

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

COMMERCIAL CASE NO.12 OF 2021

REMY MUTAMBA NGOIE.....1ST PLAINTIFF
CHRISTIAN LUSAMESO VINDU.....2ND PLAINTIFF

VERSUS

TIMOTHY FRANCIS MWANDIKO.....1ST DEFENDANT
GOLDEN PAUL MWANDIKO.....2ND DEFENDANT
AUGUSTINO MWANDIKO GWANGWALA.....3RD DEFENDANT
EILENICHI ELIDAIMA MASAWA.....4TH DEFENDANT
MWANDIKO MINING AGENCY CO.,LTD.....5TH DEFENDANT

*Last Order: 06th OCTOBER 2021
Judgement: 26th NOVEMBER 2021*

DEFAULT JUDGEMENT

NANGELA, J.:

In this suit the Plaintiffs sued the jointly and severally Defendants praying for judgement and decree as follows, that:

1. The Defendants be compelled to refund **Tanzanian Shillings 40,321,000/=** and **USD (\$) 91,186.68.**
2. The Defendants be compelled to return semi refined gold weighing

(gross weight) of 12.40kg or value equivalent to it in USD (\$).

3. The Defendants be ordered to pay specific damages for breach of agreement, loss of use and profit to the tune of **TZS 40,321,000** and **USD 91,186.68**.
4. The Defendants be ordered to pay interest over the decretal sum at a commercial rate of 30% per month from the first transaction date on 30th November 2019 to the date of judgment.
5. The Defendants be ordered to pay general damages as may be assessed by this Honourable Court.
6. The Defendants be ordered to pay interest at Court rate of 12% from the date of judgement to the date of full payment of the decretal sum.
7. Costs incidental to this suit.
8. Any other relief(s) as this Honourable Court may deem fit and just to grant in favour of the Plaintiffs.

On the 3rd of March 2021, this suit was called on for mention before me for the first time. On the material date, Mr Philemon Msegu, learned advocate, appeared in Court representing the Plaintiffs. The Defendant were absent

although it was submitted that since 3rd of February 2021, the Plaintiffs has served the 1st Defendant with the Plaint though Proxima-Attorneys. A prayer was made, thus, and I which I readily allowed, to have the rest served by way of a substituted service mode. The suit was fixed for a mention in chambers on 15th April 2021.

On the material date, i.e., 15/4/2021, Mr Simon Shao, learned advocate, appeared holding brief for Mr Msegu, Advocate for the Plaintiffs. Mr Shao did as well held the brief of Mr Bais, learned advocate for the 1st Defendant. The 2nd to 5th Defendants were absent in Court. Mr Shao informed the Court that the order issued on the day 3rd of March 2021 was complied with and a substituted service mode was employed to effect service in respect of the 2nd to 5th Defendants.

He prayed, thus, to proceed ex-parte against the 2nd to 5th Defendants. He also prayed for a date within which the Court will convene for the first pre-trial conference and scheduling orders. This Court granted both prayers and set the 8th of June 2021, at 9:30 am, as the date for the first pre-trial conference (PTC).

However, on 8th June 2021, the Plaintiffs' advocate, Mr Msegu appeared for the first PTC. The 1st Defendant was absent and the case against the rest of the Defendants was to be proceeded ex-parte. Mr Msegu informed the Court that the 1st Defendant was absent and

that his advocate has withdrawn from representing him. He prayed to proceed with the matter under Rule 31(1) (b) of the *High Court (Commercial Division) Procedure Rules, 2012, GN 250 of 2012 (as amended 2019)*.

However, noting that the advocate for the 1st Defendant had withdrawn his services, and since this Court was not aware regarding whether the learned advocate earlier representing the 1st Defendant had informed him about that, the suit should be adjourned to another date. The 13th of July 2021, at 9.00am, was appointed, thus, a date fixed for next mention of the suit.

On the 13th day of July 2021, Mr Shao appeared in Court holding brief for Mr Msegu, the advocate for the Plaintiff. The 1st Defendant was absent. Mr Shao submitted that, since the matter was scheduled for necessary orders, the Plaintiffs were reiterating the prayers made on the 8th of June 2021.

