

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM
COMMERCIAL CASE NO. 48 OF 2017**

ALAF LIMITED PLAINTIFF

VERSUS

MINEX LOGISTICS LIMITED DEFENDANT

Date of Last Order: 16/07/2021

Date of Judgement: 13/08/2021

JUDGEMENT

MAGOIGA, J.

The plaintiff, ALAF LIMITED by way of plaint instituted the instant suit against the above named defendant praying for judgement and decree in the following orders, namely:

- a. The sum of (a) TZS.81,918,776.87 and (b) USD.5,981.00 as per paragraphs 3 and 4 hereof;
- b. Interest on the said sum of TZS.81,918,776.87 and USD.5,981.00 at the commercial rate from the date of service of the letter of demand i.e 12th February, 2016 to the date of judgement;
- c. Interest on the decretal amount at court's rate from the date of judgement till date of payment in full;
- d. Costs of this suit;



- e. Interest on the costs at the rate of 7% per annum from the date of award thereof till full and final payment of the same;
- f. Further or other relief this honourable court may deem appropriate and fit to grant.

Upon being served with the plaint, the defendant filed a written statement of defence disputing all claims by the plaintiff and prayed that the suit for plaintiff be dismissed with costs. In the alternative, the defendant raised a counter claim against the plaintiff claiming for judgement and decree in the following orders, namely:

- i. That the honourable court be pleased to order the plaintiff in this counter claim to pay the defendant a sum of Two Hundred Eighteen Million, Six Hundred Ninety-Five Thousand Five Hundred Eighteen Sixty shillings and Three Cents (TZS.218,695,518.63) being clearing agency fees and third party charges paid by the defendant on behalf of the plaintiff;
- ii. Interest at the commercial rate of 12% over TZS.218,695,518.63 from 5th June, 2015 to the date of judgement;
- iii. Interest on the decretal sum at the court's rate of 7% from the date of judgement to the date of full satisfaction of a decree;



- iv. Costs of this counter claim be borne by the plaintiff;
- v. Any other relief that the honourable court may deem fit and just to grant.

Upon being served with the counter claim, the defendant in the counter claim filed written statement of defence disputing the claims by the plaintiff to counter claim and urged this court to dismiss the counter claim with costs.

The facts of this suit and counter claim as gathered from pleadings and some of which are not disputed are imperative to be stated. The plaintiff and defendant had long established business relationship whereby the defendant was appointed the clearing and forwarding agent of the plaintiff's company from 1st January, 2012 up to 23rd July, 2015. It is further alleged that, in the period between 2nd May, 2015 and 14th May, 2015 inclusive, the plaintiff mistakenly overpaid the defendant in respect of services provided to the tune of TZS.81,918,776.87 and USD.5,981.00 which money the plaintiff has claimed for refund in vain, hence this suit claiming the same as contained in the plaint.

On the part of the defendant/plaintiff in the counter claim it is stated and alleged that, on the account of the same clearing and forwarding agency

relationship that was signed between parties on 5th November, 2011, 7th November, 2011 and 8th November, 2011 respectively, the defendant in the counter claim engaged the plaintiff in the counter claim to provide clearing and forwarding services for various consignments imported by plaintiff in the main suit vide different custom entry points in the United Republic of Tanzania.

Further facts were that, in performing its obligations under the contract and acting upon the instructions of the plaintiff in the counter claim dutifully provided clearing and forwarding services for various consignments. As per contracts, the plaintiff in the counter claim raised invoices against the services but which invoices were not fully paid and the unpaid amount stand at the tune of TZS.218,695,518.63. The demands by the plaintiff in the counter claim to the defendant in the counter claim to be paid the unpaid balance have been in vain, hence, this counter claim for reliefs as contained in the counter claim.

