]IN THE HIGH COURT OF UNITED REP UBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO.28 OF 2022

SAS LOGISTICS LIMITED ..... PLAINTIFF

VERSUS

USANGU LOGISTICS

TANZANIA LIMITED..... ..... DEFENDANT

IN COUNTER CLAIM

USANGU LOGISTICS

TANZANIA LIMITED ..... PLAINTIF

VERSUS

SAS LOGISTICS LIMITED ..... DEFENDANT

JUDGEMENT

Date of Last Order: 8/06/2023
Date of Judgment: 30/06/2023

AGATHO: J.:

The Plaintiff, **SAS LOGISTICS LIMITED,** by way of plaint instituted the instant suit against the above-named defendant praying for judgment and decree in the following orders, namely: -

i. A declaration that the defendant has breached the terms and conditions

of the three memorandums of understanding signed and executed between the parties in this suit.

ii. An order for defendant to pay USD 114,135.94 (Say US Dollars One Hundred Fourteen thousand, One Hundred Thirty -Five and Ninety - Four Cents) only to plaintiff being an outstanding amount from transport services provided by the plaintiff to the defendant.

iii. Interest at commercial rate of 25% from the date due to the date of Judgement.

iv. Interest at courts rate of 12% from the date of judgement to the date of payment in full.

v. Costs of the suit and

vi. Any other relief this honorable court deem fit to grant

Upon being served with plaint, the defendants filed a written statement of defence disputing all claims by the plaintiff on the ride that, plaintiff breached the three memorandums of understanding for failure to deliver the consignment of copper as agreed and eventually prayed that the suit for plaintiff be dismissed with costs. Simultaneously, the defendant in her written statement of defence filed on 12th April, 2022 raised a counter claim against the plaintiff praying for judgement and decree in the following orders namely;

a. An order for payment of the sum of United States Dollars three Hundred

and Eight Thousand Six Hundred and Sixty – five and Four Cents (USD

308,665.04) being specific damages.

b. An order for payment of the general damages as may be assessed by

the court

c. Interest on (a) at commercial rate of 22% from the date the suit was instituted to the date of judgement.

d. Interest at courts rate on the decreed sum from the date of judgement until full payment.

e. Costs of this suit and;

f. Any reliefs as the court may deem fit to grant.

Having been 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. To appreciate the gist of the instant suit, the brief facts of this suit are imperative to be stated. Sometimes 2021 the plaintiff was awarded a tender to provide transportation service in form of sub- contractor to the defendant's customer. Following that arrangement, on 22nd and 23rd September,2021 three memoranda of understanding were signed between the plaintiff and the defendant. It was among others, terms of the three memoranda of understanding to transport consignment of Sulphur from Dar-es -Salaam-Tanzania to Likasi -Democratic Republic of Congo via Zambia and to take from Democratic Republic of Congo the consignment of copper to Dar-es-salaam. It was agreed further that, the customer shall pay the transporter with agreed rate of USD 330/ton breakdown of USD 165 going trip and 165 returning trip payable within 30 days after receipt of the PODs.

Further facts were that, the plaintiff performed its obligation by transporting Sulphur to DRC but on return the truck with registration No T 910 CCS with trailer No T 124 ALM was hijacked and the consignment of copper on board was stolen. Following that incidence the plaintiff raised invoice for other 6 trucks but the defendant refused to effect payment on the ground that the plaintiff breached the contract for failure to have GIT insurance covering hijacking and same demanded for payment of USD 308,665.04 which is the value of lost consignment of copper. It was against this background the plaintiff is claiming for payment of USD 114,135.94 as an outstanding amount from transport services offered to the defendant customer and on the other hand, the defendant claiming for payment of USD 308,665.04 as the value of the lost consignment of copper which plaintiff has failed to claim from her insurer. Hence, this suit claiming for reliefs as contained in the plaint and in the counter claim.

The plaintiff at all material time has been in the legal services of Mr. Mohamed Muya and Benson Adam Mahuna, learned advocates. On the other adversary part, the defendant at all material time was in the legal service of Mr. Tumaini Shija and Bertha Bihondo learned advocates. During final pretrial conference and Before hearing started, the following issues were framed, recorded and agreed between the parties for determination of this suit, namely:

i. Whether there was an agreement between the parties for the plaintiff to transport the consignment of Sulphur and copper which belongs to the defendant in round trip from Dar es salaam Tanzania to Democratic Republic of Congo via Zambia and from

Democratic Republic of Congo to Dar es salaam in form of sub-contract.

ii. Whether the payments of the contract price were made in accordance with the terms and conditions of the contract between plaintiff and defendant

iii. Whether the defendant breached the agreed terms of the agreement.

iv. Who is responsible between parties to initiating an insurance claim for loss of copper.

v. Whether it was correct for the plaintiff in the counterclaim to offer to the defendant in the counterclaim its insurance cover upon payment of USD 100 by the defendant in the counterclaim for utilization of the same.

vi. Whether the defendant in counterclaim was obliged to possess an insurance cover covering hijacking risk.

vii. Whether the defendant in the counterclaim had complied with all the preconditions before registering as a sub-contractor.

viii. To what relief parties are entitled.

