

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

AT DAR ES SALAAM

COMMERCIAL CASE NO. 137 OF 2019

EPSOM LIMITED PLAINTIFF

VERSUS

TORYA MACHINES LIMITED DEFENDANT

Date of last Order: 06/04/2022

Date of Judgement: 29/04/2022

JUDGEMENT.

MAGOIGA, J.

The plaintiff, EPSOM LIMITED by way of plaint instituted the instant suit against the above named defendants claiming jointly and severally for judgement and decree in the following orders, namely:

- a. Special damages of United State Dollars Thirty-One Thousand Five Hundred (USD.31,500);
- b. Compensation of Legal fees amounting to United State Dollars Two Thousand One Hundred and Ninety only (USD.2,190);
- c. General damages to be assessed by the court;
- d. Commercial interest of Twenty One percent (21%) of the decretal sum from the date of filing the suit to the date of judgement;



- e. Interest at court's rate of Twelve per cent (12%) from the date of judgement till payment in full;
- f. Costs of the suit and any other available reliefs that the court deem fit and just to grant against the defendants;
- g. An order for the lift of corporate veil to the 2nd defendant.

Upon being served with the plaint, the defendants filed a joint written statement of defence disputing the plaintiff's claims. And, on settlement agreement it was argued same signed under coercion at central police under police and threats to be killed by Mr. Dharmesh a friend of Mr. Harish Patel, Managing Director of the plaintiff and as such prayed that the instant suit be dismissed with costs.

The facts of this suit are that on 18th April, 2017 plaintiff and 1st defendant entered into purchase agreement of used equipment at the price of USD.25,000.00 (Manitou Telehandler Forklift MT.742, serial No.218998, chassis No.1218998 with registration No.T245 BXH. Under that arrangement, the plaintiff paid the purchase price plus transportation costs of the equipment to Geita on 28th day of April, 2017. Facts went on that, the equipment arrived in Geita on 10th day of May, 2017 and upon its



inspection it was found that, it was not in good condition and both parties agreed be returned to the seller, and, it was, indeed, returned.

Further facts were that, defendants' promises to refund the money but were promises in vain. More communications and follow ups ended into parties entering into settlement agreement dated 13th day of October, 2018. Nevertheless, no refund was made and the plaintiff instituted the instant suit claiming the reliefs as contained in the plaint.

On the part of the defendants state that the equipment was sold under as is where is, WITH ALL FAULTS basis and the buying was preceded by inspection. Further disputing the claims of the plaintiff, the defendants stated that settlement agreement was obtained under coercion before police and threats to be killed by the Mr. Dharmesh a friend of Patel as such null and void abi initio. Basically, the defendants disputed communicating with the plaintiff director and prayed that the suit be dismissed with costs.

It is against the above background, this court, after hearing parties on merits is giving this judgement.

The plaintiff at all material has been enjoying the legal services of Ms. Winjanet Lema, learned advocate, whereas, the defendants have been



enjoying the legal services of Dar es Salaam based legal clinic of Breakthrough Attorneys and later to Messrs. Gabriel Simon Mnyele and Lucas Myula, learned advocates.

Before hearing took off, parties learned advocates proposed and prayed that the following issues be recorded for the determination of this suit.

These are:-

1. Whether the plaintiff has any good or plausible reason to return the equipment to the defendants under the terms and conditions of contract of sale;
2. Whether the plaintiff is entitled to refund of the purchased price pursuant to the return of equipment and acknowledgement of receipt by the defendants;
3. Whether the settlement embodied in annexure EL4 in the plaint was procured properly;
4. If the answer to issue No.3 is answered in the affirmative, whether the defendant breached the terms of the said settlement agreement;
5. What reliefs are parties entitled to.

