6th February, 2012, the court ordered that the defendant be served through substituted service. In complying with the said order, the plaintiff served the defendant on 13th February, 2012, by substituted service through the Mwananchi Newspaper. Yet, the defendant did not make appearance in court.

On 16th March, 2012, Mr. Nyamugaruri, learned advocate for the plaintiff duly appeared but once again, defendant did not show up. Understandably, Mr. Nyamugaruri made an application to prove the case ex parte. I readily granted the prayer under order VIII Rule 14(2)(b) of the Civil Procedure Code, which provides-

" (2) In any case which a defendant who is required under sub-rule (2) of rule 1 to present his written statement of defence fails to do so within the period specified in the summons or, where such period has been extended in accordance with the proviso to the sub rule, within the period of such extension, the court may-

(b) in any case, fix a day for ex-parte proof and may pronounce judgment in favour of the plaintiff upon such proof of his claim."

In support of his case, Mr. Nyamugaruri learned counsel for the plaintiff submitted that an agreement for the supply of goods was entered into between plaintiff and defendant on 21st April, 2008. He further submitted that, the defendant has failed to honour his obligations by failing

to pay the outstanding amount plus interest of 3% per annum despite several reminders and demands made by the plaintiff. According to Mr. Nyamugururi, plaintiff has not objected to the claim, since upon receipt of the demand letter, defendant, through Mwakolo and Company Advocates, responded to the demand note and admitted liability and had requested more time to pay the outstanding claim. Mr. Nyamugaruri, further submitted that, defendant had requested to start payment by July, 2011, however, he has failed to comply with the promise. It is the averment of Mr. Nyamugaruri, that, since plaintiff has admitted the entire claim, he prays this court to take the letter from Mwakolo and Company Advocates, as admission of the claim by the defendant and hence this court grants judgment on admission of the claim as per Order XII Rule 4 of the CPC, and thus his prayer be granted as contained in the plaint.

This is an ex-parte judgment. However, from the onset, I should start by saying that, it is trite law that, even where a party is granted leave to prove his case ex parte, the standard of proof required in civil cases has to be reached on a balance of probability **(CAT) Civil Appeal No. 10 of 1998, Peter Ng'homano V. Gerson M.K Mwanga & The Attorney General.**

This case is straight forward and it need not detain me long. Annexure 3 to the plaint clearly shows that indeed there was an agreement between the plaintiff and the defendant for the supply of mattresses on

credit. Likewise, Annexure 9 to the plaint, is a letter written to the plaintiff by the defendant's Advocates, Mwakolo and Company Advocates, which clearly shows that the defendant has admitted liability and prays to be given more time to repay the outstanding claim.

The defendant was served by substituted service on 13th February, 2012. He has failed to appear in court, and has failed to seek leave to defend on time, as the suit has been filed under Order XXXV: Summary Procedure. Inadvertently, on 20th day of April, 2012, the defendant filed in this court a chamber summons seeking among other prayers, an extension of time within which to apply for leave to defend! That application has been filed more than two months after defendant was served through substituted services. When the case came before me, on 16th March, 2012, Learned Counsel for the plaintiff prayed to proceed ex parte. I readily granted his prayer as by then, there was no application for leave to defend lodged in this court, and the 21 days within which to apply had expired and no application for extension of time was filed either. In determining this application, I have also considered the provisions of O.XII Rule 4 of the CPC. I am satisfied with the same and have no hesitation that the plaintiff has established its claim according to law.

In his prayers, the plaintiff has prayed for general damages for loss of business and resultant losses. I am aware that, general damages are such a loss as the law will presume to be the natural or probable

consequence of the defendant's act. They need not be proved by evidence. In awarding general damages, it is often material to consider the circumstances under which the wrongful act was committed. In this particular case, the plaintiff has surely been deprived of the use of money that was due to him. This loss can surely be compensated by the interest to be awarded herein.

In the result, I do hereby enter judgment for the plaintiff as hereunder:


- (i) The defendant shall pay to the plaintiff the sum of T.shs. 66,552,576.34 being the outstanding amount;
 - (ii) Payment of interest computed at an aggregate rate of 3% per month on the outstanding sum from date of filing this suit to the date of judgment;
 - (iii) Payment of interest on the decretal sum at the court's rate of 12% per annum from the date of judgment to final satisfaction of the amount outstanding;
 - (iv) The defendant is condemned to pay costs of this suit
- It is accordingly ordered.


A.E. BUKUKU

JUDGE

14TH MAY, 2012

Judgment delivered this 14th Day of May, 2012 in the presence of Mr. Nyamugaruri, Learned Counsel for the Plaintiff and in the absence of the Defendant.



A.E. BUKUKU

JUDGE

14TH MAY, 2012