He also prayed for another date and undertook to inform the 1st Defendant either to come before the Court or choose to be represented by another advocate of his choice. This Court made the following orders:

1. Summons to issue to the 1st Defendant to appear in person or through an advocate of his own choice.

2. The Plaintiff to inform the 1st Defendant about his order to appear as per the undertaking made.
3. Mention for orders on 17th August 2021 at 9:30 am.

On the 17th August 2021, Mr Philemon Msegu appeared in Court for the Plaintiffs. He informed the Court that the whereabouts of the 1st Defendant has not been located and the case against the 2nd to 5th Defendants proceeds ex-parte as per the orders of this Court. He prayed the summons be served on the 1st Defendant by way of a substituted service. I granted the prayer and fixed the suit for mention on the 14th September 2021 at 1.30 pm.

On the appointed date, Mr Msegu appeared in Court for the Plaintiffs and informed the Court that, the orders of this Court issued on the 17th day of August 2021 was duly implemented since 22nd day of August 2021. He submitted that, up to the day he was appearing in Court, i.e., 14th day of September 2021, nothing was served upon him as the WSD of the Defendant.

He submitted further, that, since the case against the 2nd to 5th Defendants was as well proceeding ex-parte, the Plaintiffs opt for a default judgment against all Defendants. As such he prayed to file Form No.1, under Rule 22(a) of the *High Court (Commercial Division)*

Procedure Rules, 2012 (GN. 250 of 2012 (as amended by GN. No. 107 of 2019)).

Upon such prayers, this Court issued the following orders:

1. That, the prayer to file Form No.1 is hereby granted. The same be filed on or before 17th September 2021.
2. Mention on 6th October 2021 at 9.00 am.

When Mr Msegu appeared on the 06th day of October, he informed this Court that, the Plaintiffs have complied with the Orders of this Court dated 14th September 2021. I therefore set today (26th of November 2021, as the date for issue the default judgment.

I have gone through the Plaintiffs' Form No. 1 which was filed in this Court together with an affidavit of one Remy Mutamba Ngoie together with its various annexure (whose original copies were as well availed to the Court). As it was stated by this Court in the case of **Habib Africa Bank vs. ZamZam Oil Co. Ltd and 5 Others**, Commercial Case No.147 of 2019 (unreported), in essence:

"the filing of Form No. 1, seeking for a Default Judgment in favour of Plaintiff, is a matter of exercise of statutory right, open to the Plaintiff

in a case where the Defendant(s)
has declined to defend his case.”

Such particular right is provided for under rule 22 (1) of the High Court (Commercial Division) procedure Rules, 2012 (as amended, 2019). The said rule 22 (1) provides as follows:

“Where any party required to file written statement of defence fails to do so within the specified period or where such period has been extended accordance with sub-rule (2) of rule 20, within the period of such extension, the court may, upon proof of 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 claim, enter judgment in favour of the plaintiff.”

As it was narrated here above, all Defendants failed to appear in Court and none of them filed a written statement of defence to contest the allegations raised by the Plaintiff in the Plaint. There has as well been sufficient proof that the Defendants were served by way of substituted service. The 1st Defendant even entered appearance through an advocate but later he absconded. Efforts to serve summons to him was futile including substituted service mode as he never appeared in Court.

In any case, I am satisfied that the Plaintiffs were entitled to file Form No.1 given that all Defendants have failed to file their respective statements of defence. That being said, I have gone through Form No.1 and the affidavit which was filed to prove the claims.

In my view, taking into account the various documents annexed as forming part of the requisite proof, I am satisfied that the Plaintiffs have partially discharged their obligation as per Rule 22(1) of the High Court (Commercial Division) procedure Rules, 2012 (as amended, 2019). I hold that they have partially done so because, one of the prayers by the Plaintiffs is that they should be paid specific damages which they have not endeavoured to prove.