The plaintiff in proof of her case called one witness, one, HARISH PATEL (to be referred in these proceedings as '**PW1**'). PW1 under affirmation and

through his witness statement adopted in these proceedings as his testimony in chief told the court, he is the Managing Director of the plaintiff and that the plaintiff's claim is for breach of contract whereas the plaintiff seeks the orders as prayed in the plaint. According to PW1, the plaintiff and defendant had a business relationship that was established and built on sale agreement effected by both parties on 18th April, 2017 for the purchase of used equipment (Manitou Telehandler Forklift MT.742 serial numbers 218998 Chassis No.1218998 (T425 BXH) at a price of USD.25,000.00 and transportation costs of USD.2000.00 which was paid inclusive of VAT.

PW1 went on to testify that, upon effecting payments done on 28th day of April, 2017, the equipment was transported to Geita and arrived on 10th day of May, 2017. Upon its arrival, PW1 told the court that it was inspected and it was observed that it was not in good running condition and after communication between parties it was resolved it be returned to the defendants. PW1 told the court that on 18th day of May, 2017, the 1st defendant wrote a letter to the plaintiff to confirm and acknowledging the receipt of the returned equipment and the plaintiff was not satisfied with the condition of the equipment and the defendants committed themselves



to refund the paid amount of United State Dollars Twenty Five Thousand to the plaintiff.

PW1 went on to tell the court that despite various communications and promises by the defendants to refund the money but were all in vain. In the circumstances, on 13th day of October, 2018 parties entered into settlement agreement in which parties agreed and the defendants committed to refund the money in two installments of USD.10,000.00 to be paid on 31st October, 2018 and 21,500 to be paid on 30th November, 2018 making a total refund of USD.31,500.00 and as security of such commitment, the defendants delivered original motor vehicle registration card for Groove Cole Crane with registration No.T868 CFT belonging to the 1st defendant.

According to PW1, no refund was effected as agreed. This necessitated the issuance of several demand notices but which were not heeded to, hence this suit. PW1 prayed the prayers as contained in the prayer clause in the plaint be granted as prayed.

PW1 in proof of the case for the plaintiff case tendered the following exhibits:-

1. Sale Agreement dated 24/04/2017 as **exhibit P1.**



2. Affidavit for authentication of electronic evidence and swift copy of transfer of money as **exhibit P2a-b.**
3. Equipment observation document on the condition of the machine **exhibit P3.**
4. Affidavit of authentication of electronic evidence and 11 emails as **exhibit P4a-l.**
5. Settlement Agreement dated 13/10/2018 as **exhibit P5.**
6. A certified Motor Vehicle registration card T868CFT as **exhibit P6.**
7. Demand Notice dated 8/05/2019 as **exhibit P7.**
8. Demand Notice dated 11/06/2019 and its reply dated 23/05/2019 collectively as **exhibit P8a-b.**

PW1 under cross examination by Mr. Mnyele, told the court that he was involved in the purchase of the machine and is the one who commissioned Ronald Okare to inspect the machine and gave a report that the machine is not in good working condition. PW1 shown exhibit P3 and says it was ok that the machine was not in good working condition. PW1 shown exhibits P1 and P3 asked and which came first and says it was exhibit P3 but was quick to deny to have bought the machine as is/was basis. PW1 when shown again exhibit P1 and said it was signed by the company employee



under his instructions and it was after satisfied with the terms and conditions. PW1 pressed to read clause 7 of exhibit P1 and says it was sold as it is with all faults. PW1 insisted it was dangerous to be used and decided to return it. PW1 he paid for the machine on 25/04/2017 in good faith.

PW1 when shown exhibit P4 and admitted he went to police for assistance to enter the yard and denied anyone to have been arrested. PW1 when shown exhibit P5 says it was settlement agreement signed freely by parties on 13th October, 2018. PW1 denied to use police to sign exhibit P5.

Under re-examination by Ms. Lema, PW1 told the court that the machine was purchased on good faith and was to be in good working condition. As to the dates it was the clarification of PW1 that, the machine arrived earlier and the paper works followed. PW1 insisted that exhibit P5 was signed freely without any coercion.