The plaintiff in attempting to prove their case paraded three witnesses, the first to testify was one, **JINEY ALIAS MOHAMED ISSA ABDALLAH** (to be referred in these proceedings as "PWI"). PW1 under affirmation and through his witness statement adopted in these proceedings as his testimony in chief told the court that, he is the plaintiffs Marketing officer, hence, conversant with the fact of this case. PW1 went on to testify that, sometimes in early September 2021, Mr.

Salim Self Elbusaidy who is chairman and majority shareholder of the plaintiff instructed PW1 to apply for the tender to transport the goods of the defendant's customer in form of sub-contractor. PW1 told the court that, following that instruction PW1 applied and the same was awarded the said tender and he shared loading order with the list of trucks, their trailers together with their registration cards and driving licenses. PW1 tendered in evidence Email dated 16th September, 2021, 17th September,2021, 18th September,2021 vehicle registration, certified copy of motor vehicles registration card and certificate of authenticity of electronic document which were collectively admitted as **exhibitP1.** It was PW1 testimony that on 22nd and 23rd September,2021 the plaintiff and the defendant executed three memoranda of understanding for the purpose of transportation of defendant customer's goods. Further testimony of PW1 was that, it was among other terms of the memorandum of understanding that, plaintiff will transport goods of the defendant's customer from Dar-es -Salaam to Likasi -Democratic Republic of Congo via Zambia and from DRC to Dar-es-salaam (round trip) in consideration of USD 330 USD Per ton payable within 30days. PW1 told the court that, it was agreed further that the transportation service provider shall obtain all road permits, licenses, transit bond insurance weights and measures approval when carrying and delivery of the products of the customers. PW1 tendered in evidence three memoranda of understanding dated 22nd and 23rd September,2021, bill of lending and commercial invoice which were collectively admitted in evidence **as exhibitP2.**

According to PW1, the plaintiff secured all relevant permit and licenses for transportation of the consignment of Sulphur including a permit for transportation of chemicals with the Government Chemistry Laboratory Authority (GCLA) and other

vehicle license for conveying Transit Goods (C28) which it handed them to drivers because are to be carried by them while in enroute. The above documents were tendered in evidence and were admitted in evidence collectively **as exhibit P3.** On the basis of the above testimony, PW1 prayed that this court be pleased to enter judgement and decree against the defendant as prayed in the plaint and dismiss counterclaim with costs.

Under cross examination by Mr. Shija PW1 told the court that, He is an employee of SAS since 2015 as marketing manager whose duties among others is to make a follow up on consignments, through phones or emails as communication means. PW1 when referred to exhibit P1 identified it as email dated 16/9/2021 from Plaintiff officer to USANGU Logistics attached with details of driver's trucks. PW1 when pressed with questions told the court that when plaintiff sent the email some trucks were at the yard other were on transit and those which were at the yard were loading USANGU consignment except one vehicle with registration No T 902. PW1 when asked on the email dated 17/09/2021 he admitted that he was the one who sent it to Juma of Usangu Logistics and he attached with it KYS documents, business licence and GIT because they were required by Usangu Logistics so as to register plaintiff in defendant portal as sub-contractor. PW1 when asked further questions told the court that, on 17/09/2021 the plaintiff received another letter from Usangu logistics attached with evaluation form, (Know Your Supplier) requesting the plaintiff to fill it and return back to defendant for further procedure.

PW1 when pressed into more questions he told the court that on 18/09/2021 the plaintiff received email dated 18.9.2021 informing them that plaintiff has been registered in the portal of Usangu logistics as sub-contractor. PW1 asked to read

MoU dated 22/09/2021 under item 2 read it and told the court that, the transport service provider shall obtain all road services permit, licenses, transit bond, insurance, weight and measures approval when carrying and delivering the products of the customer. When PW1 asked on the gist of the dispute told the court that the plaintiff is claiming for payment of the service offered to defendant. PW1 when asked on major risks in transportation of copper from DRC replied that the major risk is collision which is covered by GIT (insurance).

Under re- examination by Mr. Muya, Advocate. PW1 when shown exhibit P1 told the court that the plaintiff and the defendant had email correspondences during registration stage as such after the registration and evaluation of documents the defendant approved the plaintiff by signing of MoU. PW1 when pressed with question told the court that after approval the plaintiff started the transportation tasks. PW1 when asked on the status of GIT he told the court that GIT covers collision, fire and hijacking however he was quick to point that the issue of GIT will be testified by another witness.

