

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

COMMERCIAL CASE NO. 117 OF 2014

**HASS PETROLEUM (T) LIMITED
FLEET LOGISTICS (T) LIMITED** } **PLAINTIFFS**

VERSUS

**RICHARD NEHEMIA GWAU
PARSLEY LIMITED** } **DEFENDANTS**

6th March & 2nd April, 2015

JUDGMENT

MWAMBEGELE, J.:

The plaintiffs - HASS Petroleum (T) Limited and Fleet Logistics (T) Limited - are business entities registered under the laws of Tanzania to carry on the businesses of oil supply and marketing and fleet logistics and transportation respectively. They jointly lodged this suit against the defendants – Richard Nehemia Gwau and Parsley Limited - jointly and severally praying for the following orders:

- (i) Payment of Tshs. 164,571,250.20 being the amount outstanding on the debt payable pursuant to a settlement agreement entered by and between the first plaintiff and the

defendants dated 28th November, 2013 plus interest at the commercial rate of 25% per annum accruing from the date of the agreement to the date of judgment or earlier payment in full;

- (ii) Payment of Tshs. 191,255,999.71 being the value of goods transported by the defendants but not delivered to designated destinations plus interest at commercial rate of 25% per annum accruing from the date of loading to the date of judgment or earlier payment in full;
- (iii) An order for sale of the Trucks Reg.nos. T567 AFG, T810 ACV, T418 AKD, T607 AFA, T 562 ACQ, T951 ASG, and T564 AZX; Tanker Reg. No. T627 ANN and Trailers Reg. Nos. T361 AVQ, T741 AFB, T683 CQW, T926 AFL and T360 BSV;
- (iv) Payment of general damages for breach of contract as may be assessed by the court;
- (v) Payment of punitive and aggravated damages as may be assessed by the court;
- (vi) Payment of plaintiff's costs for this suit; and
- (vii) Any other relief as may be assessed by the Court.

The defendants despite being served, never defended the case against them. As the record reveals, Msemwa advocate who had appeared initially for the plaintiffs withdrew from representation before even filing a defence ascribing lack of proper instructions to be the cause for taking that move.

There being no defence as of 26.02.2015, Mr. Byamungu learned counsel for the plaintiffs informed this court of his intention to invoke the provision of rule 22 (1) of the High Court (Commercial Division) Procedure Rules, 2012 - GN. 250 of 2012 (henceforth "the Rules") for default judgment. Accordingly, on 27.02.2015, an application for default judgment under the said rule was lodged in this court. This is the judgment in respect thereof.

I have gone through the plaint as presented in this court and indeed, the defendants having defaulted to put up a defence, as the Rules require, ordinarily, a default judgment should have been entered as prayed in the plaint. However, it is trite law that parties are bound by their own pleadings. Bearing in mind this principle, I find contradictions between the pleadings and the prayers sought by the Plaintiffs. Moreover, in my considered view, the said prayers are calculated at causing unjust enrichment to the plaintiff. The pleadings as well as attachments on this suit speak loudly and clearly. I shall demonstrate.

The dispute, as can be gleaned from the plaint arises out of an alleged breach of a settlement agreement entered between the first plaintiff and the defendants. That agreement was, in principle, an acknowledgment by the defendants of the debt at the tune of Tshs. 201,162,735/= due to the plaintiff. In the agreement, which was attached to the plaint as Annexure P1, they agreed that payment of that debt would be essentially in kind since the defendants were required to release to the first plaintiff seven trucks and trailers for transporting its fuel. Those trucks were also offered as security for the repayment of the said debt whereby the defendants

surrendered original registration cards for the plaintiff's custody who also was permitted to register the same in his name in case of such eventuality.

It is also stated that the plaintiff entrusted a consignment of fuel and lubricants worth Tshs. 191,255,999/71 to the defendants for the transportation to various destinations but neither the consignment nor the trucks ever reached the said destinations. It is for these reasons that the plaintiff instituted this suit pleading breach of trust and settlement agreement by defendants.

Apart from praying for the principal amount outstanding of Tshs. 164,571,250/20 pursuant to their settlement agreement as well as the said Tshs. 191,255,999/71 as value of the undelivered consignment, the same plaintiffs pray for the sale of the trucks which secured the debt. In my view, this prayer is unjustified as it seeks to impose a double punishment upon the defendants. That apart, in my view, it is against the wish of the parties, because, once a security, always a security and as such, it cannot be dealt otherwise, unless and until the creditor has failed to realize his monies so secured. It is for this reason that this court cannot grant this prayer which directly enhances unjust enrichment to the plaintiffs.