The plaintiff cum defendant in the counter claim at all material time in this suit has been enjoying the legal service of Ms. Hamida Sheikh, learned advocate, while the defendant cum the plaintiff in the counter claim has



been enjoying the legal services of Messrs. Nduluma Majembe and Deusdedit Luteja, learned advocates

Before hearing started, the following issues were agreed by parties and recorded for the determination of this suit, namely:

1. Whether the plaintiff overpaid the defendant on services rendered in the period starting 1st January, 2011 up to 23rd July, 2015?
2. Whether the plaintiff paid all services rendered to her by the defendant/plaintiff in the counter claim in the period starting 5th November, 2011 to 23rd July, 2015?
3. Whether there was breach of the terms of the contracts by either party?
4. To what reliefs parties are entitled to?

The plaintiff in proof of her case called 4 witnesses. The first witness for plaintiff was Mr. PREM NARAYAN VERM (hereinafter to be referred as '**PW1**') under oath and through his witness statement adopted to be his testimony in chief, told the court that, he is the Financial Manager of the roofing division of the plaintiff since 2014. PW1 told the court that, he knew the defendant as their clearing and forwarding agent and he has been making payments to her for the services rendered. PW1 went on to tell the

court that, he came to know the defendant owed the plaintiff TZS.81,918,776.87 and USD.5,981.00 during his routine reconciliation of ledger with services providers, the defendant inclusive. In the reconciliation, it was discovered that, the plaintiff had overpaid the defendant the amount stated above and the plaintiff was entitled for reimbursement of the excess amount that has been paid.

PW1's further testimony was that, immediately they informed the defendant's Manager and the same amount is reflected in Bank Statement from Standard Chartered Bank of the plaintiff of the period of 1st January 2012 to 23rd July, 2015 shows the payment made to the defendant accounts exceeded the amount they should have received.

According to PW1, the reconciliation reflects that, from 2nd December, 2013 to 14th May, 2015 the total amount paid was TZS.404,550,925.62 and there were many invoices that were already paid by the plaintiff, which were not showing in the books of the defendant to the tune of TZS.104,945,056.00.

PW1 further testimony was that, the defendant does not keep his records properly as they keep changing the entries and their statements. Giving example of the changes is the statement of 2014 the closing balance was TZS.85,071,605.87 and the opening balance of 2015 was changed to

TZS.216,008,587.02 as opening balance of the same date and that of 2014 instead of being the same.

PW1 insisted in his testimony that, the plaintiff paid all the services rendered by the defendant. And the ledger and plaintiff's Bank statement clearly shows all payments made by the plaintiff to the defendant. PW1 told the court that, after going through their claims and supporting documents, it came out that, same were the invoices that were paid for already. According to PW1, the hand written statement of invoices with their written statement of defence, counter claim and discoveries all do not show payment made by the plaintiff.

PW1 concluded that the defendant owes the plaintiff the amount as claimed in the plaint and further insisted that the defendant in the counter claim does not owe the plaintiff in the counter claim any money for services rendered.

In proof and support of the above facts, PW1 tendered in evidence the following exhibits, namely:

- 1. Letter of confirmation on payments dated exhibit P1.**
- 2. Demand notice dated Exhibit P2.**



Under cross examination by Mr. Luteja, PW1 told the court that, he has been with the plaintiff since 2014 and during that period he has been receiving invoices from the defendant.

Under re-examination by Ms. Sheikh, PW1 told the court that invoices received are charged commission, transport for any duty offered. PW1 insisted they paid against all invoices submitted for payment.

Next and second witness for the plaintiff was Mr. MESHACK CHRISTOPHEN MGEYEKWA (to be referred herein as '**PW2**'). PW2 under oath and through his witness statement adopted in these proceedings as his testimony in chief told the court that, he is the employee of the plaintiff as Management Accountant, roofing division since 2014. According to PW2, his duties are making ledger reconciliation with various vendors and service providers of the plaintiff's company.

PW2 went on to tell the court that, in 2015 while under routine ledger reconciliation, it came to his knowledge that the plaintiff has overpaid the defendant as claimed in the plaint and he reported the matter to PW1. According to PW2, PW1 started communicating within the defendant. PW2 told the court that, the reconciliation he made was based on comparison

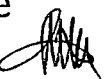


between the ledger bank statements of the plaintiff's books against the defendant's ledger statements.