The second witness was one, **ADAM RAMADHANI AMBARI** (to be referred herein in these proceedings as '**PW2**'). PW2 under affirmation and through his witness statement adopted in these proceedings as his testimony in chief, told the court that he is the General Manager of the plaintiff. And his duties as General manager is to oversee daily business activities improving overall business functions and communicating business goals. PW2 went on telling the court that, sometimes in 2021 the plaintiff and the defendant executed three memoranda of understandings for provision of transportation services to customers of the defendant. It was the testimony of PW1 that before given the tender for

transportation the plaintiff had insurance cover from insurance group of Tanzania to cover risks on collision, fire and overturning risks of trucks while on transit for period of one year commencing from 11th December,2020 to 10th December, 2021.PW2 tendered in evidence interim cover note which was admitted as **exhibit 9**.

It was further testimony of PW2 that the plaintiff performed her obligation by transporting the consignment of Sulphur from Dar es salaam to Likasi DRC via Zambia and consignments were received by the defendant customer in DRC, upon receiving the consignment the defendant customers stamped all documents which later on were handed over to the defendant during the submission of PODs which included copies of delivery notes issued by DCG at the point of loading, Movement sheet and IT issued by TRA and ZRA for payment, which were admitted in evidence collectively as **exhibit P4**. PW1 went on telling the court that, after the delivery of the consignment in DRC the plaintiff twelve (12) trucks loaded the consignment of copper ready for returning trip to Dar- es -salaam. Unfortunately, while in Zambia one of the trucks with registration No T910 CCS and trailer with registration No. T124 ALM was hijacked and all the consignment of copper were stolen. PW2 testified that, the plaintiff made follow up in Zambian authorities where it was discovered that the truck driver was not involve in accident as a such the Director of public Prosecution of Zambia issued nolle prosequi for want of prosecution against the driver. It was further testimony of PW2 that, the Director of public prosecution wrote a comprehensive report regarding theft of copper. PW1 tendered in evidence notice of Nolle prosequi and comprehensive report in evidence which were admitted in evidence collectively as **exhibitP6.**

Further testimony of PW2 was that, eleven trucks reached Dar es salaam and offloaded the consignment of copper to the defendants customers, in return they issued the document known as the goods receipt note. Thereafter, the plaintiff handed over to the defendant. PW2 went on telling the court that, upon receipts of delivery documents and after it made the verification regarding the authenticity of the proof of delivery document the defendant shared consignment note and purchase orders to the plaintiff which allowed the plaintiff to raise invoice for the service provided. It was further testimony of PW2 that the defendant after it received original invoice, commented that the PODs for vehicle with registration No. T910 CCS and T124 ALM is missing and it could not effect payment. PW2 told the court that, following that denial, the plaintiff on 6th December,2021 submitted PODs documents to the defendant of the said truck but the defendant did not effect the payment as agreed under paragraph 7 of memorandum of understanding dated 23rd September,2021 and paragraph 8 of memorandum of understanding dated 22nd September,2021. It was further testimony of PW2 that, sometimes in August 2022 the plaintiff communicated with the defendant customers, Access World, who informed her that all the monies for transportation of consignment of copper to the defendant has been paid. PW1 tendered in evidence email communication dated 11th August,2022, 12th August,2022 and 16th August,2022 which were admitted in evidence collectively as **exhibitP10**

PW2's further testimony was that, effort by the plaintiff to have paid the money was in vain and in the circumstance the plaintiff issued demand notice informing the defendant on the extent of breach and asked the defendant to rectify the breach within 7 days but the defendant did not heed to the demand. PW2

tendered in evidence demand letter dated 8.2.2022 which was admitted in evidence **as exhibit p8**. PW2 went on to tell the court that, the defendant upon receiving the demand notice replied that, payment was put on hold following the missing of PODs.

Under cross examination by Mr. Shija, PW2 told the court that, the truck which was hijacked is the truck with registration numbers T 910 CCS and it did not deliver goods in DSM because the whole consignment in that vehicle was stolen that is why the loading documents have not been attached. PW2 when presses into question told the court that the invoice which was issued by the plaintiff did not include the lost consignment. PW2 when asked on interim cover told the court that, it was sent by the office of the plaintiff. PW2 when shown exhibit p10 identified it and told the court that email correspondences on pending claim and he is the one who wrote them. PW2 when asked about exhibit p10 replied that he tendered it because there was information that the defendant cannot pay the plaintiff because the Access world has held payments so he wanted confirmation and clarification if the defendant was not paid. PW2 when shown exhibit p2 identified it as a memorandum of understanding between SAS and Usangu which is about transportation to and from DRC. PW2 when further questioned on the cause of dispute he told the court that the base of the dispute is the implementation or execution of the MoU.

