

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**COMMERCIAL CASE NO. 135 OF 2018.**

**TIANE TANZANIA LIMITED..... PLAINTIFF**

**VERSUS**

**PRO TRANS LIMITED COMPANY..... DEFENDANT**

*Date of Last order: 8/11/2021*

*Date of Judgement: 10/12/2021*

**JUDGEMENT**

**MAGOIGA, J.**

The plaintiff, **TIANE TANZANIA 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) A declaration that defendant is in breach of the hire purchase agreement dated 9<sup>th</sup> December, 2016 by its failure to discharge its duties and obligations in accordance with the agreement.
- (b) The defendant be ordered to immediately pay to the plaintiff the sum of United States Dollars One Hundred Three Thousand and Sixty-Five (USD.103 065) being outstanding of purchase price for two tractor truck vehicles on hire purchase agreement.



- (c) Payments of interest at the rate of (2% per month) chargeable from the date of filing of this suit to the date of judgement thereof
- (d) Payment of interest (24% per annum) on the on decretal amount from the of the judgment to the date of judgement thereof.
- (e) Payment of general damages to cover the loss the plaintiff suffered for the defendant failure to discharge its obligations under the said agreement,
- (f) Defendant to pay the plaintiff costs of this suit.
- (g) Any relief(s) that the honourable court may deem fit to grant.

Upon being served with the plaint, the defendant filed written statement of defence disputing all plaintiff claims on the ground that, plaintiff supplied only one Howo tractor truck vehicle to defendant. On that note defendant invited the plaintiff into strict proof of her claims thereof and eventually prayed that the suit be dismissed with costs.

The facts as to the genesis of this suit are not complicated. I find it apposite to narrate them for better understandings the gist of this suit. According to the plaint it was averred that on 9<sup>th</sup> September, 2016 parties herein above entered into Hire purchase agreement, whereby defendant promised to pay USD 130,000,00 as a purchase price for Two Howo



tractor trucks after delivery of tracks. Further facts go that, the said purchase price was to be paid in monthly instalments to the tune of USD. 5000 per month for a period of twenty six (26) months from 15<sup>th</sup> October 2016 to 15<sup>th</sup> November, 2018 inclusive. It was an agreement of the parties that, defendant was to keep sufficient fund into his bank account to honour its promissory note issued by the plaintiff immediately upon their presentation by the plaintiff on their respective payment due date and time for payment was of essence.

Among other terms of the contract it was agreed that, failure to pay any monthly instalment, the seller is entitled to claim such instalment payments along with cumulative interest of 2% till the date of actual payments. Unfortunately, plaintiff defaulted to make good payments as agreed. This state of affairs, instigated several communications but were all vain, necessitating the plaintiff to institute this instant suit for relief claimed in the plaint.

The plaintiff at all material time has been enjoying the legal services of Dr. Onesmo Michael Kyauke, learned advocate. On the other adversary part, defendant at all material time was enjoying the legal service of Ms. Judith Olomi and Mr. Moses Mvungi, learned advocates



Before hearing started, the following issues were framed, agreed and recorded between the parties for determination of this suit, namely; -

1. How many tracks were supplied by the plaintiff to the defendant?
2. Whether or not the defendant is in breach of the hire purchase agreement dated 9/9/2016
3. To what relief(s) are the parties are entitled.

The plaintiff in proof of her case, called one witness, one, **Mr. LAURIN MARTIN** (to be referred in these proceedings as "**PW1**"). PW1 under oath and through his witness statement adopted in these proceedings as his testimony in chief told the court that, he is the General Manager of plaintiff, hence, conversant with the fact of this case.

PW1 went on to tell the court that, sometimes in August,2016 defendant through purchase order No PT-O1/2508/2016 dated 25<sup>th</sup> August,2016 requested plaintiff to supply two new brand Howo Tractor truck vehicles. Following the request, plaintiff and defendant entered into hire purchase agreement, whereby it was agreed that, plaintiff to supply two Howo tractor trucks at the sale price of USD. 65,000 for each tractor making the total sale price for the two tracks to be USD.130,000.00 inclusive of customs duty, VAT and all other charges.