According to PW2 the discrepancies he discovered were that:

- i. There were some invoices in the plaintiff's books but not in the defendant's books totaling to the tune of TZS.104,945,056.00.
- ii. Some payments appeared in the plaintiff's books and Bank statements but not in the defendant's books to the tune of TZS.404,550,925.00.
- iii. There was one invoice No. 150309 of 2nd July 2015 of the amount of TZS.8,069,800.00 which appeared in the defendant's ledger but not in the plaintiff's ledger statement.
- iv. The defendant's ledger statement had discrepancies in that there was huge difference between the closing balance of 2014 and the opening balance of 2015 while in actual fact they should have been the same.

Further testimony of PW1 was that, by calculation of the amount paid and services rendered, the overpaid amount is TZS.81,918,776.87. As to the USD.5,981.00 is the balance from advance payments by plaintiff to the defendant.



PW2 on serious note, disputed all claims the plaintiff in the counter claim.

In proof and support of the plaintiff's claims, PW2 tendered in evidence the following exhibits, namely:

1. Two Bank statements in USD and TZS collectively as exhibit P3a-b.

Under cross examination by Mr. Luteja, PW2 told the court that he involved the defendant's officials. According to PW2, the ledger statement entries when compared with the defendant's statement they noted a difference. Pressed with question, PW2 admitted that, the bank statement they have tendered is for plaintiff's consumption. PW2 told the court that, all money that was paid was approved and were for services rendered. Pressed with questions, PW2 told the court that, the plaintiff was to pay money in advance to enable clearing and the raised invoices. According to PW2, the payments were for port charges, clearing fees, taxes and other collateral activities.

PW2 when shown exhibit P3a said the amount involved is TZS.48,904,592.25 as per the record and admitted that they have no proof of exactly what happened. PW2 pressed with questions admitted that, the defendant was claiming more than 340 million and disclaimed that his duties

were limited to reconciliation and other administrative matters were handled by others. As to the claim of USD 5,000.00 appear to the ledger alone and not in the bank statement as were done in advance.

Under re-examination by Ms. Sheikh, PW2 told the court that, estimates were calculated by Supply Chain Manager from the defendant. PW2 told the court that, all payments were done by bank transfer. PW2 went on to tell the court that the money paid was covering taxes and all related costs in order to release the cargo.

Next witness for the plaintiff was Mr. CHRISTIAN PAUL FELIX MKOBA (to be referred herein as '**PW3**'). PW3 under oath and through his witness statement adopted in these proceedings as his testimony in chief told the court that, he is the employee of the plaintiff as Assistant Accountant since May, 2005. The rest of PW3 testimony is a replica of PW1 and PW2 which I need not repeat here.

PW3 tendered no exhibit to substantiate the facts stated.

Under cross examination by Mr. Luteja, PW3 told the court that, he has never seen any written contract between the plaintiff and defendant. But as an accountant he has been paying approved payments for works executed.



PW3 when shown exhibit P3a and asked to show the amount of TZS.30,176,591.50 and said it is reflected on 4/2015 bank payment at page 24. The amount of TZS. 63 million is reflected in April 2015. PW3 pressed with question admitted they have no claim from Port Authority. The amount of TZS.16 million is at page 25. PW3 when shown exhibit P3b admitted the transaction was done 23/3/2020 and its purpose was as per invoices.

Under re-examination, PW3 told the court that they claimed after reconciliation. The invoices came after services but for port charges they came before services. PW3 insisted the claims in the plaint are true and need to be paid.

The last witness for the plaintiff was Mr. JAWADU SULEIMAN NDAGILE (to be referred herein as '**PW4**'). Under oath and through his witness statement adopted in these proceedings as his testimony in chief, PW4 told the court that, he has been working with the plaintiff since 1992 in different positions but now he works as Assistant Accountant. His duties were to prepare payment by cheques and online to vendors and service providers. According to PW4, every time the defendant send an invoice after going through approval process he processed payments by cheque or online and whatever



method that was used it was to be reflected in the bank statement of the plaintiff held at Standard Chartered Bank Limited.