Under re-examination by Mr. Muya Advocate PW2 told the court that there was no delivery note of the truck concerned on return because the truck was hijacked and the consignment was stolen. PW2 went on telling the court that, the

invoice of that consignment was not given because the goods were not delivered as such what the plaintiff invoiced was what was delivered. PW2 into further questions told the court that the parties called each other by phone and that is how the assignment was given to the plaintiff. PW2 insisted that they sent email to Access World because they wanted clarification on whether there was any problem on the payment.

The last witness for the plaintiff was Mr. LUQMAN SOUD ALLY (to be referred herein as 'PW3'). PW3 under affirmation 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 an Accountant since 2014. The rest of PW3 testimony is a replica of PWl and PW2 which this court need not repeat here. PW3 tendered in evidence copies of delivery note issued by the plaintiff, consignment note, purchase order and fiscalised receipt which were admitted in evidence collectively **as exhibit P11,** a copy of dispatch book which was admitted **as exhibit P12** and consignment notes, purchase orders, invoices, and fiscalised receipts for the return trip which were admitted in evidence collectively **as exhibit P13**.

Under cross examination by **Mr** Shija, advocate, PW3 told the court that, he has worked for 9 years with the plaintiff as an accountant. PW3 when referred to exhibit P2 particularly clause 8 read it and told the court that, clause 8 is similar to clause 9 of MoU dated 23rd September,2021 which deals with the PODs. According to PW3 Exhibits P11 and P13 followed the requirement of the clauses in MoU. PW3 when referred to exhibit P12 told the court that the delivery note No 20248 was for the consignments from DSM to DRC.

On re-examination by Muya, Advocate, PW3 told the court that clause 8 of the MoU required the plaintiff to send scanned PODs in the email address stated and hard copies of invoices together with LPO. However, he was quick to point that, the LPOs should be shown in particular invoices. PW3 when asked on clauses 9 and 10 of MoUs told the court that, one cannot raise invoice without POD which is normally issued after the consignment reached at the destination point.

In defence, the defendant was defended by two witnesses the first one to testify was one, Mr. HAMAMAD ABBAS SHAABAN, (to be referred in these proceedings as 'DW1'). DW1 under affirmation and through his witness statement adopted in these proceedings as his testimony in chief told the court that, he is an Accountant of the defendant, hence, conversant with the case. It was the testimony of DW1 that, the defendant is in the business of clearing and forwarding imports and exports into and from Tanzania and transportation of cargo. PW1 tendered in evidence the copies of email correspondences between Access World and Usangu Logistics, and affidavit of authenticity of data message which were admitted in evidence collectively **as exhibit D1**. It was further testimony of DW1 that in course of performing its business the defendant uses third party trucks and trailer to carry out the service as such the defendant upon signing a transportation contract with Access world South Africa Limited, it invited other transporters to provide service to the defendant.

DW1 further testimony was that it was a pre-condition that, the plaintiff to complete KYS requirements including having GIT cover and provide the defendant with an invoice from its insurer as evidence that it had the GIT because it is practice and requirement that transporters are required to have GIT cover because

the risks of loss of cargo resulting from hijacking is high. According to DW1 the defendant allowed plaintiff to issue 7 of trucks and trailers among others truck with registration No T910 CCS with trailer T124 ALM knowing that the plaintiff had GIT cover. DW1 went on telling the court that if plaintiff had indicated that its GIT for transportation copper did not extend to hijacking the defendant would not have contracted the plaintiff.

It was another testimony of DW1 that on 15th November,2021 the defendant was informed by the plaintiff that, the truck with registration No T910 CCS with trailer T124 ALM was hijacked while enroute to DSM and the consignment of copper were stolen, after receiving that information it informed Access World who responded that the defendant is responsible for the loss and requested the defendant to revert with necessary police report and submission of claim to its insurer. But the plaintiff has refused to claim to its insurer because it had no cover, the act which has made the Access World to withheld payment due to the defendant to the tune of USD 308,665.04. According to DW1 the plaintiff owes defendant USD 308,665.04 which is the value of the lost consignment which the plaintiff has failed to claim from its insurer thus causing loss to the defendant as Access World has withheld payment due.

Under cross examination by Mr. Muya, DW1 admitted that it is true that SAS was contracted to transport the goods while Usangu already had contractual relationship with Access World as such Usangu had obligation to transport the consignment but shortage of trucks made Usangu to contract other logistics companies for transportation. DW1 when pressed into question told the court that the GIT insurance cover is one of the requirements and the plaintiff ought to have

GIT insurance cover so as to secure the customer's goods. However, DW1 was quick to point that in the KYS and MoUs there was no question of GIT covering hijacking. DW1 when shown exhibit D1 read it and told the court that Access World advised the defendant to lodge a claim basing on the insurance cover against the insurance company but the witness was quick to point that up to today the defendant is yet to file any claim to the insurance company as advised by Access World.