It was further testimony of PW1 that, the key terms of agreement were:-

- i. The defendant to pay the plaintiff USD.5,000 each month through postdated cheques of the total price in 26 equal monthly instalments through signed promissory note.
- ii. Defendant was to keep sufficient fund into his bank account to honour its promissory note issued by the plaintiff immediately upon their presentation by the plaintiff on their respective payment due date.
- iii. The due dates for each instalment payment were set out and agreed.
- iv. That, it was agreed that time is of essence for purposes of making the instalment payment and delivery of the goods and any default to pay the monthly instalment would attract the interest of 2% per month until actual payments and realization along with the bank debt charges.
- v. In case of default to make the payment for the monthly instalment for three consecutive months would entitle the plaintiff seller to demand by giving a seven days demand notice to the defendant buyer ,for immediate payments of the entire unpaid /outstanding purchase price together with interest at 2%



per month from the date of respective month falling due until the date of actual payment and realization.

PW1 went on with his testimony by telling the court that, on 9<sup>th</sup> September, 2016 the plaintiff supplied two brand new Howo Tractor truck vehicles and subsequently raised a tax invoice in respect of the two tractors.

However, PW1 told the court that, some particulars were missing in the second delivery note that is why they have tendered motor vehicle registration card, for the court to ascertain the particulars of the second vehicle. Testifying further on the second Howo tractor truck, PW1 told the court that, before delivered the defendant technical team inspected the both tractors and were satisfied on the correctness, genuineness of information, specification of the tracks in terms of quality, model, year of manufacturing and other specification.

Further testimony of PW1 was that, at beginning defendant successfully paid monthly instalment on the due date in accordance with the agreement as from 15<sup>th</sup> October, 2016 to 15<sup>th</sup> April, 2017. Unfortunately, from 15<sup>th</sup> May, 2017 the defendant failed to pay installment plus interest to the months which fall due. According to PW1, defendant breached clause 4.1.1 of the agreement because for eight months defendant failed



to pay the amount. However, the plaintiff in good faith informed the defendant on the default and issued various demand letters for payment of the debt which kept on accruing interest on monthly basis .More so, PW1 told the court that plaintiff issued a notice of arbitration but defendant did not cooperate and refused either to approve the appointed arbitrator.

PW1 went on to tell the court that, despite all efforts made by the plaintiff, the defendant failed and /or neglected to pay the outstanding amount which as of 18<sup>th</sup> October,2018 stood at USD 103,065 which being the outstanding purchase price for two tractors track vehicles on hire purchase arrangement plus accrued interest at the rate of 2% per month from the date of default 15<sup>th</sup> May, 2017 to 18<sup>th</sup> October,2018.

On the basis of the above testimony, PW1 prayed this court be pleased to enter judgement and decree against the defendant as prayed in the plaint.

In proof of the above facts, PW1 tendered the following exhibits namely:-

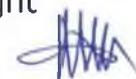
- i. Purchase order dated 25/8/2016 as **exhibit P1;**
- ii. Hire purchase agreement dated 9/9/2016 as **exhibit P2;**
- iii. Customer delivery receipt dated 9/9/2016 as **exhibit P3;**
- iv. New vehicle tax invoice dated 5/9/2016 as **exhibit P4;**



- v. Motor Vehicle registration card No 7202529 dated 6/9/2016 as **exhibit P5;**
- vi. Letter dated 10/5/2018 as **exhibit P6.**

Under cross -examination by Ms. Ulomi, PW1 told the court that, he is General Manager of the plaintiff and an overall in charge of the operation of the company. PW1 went on to tell the court that he was present when the contract was being negotiated but it was signed by sales officer as a representative of the company. When pressed with question on how many vehicles were supplied, PW1 told the court that defendant was supplied with two Howo tractor truck vehicles and the payment was to be made for 26 months. However, PW1 told the court that only 8 instalments have been paid out of 26 installments.