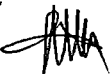
PW4 tendered no exhibit to support his testimony.

Under cross examination by Mr. Luteja, PW4 told the court that, he has been preparing payments between the years 2012 to 2017 inclusive. Pressed with question, PW4 told the court that overpayment was discovered by reconciliation division and that during the entire period he has never doubted any invoice. PW4 went on to tell the court that he has never paid more than what is in the invoice. PW4 said, he doesn't know where the error occurred and he used to pay only authorized invoices by his bosses.

Under re-examination, PW4 told the court that the Financial Manager was PW1. Further, PW4 told the court all payments were being done by cheques and online transfer.

This was the end of plaintiff's case and same was marked closed.

On the part of defendant, the defendant cum plaintiff in the counter claim had only one witness by the name of Mr. SILIVIAN HAYUMA DIYAME (herein to be referred as '**DW1**'). DW1 under oath and through his witness statement adopted in these proceedings as his testimony in chief told the



court that, as Managing Director and Chief Executive Officer of the defendant he was the point of contact between the plaintiff and defendant on all transactions. DW1 went on to tell the court that, by virtues of contracts entered and extended between the two entities the terms were; **one**, defendant was to provide clearing and forwarding services for various consignments imported to Tanzania and he was to raise invoice against services rendered, and two, the plaintiff was to pay the defendant within 30 days of the amount in the invoice from the date of service of the invoice.

According to DW1, he presented the invoices but the plaintiff did not pay them in time and in full. Examples of unpaid invoices were as follows:

- a. By the end of 2012 the plaintiff managed to pay only TZS.12,109,322.19 out of invoiced amount of TZS.28,222,367.95 leaving a balance of TZS.16,113,045.76.
- b. By the end of 2013 the plaintiff had managed to pay only TZS.122,001,327.63 out of invoiced amount of TZS.157,336,133.74 leaving unpaid balance of TZS.51,447,851.87.
- c. By the end of 2014 the plaintiff managed to pay only TZS.84,399,442.05 out of invoiced amount of TZS.122,842,096.05 leaving unpaid balance of TZS.89,890,505.87.

d. By the end of 2015 the plaintiff managed to pay only TZS.57,821,957.81 out of invoiced amount of TZS.186,626,970.67 leaving unpaid amount of TZS.218,695,518.68 which accumulated for four years of the engagement period.

Further testimony of DW1 was that, despite series of demands and reminders by the defendant/ plaintiff in the counter claim regarding delays in effecting payments of TZS.218,695,518.68, the defendant in the counter claim has not paid the plaintiff in the counter claim such amount to the date he was testifying. DW1 told the court that, he delivered the invoices in time, demanded and reminded the defendant of the delays, there is no truth that the plaintiff claims any money from the plaintiff in the counter claim and the claim of the plaintiff are intended to avoid or delay the defendant/plaintiff in the counter claim lawful accruing payments and the alleged reconciliation was fully explained to them.

DW1 insisted that no amount was paid in excess of what was supposed to be paid. DW1 equated the claim by the plaintiff as baseless and unfounded. Consequently, the defendant prayed that the plaintiff's claims be dismissed with costs. Furthermore, DW1 claimed that the counter claim be allowed as prayed in the counter claim with costs.



In disproof of the plaintiff's claims and in proof of the counter claim, DW1 tendered in evidence the following exhibits, namely:

1. Contract between parties herein dated 8.11.2011 as exhibit

D1.

2. Statement of account prepared and signed by DW1 as exhibit

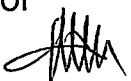
D2.

The learned advocate for the plaintiff had nothing to cross examine DW1 and nothing was as well re-examined.

This marked the end of defence case and same was marked closed.

The learned advocates for parties prayed under Rule 66(1) to file closing submissions, which prayer I granted. I have had time to go through the rivaling submissions, and I commend them for their industrious input on the suit. I will not produce them in verbatim but I will consider them along while answering the issues framed and where necessary will refer to them and where I will not it suffices to say same are accorded the weight they deserve.