DW1 when pressed with more questions told the court that, there was no any tripartite contract between Access World, Usangu, and SAS, however, there is a contract between Usangu and SAS. DW1 when questioned on MoUs told the court that there were three contracts (MoUs) the 1st dated 23/09/2021 showing the list of vehicles but he was quick to point that the vehicle hijacked was not in the list because the contract involved 3 trucks. DW1 when pressed into question admitted that it is true that SAS has not been paid for the service, she has rendered in respect of those three trucks. DW1 when asked further he told the court that according to clause 7 of the MoU the plaintiff was supposed to be paid within 30 days from the date of receipt of delivery note. DW1 when asked on the third MoU dated 22/09/2021, he quickly pointed that this MoU involved 7 trucks which transported goods to DRC and also return to DSM with other consignment except truck T910 CCS which did not return to DSM with goods as it was hijacked but it reached DRC safely and delivered the goods. DW1 when asked to read clause 3 of his witness statement read it and told the court that, it was agreed that if SAS had no GIT cover, then she was required to pay USD 100 to the defendant in order to use Usangu GIT cover but the plaintiff did not pay that money so that Usangu could

claim the said amount from her insurance company. DW1 when shown exhibit P10 identified it as email from Access World to Usangu stating that they are holding payment until defendant pays for the stolen goods.

During cross examination by Mr. Benson Mahuna, Advocate DW1 told the court that, SAS had met all the requirements for the tender to provide the service because the MoU dated 22/09/2021 which lists 7 vehicles does not talk about insurance. However, he pointed out that exhibit P2 under clause 2 has requirement of insurance cover but not covering hijacking. DW1 when shown exhibits p11 and p13 read them and told the court that, it was the notice stating that, defendant will be responsible for any loss or damage of goods.

Under re -examination by Mr. Shija Advocate DW1 told the court that, the main reason why Usangu Logistics has not claimed insurance from her insurer is that the claim would increase, and the premium would have increased and the reason why SAS has not been paid is because there is loss of goods and the value of the goods was USD 308,665.04 which has been withheld by Access World. DW1 when shown exhibit P11 and P13 identified them as consignment notes showing the vehicle which was hijacked and it is mentioned in the MoU dated 22/09/2021.

The next defendant's witness was, Mr. JUMA ISMAIL HAMIS, (to be referred in these proceedings as 'DW2'). DW2 under affirmation and through his witness statement adopted in these proceedings as his testimony in chief told the court that, he is an employee in the position of subcontractor associate of the defendant, hence, conversant with the case. It was the testimony of the DW2 that, sometimes in September, 2021 the plaintiff applied for tender to provide transportation of Sulphur from Dar es salaam to Likasi in Democratic republic of Congo via Zambia

and transportation of copper from Likasi in the Democratic Republic of Congo to Dar es salaam, Tanzania.

DW2 went on telling the court that, it was a common understanding between the parties that, during tendering process the plaintiff was required to electronically complete the defendant's Know Your Supplier (KYS) forms and provide evidence that it had valid goods in transit insurance and if not, then the plaintiff was required to pay USD 100 per trip so as to be covered by the defendant but the plaintiff indicated that it held valid GIT while not. DW2 tendered in evidence KYS form of Usangu Logistics, SAS's Equity insurance the invoice and Usangu interim order which were admitted in evidence collectively **as exhibit D3** and **exhibit D4.** It was further testimony of DW2 that if the defendant would have knowledge that the GIT held by the plaintiff did not extend to hijacking it would not have awarded the tender to the plaintiff. The rest of testimony of DW2 was more of that of DW1 on the status of the contract between defendant and plaintiff.

Under cross examination by Mr. Muya Advocate DW2 told the court that exhibit D3 shows that the plaintiff had GIT but it was not covering hijacking. DW2 when asked to read paragraph 10 of his witness statement read it and insisted that if Usangu knew that SAS had GIT that does not cover hijacking it would not have given the assignment. DW2 When pressed with question told the court that, the plaintiff was required to pay USD 100 per trip so that she could use Usangu's GIT cover but he was quick to point that there was no clause in the KYS that if the GIT does not cover hijacking, then SAS is required to pay USD 100 per trip to use Usangu's GIT.

In re-examination by Shija, Advocate, DW2 told the court that he prepared the KYS form and send it SAS for completion and evaluation so as to be registered in Usangu Logistics database. Further, when pressed with more questions, DW2 told the court that, exhibit P9 was not among the documents that we received with KYS. Further under cross examination DW2 told the court that, SAS completed the KYS form and informed defendant that it has GIT cover from Equity but he was quick to mention that it is for the first time seeing exhibit P9. This marked the end of the 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 HCCD Procedure Rules to file final closing submissions. The same was granted. The court express its sincere gratitude to them for their industrious input in the matter. In the course of answering issues, the same will be considered but the court is unable to produce them in verbatim. However, it suffices to say the same were well taken in determining this suit. In the circumstances what is serious disputed between parties is breach of MoU entered between plaintiff and the defendant.