When pressed with more questions PW1 told the court that, the amount which has been paid by defendant is USD.40,000 out of 130000. Therefore, according to PW1, the amount claimed is USD 90000 plus interest of 2% of all months in which defendant was in default. PW1 when shown exhibit P3 he recognized it and told the court that, according to exhibit P3 only one Howo tractor truck vehicle was supplied but he was quick to point that, two vehicles were supplied to defendant but some particulars of the delivery note were missing that's why they have brought



motor vehicle registration card of one motor vehicle which its delivery note is not here.

PW1 went on to tell the court that, since 2017 defendant was in breach of the contract as defendant was able to repay only USD.4000 out of 130000 which is clear breach of the contract. PW1 went on to tell the court that, the two cheques which were deposited for payments of the amount due bounced. According to PW1, the amount claimed is USD 103,520 which is an outstanding purchase price plus interest.

When PW1 shown exhibit P6 , told the court that it's a reply to demand letter in which defendant admitted that he is indebted to the plaintiff in the tune of USD.90,000. PW1 when asked on the bank details he was able to tell the court that, defendant has bank details all payment of the purchase price were being made but pointed that, he does not recall if the hire purchase agreement had bank details. PW1 when asked on the principle of force majeure he admitted to know it and told the court that, it was among terms and condition of the agreement. PW1 quickly pointed out that COVID-19 cannot be taken as a ground for defendant failure to pay the purchase price because its outbreak was in 2019 when defendant was already in default as last payment was supposed on November,2018.

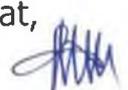


In addition, PW1 told the court that they have never contributed for defendant's failure to pay the debt neither defendant has never said he was forced by force majeure.

Under re-examination by Dr. Kyauke, PW1 when shown exhibit P2 told the court that, the total price debt was USD.130000. PW1 was able to tell the court that, Pro Trans was to pay the money through the bank as he has the bank details as contained in the contract. PW1 when further shown exhibit P3 and P5 told the court that those exhibits show different particulars of two Howo tractor truck vehicles which were ordered by the defendant and delivered to defendants. PW1 went on to tell the court that the proof of supply of two motor vehicle are registration card and delivery note . PW1 when shows exhibit P6 recognized and insisted that, it is a letter of reply from the defendant admitting the debt of USD.90000.

This marked the end of hearing of plaintiff case and the same was dully marked closed.

In defence, the only witness was Mr. **HUSSEIN AKBAR KERMALI**(to be referred in these proceedings as '**DW1**'). DW1 under affirmation and through his witness statement adopted in the proceedings as his testimony in chief told the court that, he is the director of the defendant, hence, conversant with the case. DW1 went on to tell the court that,



defendant and plaintiff entered into hire purchase agreement, whereby plaintiff was supposed to supply two Howo tractor trucks but plaintiff supplied only one howo tractor truck instead of two tractors agreed.

It was a testimony of DW1 that, the agreed purchase price for each howo tractor truck vehicle was USD.65000 and since plaintiff supplied one vehicle, then defendant was supposed to pay plaintiff USD.65000 and not USD.130000 because only one tractor was supplied. It was further testimony of the DW1 that, since the defendant has paid USD.40000 in respect of one vehicle supplied out of USD.65000, then, the remaining outstanding balance was USD.25000 and not USD 103, 520 as claimed by the plaintiff.

DW1 admitted that, he defaulted in making monthly instalment payments in respect of single tractor supplied as agreed. However, he was quick to point out that his failure to pay the outstanding balance was attributed by three reasons these are:- **one**, defendant was experiencing financial instability due well-known hardship in transport sector business since 2016. **Two**, plaintiff rejected payment through cheque, at the same time refused to avail defendant bank details. **Three**, that plaintiff failed to supply second Howo tractor truck vehicle as agreed. According to DW1,



the above three reasons attributed his failure to pay the remaining balance.

DW1 went on to tell the court that, the defendant approached plaintiff and requested for restructure of the instalment or negotiate an amicable settlement but plaintiff was not ready to settle the matter neither to restructure the payment of instalment .On the foregoing reasons DW1 prayed and urged this court to dismiss the instant suit with costs.