Having summarized the evidence by both parties and having read the final submissions by the rivaling learned advocates for parties, the noble task of



this court now is to determine the merits and demerits of the suit and counter claim. However, it should be noted that in this suit there are some facts which are not in dispute between parties and which will assist this court to do justice. These are; **One**, there is no dispute that parties herein entered into written agreements for defendant to be the clearing and forwarding agent of the plaintiff for the period of 2011 to 2015. **Two**, there is no dispute as well that, in the entire period the parties enjoyed the services and payments done as instructed by the plaintiff and claimed by the defendant

Also it is worth to note that, each party in this suit and counter- claim claims specific damages against each other. Therefore, it is a trite law in our jurisdiction that, for a party to succeed in claim for specific damages same must be specifically pleaded and strictly proved. See the case of ZUBERI AGOSTINO vs. ANICET MUGABE [1992] TLR 137 (CAT).

However, what is in serious dispute is the amount claimed to be overpaid and remained unpaid between parties as claimed in their respective pleadings.

Now back to the issues, I will deal with each issue raised one after the other. The first issue was couched that, **whether the plaintiff overpaid**



the defendant on services rendered in the period between 1st January, 2012 to 23rd July, 2015? The plaintiff counsel in his final submissions had it that, the amount as claimed in the plaint has been proved and urged this court to grant them as prayed. While the defendant's counsel had diametrical different view that same is not proved and the plaintiff has failed to discharge her duty to the standard required in civil cases.

I have carefully gone through the pleadings, witness statements, exhibits tendered in evidence and final rivaling submission for parties' in the course of answering this issue with keen legal eyes and mind, and I am inclined to answer this issue in the affirmative. My reasons are not far-fetched. **One**, all plaintiff's witnesses testified that the overpayment as alleged and claimed was discovered after going through the ledger book of both sides and the bank statements of both USD and TZS accounts sometimes in 2015. Though no ledger books were tendered to show how that figures were arrived but scanning through **exhibit P3a** shows a closing balance of USD.5,981.00. This amount of USD.5,981.00 was specifically pleaded but was not seriously challenged by the defendant, so in my opinion the evidence in **exhibit P3a** remain unchallenged. A mere calling the plaintiff into strict proof thereof



where specific amount of money is claimed in the plaint but one would have stated that he either never received the money or if received all was utilized and the balance in dispute was other than the overpayment claimed. Rules 3-5 of Order VIII of the Civil Procedure Code,[Cap 33 R.E.2019] are very specific on how defendant is to answer allegations on the plaint and if does evasively same shall be deemed to have been admitted. In this case, the defendant did not answer the claim and in the absence of other evidence to challenge the contents of exhibit P3a, the same remain proved on balance of probability.

That said and done, I find and hold that, the plaintiff has been able to prove that, actually she overpaid the money in advance and the balance of USD.5,981.00 is proved and the plaintiff is entitled to be refunded, hence, the claim of USD.5.981.00 is hereby answered in the positive as claimed.

Two, on the claim of TZS.81,918,766.87 is equally proved on same reason as stated in the above claim of USD that, was not seriously disputed by the defendant. The contents of **exhibit P3b** shows a closing balance of TZS.81,384,236.47 and not TZS.81,918,766. This amount when traced from the pleadings was not specifically challenged and this account specifically opened for clearing and forwarding transactions.



Three, the defendant claimed that he was not paid TZS.218,695,518.63 out of services rendered since 2011 to 2015 and enumerated a number of invoices that were not paid in **exhibit D2**. This court having carefully gone through the contents of **exhibit P3b** and **exhibit D2** has discovered that all invoices between 2nd May, 2015 and 14th May, 2015 were paid for as evidenced from pages 24 to 26 of exhibit P3b but are the same invoices that are indicated in exhibit D2 to have not been paid.

On the totality of the above reasons, I am inclined to find and hold that, the plaintiff has been able to prove as well the claim of TZS.81,384,236.47 and without much ado the amount so proved is hereby granted.