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

The defendants were defended by one, Mr. ERSAL YAZICI (to be referred in these proceedings as '**DW1**'). DW1 under affirmation and through his witness statement adopted as his testimony in chief told the court that he is



the director of the 1st respondent. DW1 agrees and admits that parties had sale agreement for sale of used equipment as stated and described in the agreement and as stated by PW1.

DW1 went on to testify that, on 18th day of May, 2017, in breach of the contract, PW1 wrote an email requesting to return the equipment because **'his boys'** did not like it without any plausible reasons. DW1 quoted the email dated 18/05/2018 to justify that the machine was return not on good working condition because his boys did not want it.

DW1 went on to tell the court that the plaintiff's officer inspected the machine and were satisfied that it was in good order and suitable for the purposes it was bought for. Not only that but DW1 as well pointed out that, under clauses 7 and 8 the discovery of any fault in the equipment after sale and delivery did not entitle the plaintiff to return the machine to the defendants. According to DW1, clauses 7 and 8 protects the seller from liability over the machine after sale and concluded that it was the plaintiff who breached the terms and conditions of sale because is not entitled to any payment from the defendants.

DW1 further told the court that it is true he signed exhibit P5 but was quick to point out that same was signed under coercion after being locked in cell

for several days at police in front of two policemen and after serious threats to his life. In the circumstances, DW1 disowned it completely and asked this court to dismiss this suit.

DW1 in disproof of the plaintiff's case prayed that exhibit P1 to form part of the defence case.

Ms. Lema had nothing to cross examine DW1 and as such was not re-examined as well.

The defence case was as well marked closed.

Parties' learned advocates prayed for leave to file final closing submissions and guided by rule 66 of this court's rules, I granted the prayer and gave them seven days to do so. I have had time to read their respective submissions to the letter. Truly, I commend them for their insightful input on the matter at hand. However, in the course of determining this suit, I cannot be able to reproduce them herein but will be referring them where necessary and it suffices to say are taken and considered on board in determining this suit.

The noble task of this court now, is to determine the merits or otherwise of this suit. Before going into answering issues framed for the determination of



this suit, after hearing both sides story, I noted that there are facts which are not in dispute, and which will help this court in answering the issues framed. These are; **one**, no dispute that on 18th April, 2017 parties herein executed sale agreement for sale of used equipment for USD.25,000.00 as per **exhibit P1**. **Two**, there is no dispute that the plaintiff as such paid up USD.29,525 to the defendants being purchase price, transportation costs and VAT through **exhibit P2b**. **Three**, there is no dispute that the said equipment was delivered to the plaintiff at Geita on 10th day of May 2017 and upon being inspected it was returned to the defendants on 18th day of May 2017. **Four**, there is no dispute that DW1 signed exhibit P5 but on rider that it was signed under coercion.

However, what is in serious dispute is the return of the equipment, refund, settlement agreement, and, if any, breach of its terms. To start with the first issue which was couched that **"whether the plaintiff has any good or plausible reason to return the equipment to the defendants under the terms of the contract for sale?"** The defendant counsel in their written submissions argued that this issue be answered in the affirmative the machine was not in good working condition, the defendants



admitted the defect and agreed to return the equipment and acknowledged receipt of the same and promised to refund the purchase price.

According to learned advocate for the plaintiff, the act of accepting and promising refund was equal to waive of clause 7 of exhibit P1 by defendants. Ms. Lema as such urged this court to find merits on this issue in favour of the plaintiff.

On the other hand, the defence counsel argued that the plaintiff executed exhibit P1 being aware of all defects and was inspected prior to delivery, signing of exhibit P1 and was not thus open to the plaintiff to re-inspect and return it to the defendants. In support of this point cited the case of TANZANIA CIGARATTE COMPANY LIMITED vs. MAFIA GENRAL ESTABLISHMENT, CIVIL APPEAL NO.118/2017 CAT (DSM) (UNREPORTED) in which discussed the import of section 36(1) and (2) on when inspection is done.