In law, specific damages must not only be pleaded but must as well be strictly proved. The Court of Appeal decisions in the case of **Zuberi Augustino Mugabe vs. Anicet Mugabe** [1992] T.L.R. 137 and that of **Xiubao Cai and Maxinsure (T) Ltd vs. Mohamed Said Kiaratu**, Civil Appeal No.87 of 2020, are quite illustrative on that. In the case of **Zuberi Augustino Mugabe** (supra) the Court of Appeal was of the view that:

“It is trite law, and we need not cite any authority, that special damages must be specifically pleaded and proved.”

It is also a settled legal position as stated by the Court of Appeal in the case of **Stanbic Bank Tanzania Ltd vs. Abercrombie & Kente (T) Limited**, Civil Appeal No.21 of 2001 (CAT) (unreported), that, a claim for specific or special damages must not only be **pleaded** but also its **particulars** must be specifically stated and strictly **proved**. In view of that, the Plaintiffs failure plead, particularise and prove the claim for specific damage, makes their prayer number (iii) for payment of specific damages to the tune of **TZS 40,321,000/=** and **USD (\$)** **91,186.68** to be rejected.

It suffices to state, therefore, that, save from the claim on payment of specific damages, since this Court is satisfied that there has been compliance with Rule 22(1) of the High Court (Commercial Division) procedure Rules, 2012 (as amended, 2019), and given that the evidence adduced establishes the claim for refund of **TZS 40,321,000/=** and **USD (\$)** **91,186.68**, nothing will stop the Court from entering a default judgement in favour of the Plaintiffs.

On the other hand, the Plaintiffs have as prayed to be awarded general damages. Looking at the evidence available generally, there is no dispute that the Plaintiffs have suffered general damages and inconvenience resulting from the breach of the agreement. Legally speaking, unlike specific damages which need to be

pleaded, particularized and proved, general damages are not proved.

Generally, however, to be eligible for general damages the Plaintiff should have suffered loss or inconvenience to justify the award. See the Ugandan case of **UCB vs. Kigozi** [2002] EA 305. In the case of **Southern Engineering Company Ltd vs. Mulia** [1986-1989] EA 541] it was as well made clear, as a trite law, that, the measurement of the quantum of damages is a matter for the discretion of the individual judge which of course has to be exercised judiciously. Turning back to this suit, I am indeed satisfied, based on the available evidence submitted to the Court, that, the Plaintiffs have suffered under the hands of the Defendants, and are entitled to be paid general damages, which I hereby assess to be amounting to **TZS 20,000,000/-**.

Finally, it is worth noting that, in terms of Rule 22 (2) (a) and (b) High Court (Commercial Division) Procedure Rules, 2012 (as amended, 2019), any decree emanating from a default judgement cannot be executed until after the decree holder has, within a period of ten (10) days from the date of the default judgment, publish a copy of it (the decree) in at least two (2) widely circulated newspapers in the country and after a period of twenty one days (21), from the date of expiry of the said ten (10) days, has elapsed.

In view of the above, this Court hereby enters a default judgement and decree in favour of the Plaintiffs and makes the following orders, that:

1. The Defendants are hereby ordered to refund **Tanzanian Shillings 40,321,000/=** and **USD (\$) 91,186.68** to the Plaintiffs.
2. The Defendants are hereby ordered to return semi refined gold weighing (gross weight) of **12.40kg** or value equivalent to it in USD (\$).
3. The Defendants are ordered to pay interest over the sum sated in No.1 above at a commercial rate of **17%** per annum from the first transaction date on 30th November 2019 to the date of judgment.
4. The Defendants to pay the Plaintiffs **TZS 20,000,000** as general damages.
5. The Defendants are hereby ordered to pay interest at Court rate of 12% from the date of judgement to the date of full payment of the decretal sum.
6. The Defendants are to pay all costs incidental to this suit.

Further orders:

7. That, in terms of Rule 22 (2) (a) and (b) High Court (Commercial Division) Procedure Rules, 2012 (as amended,

2019), the Court makes further orders that the decree emanating from this suit shall not be executed unless the decree holder has, within a period of ten (10) days from the date of this default judgment, publish a copy of it (the decree) in at least two (2) widely circulated newspapers in the country 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 26th Day of
November, 2021**



Deo John Nangela

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HON. DEO JOHN NANGELA
JUDGE