The first issue was couched that whether there was an agreement between the parties for the plaintiff to transport the consignment of Sulphur and copper which belonged to the defendant's customer on a round trip from Dar es salaam, Tanzania to Democratic Republic of Congo via Zambia and from DRC to Dar es salaam in form of sub- contract. Having carefully considered the pleadings, the testimonies of the respective parties' witnesses and documentary evidence tendered in their totality, the court makes it clear that based on the evidence, there is no dispute between the parties that there was an agreement between the parties

for the plaintiff to transport the consignment of Sulphur and copper which belonged to the defendant's customer on a round trip from Dar es salaam, Tanzania to Democratic Republic of Congo via Zambia and from DRC to Dar es salaam in form of sub- contract . Without much ado the court fully agree with the submissions by Mr. Muya that this issue was never disputed therefore it should not waste much time of the court. In the totality of the above reasons, the answer to issue number one is affirmative.

Next is issue, which is number two is whether the payments of the contract price were made in accordance with the terms and conditions of the contract between plaintiff and defendant. It should be noted that the terms and conditions of this contract are mainly found in three Memoranda of understanding signed by the parties' **exhibit P2**. In the court's understanding the crucial terms for payments were set out in (exhibit P2) particularly clause 7 and 9 of MoU dated 22nd September,2021, and clause 8 and 10 of MoU dated 23rd September,2021 For easy reference it is reproduced here under:

> **Clause 8**: That all balances payment shall be made within 30days after receipt of original invoice and a complete set of all signed PODs from the transporter service providers. However, the scanned document (PODs) will be shared within 7 days from the offloading of both imports and export cargo.
>
> **Clause: 10** PODs containing the following documents signed and stamped signed consignment note, signed per trucks invoices, signed

per trucks packing list, T1, movement sheet and border custom document.

Thus, it is the court's view that the payments of contract price were to be made in accordance with the above terms and conditions. The learned counsel for plaintiff has submitted that, the plaintiff performed its obligation as stated in exhibit p2 by issuing documents with original stamp during submission of PODs and defendant endorsed exhibit P11 and exhibit P13. In rebuttal the learned counsel for defendant had it that the document presented for payment was stamped by Bravo Logistics (T) LTD an entity which is not a party to the MoU or related to the defendant in the main suit as such the plaintiff did not submit PODs documents as required under the MoU because all documents presented related to the business between the plaintiff and Bravo logistic (T) LTD and not between the plaintiff and the defendant.

Having carefully considered the pleadings, the testimonies of the respective parties' witnesses and documentary evidence tendered in their totality, the court is inclined to answer this issue in the affirmative. The reasons are not far-fetched. One, the defendant does neither dispute that the 12 trucks of the plaintiff delivered goods at Likasi in Democratic Republic of Congo nor that 11 trucks delivered consignments of copper from Likasi in Democratic Republic of Congo to Dar es salaam, Tanzania save for only one truck with Registration No T910 CCS and with trailer T 124 ALM which was hijacked. Since there is no dispute on the delivery of goods, and document presented, then stamping PODs document using Bravo stamp which the defendant has fronted her lamentation cannot be termed as breach of the term of MoU. It is inconceivable to say that all documents presented for payment related to the business between the plaintiff and Bravo logistic (T) while

the packaging list is in the name of the plaintiff. As if that is not enough, the details of the trucks and trailers provided thereto belong to the plaintiff in the main suit as listed in the MoUs, all drivers were employees of the plaintiff. It is evident that documents presented belonged to plaintiff and appearance of Bravo stump was private arrangement between the plaintiff and Bravo which has nothing to do with the substantive part of or root of the contract which is breach of MoU for failure to make payment and not only that but the arrangement between the plaintiff and Bravo Logistic has nothing to do with the arrangement between the defendant and the plaintiff.

Worse enough PW1, PW2 and PW3 were not cross examined by the learned advocate for the defendant on the issue of Bravo Logistics stamp. As a matter of principle, a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be stopped from asking the trial court to disbelieve what the witness said. This legal position was stated by the Court of Appeal in the case of **SHADRACK BALINAGO v FIKIRI MOHAMED @ HAMZA & 2 OTHERS, CIVIL APPEAL NO. 223 OF 2017 (CAT) MWANZA (UNREPORTED)** in which it was held that: -

> *"As rightly observed by the learned trial judge in her judgement, the appellant did not cross examine the 1st respondent on the above piece of evidence. We would, therefore, agree with the learned judge's inferences that the appellant's failure to cross examine the 1st respondent amounted to acceptance of the truthfulness of the appellant's account."*

Then, if that is the position, failure of learned counsel for the defendant to cross examine PW1, PW2 and PW3 on the Bravo stamping PODs documents, should be taken to be an admission or acceptance that payments of the contract price were ought to made in accordance with the terms and conditions of the contract between the plaintiff and the defendant. In totality of the above reasons, the second issue is hereby answered in affirmative.