Likewise, as to the prayers for interests, the same are rather, in my view at unjustifiably inflated rate by the plaintiffs. Therefore, I will award interest at commercial rate of 19% on both principal amounts outstanding in the first prayer and on the value of the undelivered goods in the second prayer.

The plaintiffs, apart from a prayer for general damages, they prayed for both punitive and aggravated damages. Despite this being a default judgment, the circumstances, leading to it, in my considered opinion do not automatically require this court to blind-foldedly proceed to grant the prayers. It is the duty of the court to examine the veracity of the prayers as prayed to ensure that justice is done.

The UK Court of Appeal had an opportunity to observe in respect of aggravated Damages in the case of ***Thompson Vs commissioner of the Metropolis*** [1997] 3 WLR 403, at page 417. It had this to say (as quoted in the Jamaican case of ***Miller Leonard Vs the Attorney General of Jamaica & Another***, Claim No. 2004 HCV 3084 – (available at <http://supremecourt.gov.jm/content/miller-leonard-v-ricketts-constable-raymond-and-attorney-general-jamaica>):

“Aggravated damages are awarded where there are aggravating features about the case which would result in the plaintiff not receiving sufficient compensation for the injury if the award were restricted to a basic award”.

This was re-echoed in Uganda in the case of ***Uganda Revenue Authority Vs W. Kitamirike David***, Civil appeal no.43 of 2010 (available at <http://www.ulii.org/ug/judgment/court-appeal/2012/3>) where the Court of Appeal of Uganda had this to observe:

"Aggravated damages are; like general damages, compensatory in nature, but they are enhanced as damages because of aggravating conduct of the defendant. They reflect the exceptional harm done to the plaintiff by reason of the defendant's actions/omission..."

The court went on to observe in respect of punitive damages, that:

"... unlike general damages, punitive damages focuses on the defendant's misconduct and not the injury or loss suffered by the plaintiff ... they are awardable with restraint and in exceptional circumstances, because, punishment, ought, as much as possible, to be confined to criminal law and not to the civil law of tort or contract".

In the instant case, it is alleged that the defendants failed to honour the settlement agreement by failing to meet the transportation obligation and also never delivered the cargo entrusted to them to transport under the same settlement agreement. In my considered view, and on the basis of the above said authority, by which I am highly persuaded, neither aggravated nor punitive damages, are awardable in this case.

As for general damages, the same are bound to fail as well in that, however much the same are awarded at the discretion of the court, I find not material upon which to peg my discretion of assessment in respect of the same. I am alive to the position that general damages need not be specifically pleaded; they may be asked for by a mere statement or prayer of claim – see ***The Cooper Motor Corporation Ltd. Vs Moshi/Arusha Occupational Health Services*** [1990] TLR 96. However, I still feel that in order to exercise discretion on how much general damages should be awarded to the plaintiff, there should be some material upon which to peg the amount to award which material is wanting in this case. In the premises, the prayer for general damages also fails.

In the upshot, a default judgment is entered against the defendants and I hereby decree as follows:

1. The defendants, jointly and severally, shall pay the plaintiff Tshs. 164,571,250/20 being the amount outstanding on the debt payable pursuant to the settlement agreement entered by and between the first plaintiff and the defendants dated 28.11. 2013;
2. The defendants, jointly and severally, shall pay the plaintiffs Tshs. 191,255,999/71 being the value of goods transported by the defendants but not delivered to designated destinations;

3. The defendants shall pay the plaintiffs interest on items 1 and 2 at commercial rate of 19% from the date of filing this suit to the date of judgment;
4. The defendants shall pay the plaintiffs further interest at court rate of 7% on the decretal sum from the date of this judgment till final and full satisfaction; and
5. The defendants shall pay the plaintiffs costs of this suit.

It is hereby further directed that this decree shall not be executed unless and until the provisions of rule 22 (2) of the Rules are complied with to the letter.

Order accordingly.

DATED at DAR ES SALAAM this 2nd day of April, 2015.

J. C. M. MWAMBEGELE
JUDGE