

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)**

DAR ES SALAAM

COMMERCIAL CASE NO. 82 OF 2019

TANZANIA BUREAU OF STANDARDS 1ST PLAINTIFF.

THE HON. ATTORNEY GENERAL 2ND PLAINTIFF.

VERSUS

MESSRS SERENGETI GLOBAL SERVICES LIMITED..... DEFENDANT.

Date of Last Order: 10/03/2020.

Date of Judgement: 20/03/2020.

DEFAULT JUDGEMENT.

MAGOIGA, J.

This is default judgement revolving around breach of contract. The plaintiffs, TANZANIA BUREAU OF STANDARDS AND THE HON. ATTORNEY GENERAL by way of plaint instituted the instant suit against the above named defendant praying for judgement and decree in the following orders:-

- a. That the defendant should pay the outstanding debt of an amount of USD.141,747.96 with interest for the loss suffered by the first plaintiff.
- b. Commercial interest of 7% per annum from the date of breach of the contract to the date of full payment.

- c. An execution order in accordance with Reciprocal Enforcement of Foreign Judgements Act, [Cap 8 R.E. 2002] and its Rules.
- d. The costs of this suit.
- e. Any other reliefs this Honourable Court may deem fit to grant.

The facts of this suit as gathered from the plaint are straight forward. It is alleged that on 16th February, 2016 the first Plaintiff entered into contract with the defendant for provision of Pre-Shipment Verification of Conformity to Standard (PVoC) Services for used motor vehicles imported to Tanzania from the United Kingdom for the period of 36 months. According to the provisions of clauses 8 and 9 of the Special Condition of Contract, the contract was to commence on the 1st April, 2015 and was to end on 31st March 2018. It was agreed, among others, that the defendant shall be remitting administration fees which is 30% of the USD.200 for each motor vehicle inspected, which remittance was to be paid on or before 15th of the following month and that interest of 1% per day shall be charged after the date due for all payments done after 15th of the following month.

Further facts go that the defendant failed to remit the administration fees and to submit annual report as so required in the Clause 21 of the Special Condition of Contract (SCC). Following that failure, the 1st plaintiff, on 14th

January, 2017 wrote to the defendant informing her on non-conformity observed during the audit conducted in December, 2016 as per sub clause 40.1 and required the defendant to remit all outstanding balances and several communications were exchanged between parties, of which the defendant promised to pay the outstanding balances but in vain. Even the effort by the plaintiff to have the matter arbitrated was in vain, for failure of the defendant to show cooperation. It was further alleged that by 18th June, 2019, the amount of the debt was USD.141,747.00 being, one, USD.11.257 as royalties and USD.130,490 being penalties. It was under the circumstances, the plaintiffs instituted this suit praying for judgement and decree for orders as prayed in the plaint, hence this judgement.

Basically this suit revolves around non-performance of the terms of the contract on the part of the defendant for failure to remit the amount of money agreed in the contract.

In order to understand why this is a default judgment, I find it apposite albeit in brief to know the history of this suit. Given the facts above, the plaintiffs instituted the instant suit in this Court on 18th July, 2019. The matter was assigned to me and I ordered that defendant be served. And the suit was fixed for orders on 15/08/2019. When the matter was called

for orders on 15/08/2019, Ms. Careen Msonda , learned State Attorney informed the Court that the defendant is a foreign company and their efforts to make service in the country has been in vain. In the circumstances, the learned Attorney prayed that they be allowed to serve the defendant by way of email for this being a foreign company, publication in the newspaper will not achieve the purpose. This Court given the situation, allowed the plaintiffs to serve the defendant by way of email. The matter was scheduled for mention on 15/10/2019. On that day the learned Senior State Attorney, Mr. Hangi Chang'a told the court that they have complied with the Court's order by serving the defendant by email and on top of that they had sent the defendant with plaint and summons by way of DHL all sent on 11/10/2019 and 24/10/2019 respectively. The learned Senior State Attorney submitted in Court proof service as submitted. Since time for filling of the written statement of defence has not elapsed, I adjourned the matter to another date and fixed it for orders on 19/11/2019. However, on that date, no defence was filed nor any application preferred for extension of time to file one. The matter was scheduled for orders on 25th February, 2020 for orders. On that date, the Mr. Chang'a learned Senior State Attorney for plaintiff prayed to Court that

since they have proof of service by email on 11/10/2019 and DHL on 24/10/2019 to invoke the provisions of Rule 22 of this Court's Rules as amended by G.N. No. 107 of 2019 to allow them to make an application for default judgement. This court, under the circumstances, granted the prayers as there was no defence at all as per the Rule 22(1) of the Rules, I allowed the plaintiffs to make an application accompanied with affidavit in proof of the claim. And I ordered that the matter be scheduled on 10/03/2020 for necessary orders in the circumstances. On that last mention date, the plaintiffs had complied with the Court's order and I fix this matter for default judgement today.