In proof of what has been testified above, DW2 requested the court that **exhibit P2 and P6** to form part of defence case and the prayer was granted.

Under cross -examination by Dr. Kyauke, DW1 when shown exhibit P5, told the court that, the chassis No. of exhibit P5 is L225CLS BIFD 115425 which is owned by the defendant. DW1 insisted that he never received the second motor vehicle despite being agreed and ordered two Howo tractor truck vehicles.

DW1 when asked on the registration of the vehicle, told the court that, the defendant is the one who registered the motor vehicle after plaintiff supplied it. DW1 when pressed with questions he denied his previous statement that delivery was done. DW1 when shown exhibit P3 recognized it and told the court that chassis numbers



L225CNSBSFD116451 and chassis numbers in exhibit P5 indicates that there are two different Motor vehicles. DW1 shown exhibit P2 recognized it and told the court that it's a sale agreement and the total contract price was USD.130,000 for two motor vehicles, which was supposed to be paying USD 5000 per every month but he has paid USD.40000.

DW1 when show an email he admitted that it is an email from her company but he does not want it to be admitted in evidence as exhibit because they have never said they were not given two motor vehicles.

Under re- examination by Ms. Ulomi, DW1 when shown exhibit P5 and told the court that exhibit P5 bears the name of Pro-Trans Ltd. DW1 when show exhibit P6 recognized it and told the court that it is a reply letter to demand notice to the debt between the parties herein which involve motor vehicles.

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

The learned advocated for parties prayed to exercise their rights under rule 66(1) of this court Rules to file final closing submissions. I granted the prayer. I express my sincere gratitude to them for their industrious input on the matter. I will, in the course of answering issues, consider



them but will not be able to produce them verbatim but it suffices to say the same were well taken in determining this suit.

However, before going into issues from the pleadings and testimonies of respective witnesses for parties and exhibits tendered in this suit, there are some of the facts which are not in dispute. I find it apposite to state them because will help this court in answering issues in respect of this legal dispute. These are, **One**, there is no dispute that on 9<sup>th</sup> September 2016 parties herein entered into hire purchase agreement for two Howo tracks. **Two**, equally no dispute that, the quoted price was USD 65000 for each truck making the purchase price to be USD 130, 000. **Three** there is no dispute that defendant has defaulted in payment of the outstanding debt. However, in the circumstances what is serious dispute between parties is the how many vehicles were supplied and who breached the hire purchase agreement between the parties.

The first issue was couched that, "**how many tracks were supplied by plaintiff to defendant.**" The defendant counsel is in strong submission that, plaintiff supplied only one Howo tractor track vehicle on the ground that there was no delivery note to prove that plaintiff received the second motor vehicle. In rebuttal, the plaintiff submitted that the evidence on record sufficiently prove that two tracks vehicle were supplied to the



defendant, if at all the second tractor was not supplied why at the first instance it did not sue for late delivery as clause 4.2 allow defendant to claim damages for late supply, therefore, what defendant is claiming now is an afterthought.

Having passionately considered this issue right from the pleadings, testimonies of the parties, exhibits tendered and final closing rivalling submission, I am inclined to answer this issue in affirmative that two Howo tractor truck vehicles were supplied to defendant. The reasons why I am taking this stance are not far-fetched. **One**, the delivery note is not alone conclusive evidence that, the second Howo tractor truck vehicle was not delivered to defendants. Delivery note could only add, support or corroborate all other evidence which negate the fact that, there was no delivery of the vehicle, unfortunately the payment schedule indicates that defendant was making payment on two vehicles. Not only that, but also if only one vehicle was supplied defendant was supposed to be paying USD 25000. **Two**, exhibit P6 which were never disputed during hearing clearly explains and indicates that, the outstanding balance was on two vehicles as after careful perusal of exhibits P6, I discovered that defendant under paragraph one of exhibit P6 defendant acknowledged that the outstanding debt is USD.90000, in a normal circumstance defendant could



not acknowledge the debt of USD 90000 if at all they were supplied with one motor vehicle because the price of one Howo tractor track vehicle was USD.65000. Therefore, it is my considered opinion that, the acknowledgment of USD 90000 it's a clear indication that, defendant was making repayment on the two vehicles and not otherwise. **Three**, the allegation that plaintiff did not supply the second Howo tractor truck vehicle, it is an afterthought as it come to mind of defendant after plaintiff instituted this suit. I am saying so, because under clause 4.2 of the hire purchase agreement (**exhibit P2**) defendant had the right to claim damages for late delivery but did not claim for damaged either did not made any complaint in the communication with the plaintiff to the effect that only one tractor truck vehicle was supplied then raising it at this juncture is an afterthought.