The third issue was whether defendant breached the agreed terms of the agreement. The learned counsel for plaintiff had it that, the defendant was required to effect payment within 30 days after receipt of the invoices but to date she has not paid the plaintiff, the act which amount to breach of MoUs. On the other hand, the learned counsel for the defendant had nothing to submit on this issue save only for the claim for payment of lost consignment of copper. This issue will not detain this court much based on reasons given when dealing with the second issue in this suit. The contents of exhibit P2 particularly clause 5 of the memorandum of understanding dated 22nd and 23rd September,2021 are loud and clear that, the customer shall pay the transporter with agreed rates of USD 330 /ton of round trip with a breakdown of USD 165/ton going trip and USD 165 /ton returning trip.

The court has carefully revisited and considered the pleadings, the testimonies of PWI, PW2, PW3, DWI and DW2 together with exhibit P2, exhibit p11 and exhibit p13. There is no doubt whatsoever that the defendant breached the terms of MoU. That is so because there is no term or condition in exhibit P2 which require the plaintiff in the main suit to be paid upon delivery of all goods by all vehicles involved in a round trip. The only condition is that within 30days after receipt of the PODs then the defendant in the main suit was required to pay the

plaintiff upon all 12trucks for the going trip but to date the defendant is yet to pay the plaintiff for service offered to the defendant's customers. Moreover, exhibits P11 and P12 are loud and clear that the defendant endorsed the plaintiff documents but for reasons known best to the defendant she failed to make payments. As such the arguments and the counterclaim that it is the plaintiff who breached the terms of MoU is devoid of any useful merits and is rejected. That said and done, the court associates itself with the conclusion by Mr. Muya that the third issue should be and is answered in the affirmative that, the defendant in the main case has breached the terms of the three memoranda of understanding.

The fourth issue was couched thus who is responsible between parties to initiating an insurance claim for loss of copper. The learned counsel for the plaintiff was of the view that, according to clause 2 of the memorandum of understanding dated 22nd September,2021 the plaintiff was required to possess insurances (GIT) and the plaintiff complied with that condition as per exhibitP9 and there was no condition which require plaintiff to possess GIT insurance covering hijacking. In denials the learned counsel for the defendant was of the view that, since theft of copper occurred at the hands of the plaintiff in main case it was the duty of the plaintiff to claim the loss. Having carefully considered both the pleadings, the testimonies of the respective parties' witnesses and documentary evidence tendered in their totality, the court is inclined to answer this issue that it is the defendant in the main suit who is responsible to initiating an insurance claim for loss of copper. The reasons are not far-fetched. One, as correctly argued by Mr. Muya, and rightly so in the court's opinion that the whole transaction traces its genesis from exhibit P2 which provided that:

Clause 2. *The transport service provider shall obtain all roads service permits, licenses transit bond insurances weights and measures approved when carrying and deliver products of the customer.*

Going by the above wording of exhibit P2 particularly clause 2 on the condition of having insurance, there is no condition requiring the plaintiff to have GIT covering hijacking. In the circumstance of this suit the plaintiff complied with the condition see also exhibit P9. Therefore, the argument that the plaintiff did not disclose the fact that it has no insurance is devoid for want of evidence because the content of exhibit D3 and exhibit P9 are clear that the defendant was satisfied with the insurance cover of the plaintiff by signing the MoU. If the defendant could not have been satisfied with the insurance cover of the plaintiff, it could not have executed the three memoranda of understanding. Moreso, the defendant did not tender the records showing that the parties agreed to have GIT covering hijacking. Failure to tender those records was fatal blow to the defendant's case because they were very material evidence in proving that fact. It is a common knowledge that, once a party disputes a fact, it has duty to prove it. Given that the defendant in the main case opted not to call any witness or to tender the record that were supporting exhibit D3 which was seriously disputed by the plaintiff that there was no such condition of GIT covering hijacking leave alone the issue for GIT covering hijacking hanging on their part of the defendant who is the plaintiff in the counter claim. Section 110 of the Tanzania Evidence Act, [Cap 6 R.E. 2019] underscore the point that whoever wants the court to decide in his favor has legal burden to prove what he alleges on

balance of probability as a required standard of proof in civil case. Unfortunately, this was not done in this case as defendant claim in concerned.