Further Mr. Mnyele strongly argued that parties were bound by exhibit P1 and no evidence can be brought to modify it.

Having carefully considered the pleadings, evidence by both parties', exhibits tendered and final closing submissions on this issue, I am with due



respect to Mr. Mnyele, learned advocate for the defendants going to answer this issue in the affirmative that the plaintiff has good and plausible reasons to return the equipment to the defendants under the terms of the contract for sale. I will explain why I am taking this stance. **One**, the defendants received the returned equipment and acknowledged by letter **exhibit P4a** and nowhere in their defence explained why they received it back. **Two**, the contents of clauses 7 and 8 ceased to be operative when the defendants acknowledged receipt of the equipment on reason of not been satisfied with condition of the equipment. **Three**, exhibit P5 which equally was alleged to have been signed under coercion but defendant have failed to prove any coercion and upon close examination of it, same shows was signed before of Common Law Chambers and not police as alleged. **Four**, in the said **exhibit P4a**, the defendants promised to refund and this shows parties were no longer bound by the terms of the agreement any more. **Five**, as correctly argued by Ms. Lema, and rightly so in my opinion, the moment the defendants accepted and acknowledged receipt of the machine, exhibit P1 and its terms were no longer operative between parties.



Six, the argument that machine was returned because his boys did not like it was negated by creation of **exhibit P5**.

From the foregoing above, this court is inclined to answer issue number one in the affirmative that the plaintiff in the circumstances, has good and plausible reason to return a machine that did not meet his expectations of buying it.

The above conclusion, takes me to issue number two, which was couched that **“whether the plaintiff is entitled to refund of the purchased price pursuant to the return of the equipment and acknowledgement of receipt by the defendant.”** Mr. Mnyele for the defendant argued on issue number two that parties were bound by exhibit P1 and urged this court to find so.

Whereas Ms. Lema argued that much as the equipment was found defective beyond repair they communicated the matter to the defendant who accepted return and upon return the defendant promised to refund in writing exhibit P4k. So they cannot deny this.

Having considered the rivaling arguments and evidence tendered, and, in particular, my finding to issue number one, this issue will not detain this



court much. Much as the defendant received back their machine, no court of law will allow them to benefit from both ends. Defendants' failure to explain whereabouts of the machine which was returned to them or whether it has been resold is an indication that they are contended with the return and are obliged to refund the purchase price with immediate effect.

That said and done, the second issue is as well answered in the affirmative that, the plaintiff is entitled to refund of the purchase price pursuant to the return of the equipment and acknowledgement of receipt by the defendants.

This trickles this court to issue number three, which was couched that **"whether the settlement agreement embodied in annexure EL4 (now exhibit P5) to the plaint was procured properly."** Mr. Mnyele was of the view that it was procured by coercion and under duress so null and void and cannot bind the defendants.

Mr. Mnyele went on to argue that much as the counsel failed to cross examined DW1 on this issue, then, his allegations of coercion and duress remained unchallenged and are truth. To buttress his pointed, the learned advocate for the defendants cited the cases of SHADRACK BALINAGO vs.



FIKIRI MOHAMED @ HAMZA AND TWO OTHERS, CIVIL APPEAL NO.223/2017, CAT (MWANZA) (UNREPORTED) in which it was held that:-

'it's rightly observed by the learned trial judge in her judgement that the appellant did not cross examine the first respondent on the above piece of evidence.

We would, therefore, agree with the learned judge's inference that the appellant's failure to cross examine the first respondent amounted to the acceptance of the truthfulness of the appellant's account.'

Another case cited is the case of EMMANULE SAGUDA @SULUKUKU AND ANOTHER vs. THE REPUBLIC, CRIMINAL APPEAL NO.422 "B" OF 2013 CAT (TABORA) (UNREPORTED) in which it was held that:-

"In Brown versus Dunn [1893] 6 R 62 HC it was held that a decision not to cross examined a witness at all or on a particular point tantamount to acceptance of the unchallenged evidence as accurate, unless the testimony of the witness is incredible or there has been a clear prior notice of intention to impeach the relevant testimony."