In the totality of the above reasons, I agree and associate with the learned advocate for plaintiff's conclusion that the plaintiff has been able to prove her case on balance of probability.

This takes me to the second issue which was couched that **'whether the plaintiff paid for all services rendered to her by the defendant between the period of 5th November, 2011 to 23rd July, 2015?'** This issue is in respect of the counter claim. The learned advocate for defendant in the counter claim had it that, the amount of TZS.218,695,518.63 claimed by the plaintiff in the counter claim was not proved in the absence of the



bank statement to substantiate it. On the other hand, the learned advocate for the plaintiff in the counter claim had it that same was proved to the standard required in civil cases. The thrust of the learned advocate for the plaintiff in the counter claim was pleading as stated in paragraph 12 of the counter claim and paragraph 4 of the witness statement. The learned advocate for the plaintiff in the counter claim cited the case of NYERERE NYAGUE vs. REPUBLIC , CRIMINAL APPEAL NO. 67 OF 2010 quoted with approval in another case of JAFARI SALUM @ KIKOTI vs. REPUBLIC, CRIMINAL APPEAL NO.370 OF 2017, CAT in which it was held that **“as a matter of principle, a party who fails to cross examine a witness on certain matter is deemed to have accepted that matter and will be stopped from asking the trial court to disbelieve what the witness said.”** But unfortunately to the learned advocate for the plaintiff, in the counter claim no copy of the judgement was availed to this court for consideration.

I have carefully gone through the contents of exhibit D2, which is the basis upon which the learned advocate for the plaintiff in the counter claim submit to have proved the amount of TZS.218,695,518.68 but with due respect to him, my third reason when I was dealing with the first issue above in which



I made a through comparison between exhibit P3b and exhibit D2 negates the claims as being exaggerated and have no truth of the matter. From my stance above and the reasons I am taking this position are not far-fetched. **One**, it is a trite law in our jurisdiction now that parties are bound by their pleadings even without citing any decision. The defendant in the counter claim challenged and seriously disputed the amount as averred in paragraphs 8 and 11 of the written statement of defence. Therefore, once a fact is disputed, then, the part has duty to prove it whether cross examined on it or not. In this suit, even in the absence of cross examination it cannot be a warrant to grant damages that have not been proved by documentary evidence, in particular, when are specific in nature.

From the foregoing, I am inclined to find and hold that, the second issue is answered in the negative because by virtue of **exhibit P3b** all services rendered were paid for.

Next is the third issue couched that **"whether there was breach of the terms of the contract by either of the parties?"** Truly, the only terms of the contract were as evidenced in **exhibit D1** which had 13 terms and conditions but expired after two months. Assuming parties went on the same terms till 2015 because none of the parties tendered any other agreement,



but by necessary implications it was the same that enabled parties to continue with their business relationship up to 2015.

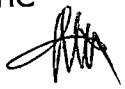
Having followed the rivaling argument for learned advocates for parties but none convinced me to find any term to have been breached by either party.

The above being the case, refund was not among the terms of the contract and since no unpaid invoice was proved, I find this issue unproved by the plaintiff and defendant respectively.

The usual last issue was couched that **"to what reliefs parties are entitled to?"** This issue will not detain this court much. Based on what I found on issue number two above, the counter claim is hereby and must be dismissed for want of evidence. The plaintiff suit is allowed to the extent explained above and prayers in paragraphs (c), (d) and (e) of the plaint are granted as prayed. Prayer (b) of the plaint is rejected.

In the fine, this court enters judgement in the following orders, namely:

- i. The plaintiff is entitled to the refund of (a) TZS.81,384,236.47 and (b) USD.5,981.00 as proved in this suit;
- ii. The plaintiff is entitled to court's interest at the rate 7% on the amount on (i) above;



- iii. The plaintiff shall have costs of this suit.
- iv. Prayer (b) in the plaint is not granted.

It is so ordered

Dated in Dar es Salaam this 13th day of August, 2021.



S.M. MAGOIGA

JUDGE

13/08/202