In the totality of the above reasons the first issue must be and is hereby answered in affirmative that two Howo tractor trucks were supplied by the plaintiff to defendant.

The next issuethus was couched that, **whether or not the defendant is in breach of the hire purchase agreement dated 9<sup>th</sup> September,2016?** The learned counsel for plaintiff submitted that, defendant was supposed to pay USD.5,000 for 26 monthly instalments



from 15<sup>th</sup> October,2016 to 15<sup>th</sup> November,2018 but to date defendant has not fulfilled his obligation, hence, breached the hire purchase agreement. In response counsel for defendant, submitted that failure of the plaintiff to supply the second trucks amount to breach of contract.

Having passionately considered the rivalling arguments of the learned advocates for the parties, pleadings and exhibits tendered in support of this issue.It is settled legal position that, a breach of contract occurs when one party in a binding agreement fails to perform his obligation, according to the terms of the contract. The provisions of section 37 of the Law of Contract Act, [Cap 345 R.E 2019] underscore on the point. For easy of reference, I produce it hereunder: -

**"Section 37. "The parties to the contract must perform their respective promises, unless such performance is dispensed with or excused under the provision of this act or by any other law."**

Guided by the above legal position, at this juncture the question for determination is there any such failure on the party of the defendant or plaintiff. After carefully examination of the testimony of both parties, and according to the exhibit P2, which is loud and clear under clause 2.3.2 that defendant was supposed to clear the purchase price on 15<sup>th</sup>

November,2018, last day for payment of last instalment up to institution of this suit, the defendant was still indebted to plaintiff.The issue of failure to pay the installments as agreed is/was admitted by the defendant in **exhibit P6** under paragraph 1, when he was asking a clarification of the debt of USD 103,520 he indicated that the outstanding balance is USD 90000, hence, bringing to one but conclusion that defendant is in breach of the terms and conditions of the Hire Purchase Agreement entered on 9<sup>th</sup> September,2016. The assertion that, the plaintiff attributed the breach of contract is baseless and has no any factual and legal basis because it come to mind of the defendant after plaintiff instituted this suit.

On the above note, it brings us to a conclusion that, the defendant allegations that, the plaintiff is the one who breached the contract because did not supply the second motor vehicle, a bare allegation without any support because plaintiff fully fulfilled his obligations to the contract.

Therefore, issue number two as for the reasons stated above is answered in the affirmative that the defendant breached the said Hire Purchase Agreement because purchase price have not been paid in full as agreed under clause 3.1 of the Hire and Purchase Agreement.



The last issue is **to what reliefs are the parties entitled.** Since I have found and ruled that, plaintiff supplied two Howo Tractor trucks vehicle and that the defendant was in breach of the fundamental terms of the contract by failure to pay the installments as agreed, I find this suit proved to the standard required in civil proceedings against defendant.

That said, I proceed to grant the reliefs as follows: -

- i. I order payment of USD. 103,065 being the outstanding purchase price for two tractor truck vehicles.
- ii. Payment of interest on (I) above at the commercial rate of 2% chargeable from the date filling to the date of judgement;
- iii. Payment of interest on the decretal sum at court's rate of 7% from the date of judgement to the date of full settlement of the outstanding debt;
- iv. Payment of general damages to the tune of TZS.5,000,000.00
- v. The plaintiff shall have costs of this suit

It is so ordered.

Dated at Dar es Salaam this 10<sup>th</sup> day of December, 2021.



  
**S. M. MAGOIGA**

**JUDGE**

**10/12/2021**