Guided by the above holding of the Court of Appeal on failure to cross examined DW1 as it was in this suit, then, the allegations of coercion and duress by police in creation of exhibit P5 remained unchallenged. The learned advocate for the defendant cited section 19 of the Law of Contract Act, [Cap 345 R.E. 2019] and concluded that a contract procured by coercion and duress is voidable. And that by refusing to pay under exhibit P5, the defendants' avoided the contract under no uncertain terms and refuse to pay is not breach.

On the above reasons, the learned advocate for the defendants urged this court to find this suit not proved and urged this court to dismiss it with costs.

On the other hand Ms. Lema argued that exhibit P5 was procured properly and binds the defendants as there was no duress proved.

Having taken into account the rivaling arguments of the learned advocates on this issue and taken into account the date when the same was signed and the suit was instituted in November, 2019, the defendants through DW1 utterly failed to prove that, after becoming free agent, whether he took any legal steps to deny its contents and not an afterthought on his part. It is a trite law, and, indeed, the law that he who alleges must prove

to be entitled the court to give a decision in his or her favour as amply provided under section 110 of the Tanzania Evidence Act, [Cap 11 R.E 2019]. In this suit, the defendant had legal burden to prove coercion but which is missing. Failure to prove coercion, this court is inclined to find that exhibit P5 was properly procured and is what parties agreed in their free will. Guided by the decision in the case of EMMANUEL SAGUDA @SULUKUKU vs. REPUBLIC (supra) cited by Mr. Mnyele, I am with all respect to the counsel for the defendant find the testimony of DW1 on this point is incredible because the contents of exhibit P5 was made before a law firm and not police as suggested by DW1. 62.

Also by Settlement agreement exhibit P5 parties rescinded the old contract to the new one of refund. Section 62 of the Law of Contract Act on effect of novation, rescission and alteration of contract provides as follows;;

'Section 62- If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.'

Therefore, is a misconception on the part of the defendant to want to rely on exhibit P1 which in essence was rescinded or altered by exhibit P5. On that note I reject their arguments on their face value.



Next is the issue number four couched that **"if issue number three is answered in the affirmative, whether the defendant breached the terms of the said settlement agreement."** Mr. Mnyele argued that failure to honour the terms of exhibit P5 was part of avoiding the said exhibit which was voidable and as such no breach of contract on their part.

On that note prayed that this issue as well be answered in the negative.

Whereas on the other hand Ms. Lema argued that failure to honour the terms of exhibit P5 was clear breach of contract on part of the defendants and by committing to pay it cannot be said otherwise.

This court in answering this issue found out that, much as issue number three has been answered in the negative and in the absence of any other evidence that the defendant paid the money as agreed, then, the only conclusion is that the defendants breached the terms of the settlement agreement.

The last and usual issue is **"to what reliefs parties are entitled to?"**

The defendants prayed in their written stamen of defence and their learned advocate both invited this court to dismiss this suit with costs. On the other hand, Ms. Lema prayed that this court allow this suit as prayed in the plaint.



Based on my findings on issues above, without much ado, I will allow this suit save for prayer (b) in the plaint which is not granted and grant judgement and decree in the following orders:

- a. Payment of special damages of United State Dollars Thirty-One Five Hundred (USD.31,500);
- b. General damages to the tune of Tshs.10,000,000.00 based on unjustifiable denial to refund money while received the defect equipment
- c. The defendants to pay the plaintiff commercial interests of 21% of the decretal sum from the date of filing this suit to the date of this judgement;
- d. Payment of interest at court's rate of 12% from the date of judgement till payment in full;
- e. The plaintiff shall have costs of this suit.

It is so ordered.

Dated at Dar es Salaam this 29th day of April, 2022.




S. M. MAGOIGA

JUDGE

29/04/2022