It should be noted that the amendment of Rule 22 by G.N.No.107 of 2019 changed the old legal position for grant of default of judgment by mere proof of service as opposed to the current legal position where default judgment is and can only be granted where there is proof of the claim by affidavit. I find it prudent to reproduce Rule 22(1) hereunder for easy of reference. Rule 22 (1) provides as follows:-

"Rule22(1). Where a party required to file written statement of defence fails to do so within the specified period or where such a period has been extended in accordance with sub-rule 2 of

Rule 20 within the period of such extension, the Court may, upon proof of the service and on application by the plaintiff in Form No. 1 set out in the Schedule to these Rules accompanied by an affidavit in proof of the claim, enter judgement in favour of the plaintiff.”(Emphasis mine)

This Court faced with similar situation in the cases of NITRO EXPLOSIVE (T) LIMITED v. TANZANITE ONE MINING LIMITED, COMMERCIAL CASE NO. 118 OF 2018, A-ONE PRODUCTS AND BOTTLERS LIMITED v. TECHLONG PACKAGING MACHINERY LIMITED AND ANOTHER, COMMERCIAL CASE NO. 105 OF 2017 **observed in strong terms that before January 2019, under the High Court (Commercial Division) Procedure Rules, G.N.250, the grant of default judgement was mandatory and automatic upon the plaintiff proving that the defaulting defendant failed to file written statement of defence after prove of service and upon making an application in prescribed Form No. 1 to the First Schedule to the Rules.**

In the above cases, the Court went on to hold that under the new Rule as quoted above the plaintiff who want the Court to grant default judgement in his favour must prove the following:

- i. **Proof of the service to the defendant but who has failed to file written statement or make an application for extension of time to file one.**
- ii. **The plaintiff must make an application in the prescribed Form no. 1 to the First schedule to the Rules.**
- iii. **That the said application in Form no. 1 must be accompanied by an affidavit in proof of the claim. (Emphasis mine).**

On the same vein, further this Court on similar situation noted and emphasized that **"the affidavit in proof must be self-explanatory proving every claim in the plaint and the exhibits must as well be authenticated and that the three ingredients must co-exist for the judgement in favour of the plaint to be given. This so far has been guidance to any part to the suit who wants to enjoy the fruits of justice under Rule 22 (1) as amende by G.N.107 of 2019."**

The genesis of this suit is breach of contract on the part of defendant for failure to remit the sum of USD.141,747.96 being royalties and penalties as agreed in exhibit P1 from collection of charges from used motor vehicles from United Kingdom for a period 36 months ending 31st March 2018. It is

stated in the plaint and in the affidavit in proof of the claim that failure to remit the said money is clear breach of the contract the subject of this claim. It is further stated in the plaint and in the affidavit in proof of the claim that all efforts by the plaintiff to have the matter solved in an amicable way under the contract all proved futile, including arbitration as provided in the contract. Another claim is for commercial interest of 7% per annum from the date of breach of the contract to the date of full payment. Also is the claim of execution order in accordance with the Reciprocal Enforcement of Foreign Judgements Act, [Cap 8 R.E. 2002] and its Rules. And lastly was the claim of costs of this suit.

Guided by the above Court's interpretation of Rule 22 (1) there is no dispute that the plaintiff in this suit has proved that the defendant was legally served under Order V Rules 21(1) and 29 of the CPC as ordered by this Court but failed to file written statement of defence. Also, it is not in dispute that the plaintiff has equally filed both Form no. 1 and an affidavit in proof of the claim. Therefore, the three ingredients co-exist in this suit. However, the last ingredient was the subject of the amendment of Rule 22 (1) which now cast legal duty to Court to see that the affidavit must contain facts which proves the claim to the standard required in civil cases.

I have had an opportunity to go through the affidavit in proof of the claim and exhibits P1-16 annexed thereto with a very keen legal eye and my entire traversing of all these in their totality am satisfied that the plaintiffs have been able to prove their claim as prayed in the plaint on balance of probability. This being the case, I hereby unhesitatingly hold that the plaintiff is entitled to default judgement as prayed in the plaint save for one prayer of execution in accordance with the Reciprocal Enforcement of Foreign Judgements Act,[Cap 8 R.E.2002] and its Rules which I decline to grant. This order cannot be granted at this stage because the enforcement of foreign judgement has its procedure which this judgement is yet to qualify for, and if need be. This judgement needs to be registered and executed in the United Kingdom and not in Tanzania. The reasons I am granting this default judgement are not far to fetch. **One**, the 1st plaintiff's intention enter into contract with the defendant was to see to it that all charges agreed are collected for the development of the intended collections and the defendant had a legal duty upon being paid consideration in accordance with the agreement remit the money collected without fail. So, failure to perform her obligations as agreed, it cannot be other than that the defendant is in breach of the contract and the plaintiff

is entitled all royalties and penalties as agreed. **Two**, the affidavit in proof of the claim when read together with the plaint, alongside with the exhibits tendered, gives a true picture of what transpired in this suit. All communications and unfruitful promises by the defendant to make good the payment of money due shows how the plaintiff was affected, and as such qualifies the plaintiff to be entitled to 7% interest as claimed in the plaint from the date of breach to the date of full payment. **Three**, there is ample evidence even how the plaintiff arrived at those figures she is claiming in the plaint. Indeed, the defendant does not dispute the figure but asked for waiver of the penalties which were not accepted by the plaintiff.

Subsequently, in terms of Rule 22 (1) of this Court's Rules, I hereby enter judgement for the plaintiff and decree as follows:

- A. the defendants is hereby ordered to pay the plaintiffs the sum of USD.141,747.96 with interest for the loss suffered by the 1st plaintiff.
- B. The defendant shall pay commercial interest of the adjudged claim at the rate of 7% for the date of breach to the date of full payment.
- C. The defendant is condemned to pay the plaintiff the costs of this suit.

In terms of Rule 22 (2) (a) and (b) of the Rules, I further order that the decree in this case shall not be executed unless the decree holder has, within a period of ten (10) days from the date of the judgement, serve a copy of the decree by way of email and DHL(courier) to the defendant and after a period of twenty one days (21) from the date of expiry of the said ten (10) days has elapsed.

It is so ordered.

Dated at Dar es Salaam this 20th day of March, 2020.



A handwritten signature in black ink, appearing to read "S. M. Magoiga".

S. M. MAGOIGA

JUDGE

20/03/2020