In addition to that, it is elementary principle of insurance law that for a party to insure its property it must establish insurable interest. In the court's considered view, the one who was supposed to insure the goods were the defendant's customers who were the owner of those goods and not transporter because he has no interest in the goods. Moreover, clause 2 as stated above does not require GIT covering hijacking. It is only insurance which the plaintiff had in that circumstance which was evaluated by the defendant prior to being contracted for the job. Even if the insurance cover for hijacking would have been there, it cannot be concluded that the plaintiff was the one to claim for the loss while he had no interest on the goods. In totality of the above reasons, the fourth issue must be and is hereby answered that the defendant in the main case is responsible for initiating an insurance claim for the loss of copper.

The next issue was couched whether it was correct for the plaintiff in the counterclaim to offer the defendant in the counterclaim its insurance cover upon payment of USD 100 by the defendant in the counterclaim for utilization of the same. It should be made clear that based on the evidence, this issue was only argued by the plaintiff counsel which indicate that the defendant had nothing to submit on it. The counsel for the plaintiff in the counter claim briefly submitted that the defendant in the counterclaim has stated that she had GIT and it goes without saying that the payment of USD 100 was unnecessary in the premises. But what it not explained though is the fact that neither KYS form mentioned that the GIT should cover hijacking nor the executed Memoranda of Understanding had such a

condition. Without much ado the court fully agree with the submissions by Mr. Muya that such condition was never part of the conditions in the KYS form nor in the MoU. In addition to that the plaintiff in the main case was not required to pay the said USD 100 to the defendant because the defendant in main case is not an insurer. The act of the defendant in the main suit demanding payment of USD 100 purporting to be the insurer would be a deliberate contravention of Section 21(1) of the Insurance Act, 2009 which requires anybody conducting insurance business to be registered as insurer. There is no evidence that the defendant in the main case has ever been registered as the insurer. That said and done this issue is answered in negative that it was not correct for the plaintiff in the counterclaim to offer to the defendant in the counterclaim its insurance cover upon payment of USD 100 by the defendant in the counterclaim.

The sixth issue was whether the defendant in counterclaim was obliged to possess insurance cover covering hijacking risk. The learned counsel for plaintiff submitted that the content of exhibit D3 are conspicuous that there was no condition which required the defendant in the counter claim to state if she possesses the GIT Insurance covering hijacking rather the requirement was for the defendant in the counter claim to state if she had the GIT insurance. On the other hand, the plaintiff in the counter claim submitted that the defendant in the count claim was supposed to have GIT covering hijacking. I have carefully revisited and considered the contents of exhibit P2 particularly clause 2 and exhibit D3 (including KYS) in answering this issue with keen legal eyes and mind. With due respect to Mr. Shija, counsel for the defendant in the main case, the plaintiff in the main case was not obliged to have GIT covering hijacking because it was not among the terms in

the three memoranda of understanding. As a matter of principle, the obligation to honour what was agreed by the parties to a contract is fundamental or cardinal principle in the law of contract as per Section 37(1) of the Law of Contract Act [Cap 345 R.E. 2019]. This was emphasized by the court of appeal in the case of **Simon Kichele Chacha V. Avelina M. Kilawe Civil Appeal No 160 of 2018** where the court held that;

> *"Parties are bound by the agreement they have freely entered into, and this is a cardinal principle of the law of contract that there should be a sanctity of the contract."*

With that in mind and back to the suit at hand, and after careful scrutiny of exhibit P2 clause 2 and exhibit D3 item 9.1 and 9.2 plaintiff has no obligation to have GIT covering hijacking. There is nowhere in those clauses where GIT cover was explained to extend to covering hijacking. As such the argument that the defendant in the counter claim was obliged to possess an insurance cover covering hijacking risk was raised out of context because it was not among the terms in the memoranda of understanding. For above reasons, this issue is answered in the negative.

The next issue was couched thus whether the defendant in the counterclaim had complied with all the preconditions before registering as a sub-contractor. It is explicit from the evidence adduced in the case that the defendant in the counterclaim complied with all the pre-conditions before being registered as the subcontractor. The fact that the defendant in the counterclaim was given the assignment to transport the goods confirm that the preconditions were met. The

witnesses for both sides confirmed that the defendant in the counterclaim met the pre-conditions and she was thus registered as the sub-contractor. The issues is therefore answered in the affirmative.

Before answering the final issue on relief for the parties, the court sought it ideal to say a word on general damages. The plaintiff in the main case has not claimed general damages, but the defendant (plaintiff in the counterclaim) has prayed for damages. The law under Section 73 of the Law of Contract Act [Cap 345 R.E. 2019] has stipulated that the party who suffered a loss due to breach of the contract deserves damages. That provision of the law provides that:

> *"Where a contract has been broken, the party who suffers by such breach to receive, from the party who has broken the contract, compensation for any loss or damage caused to him..."*

Since the breach of contract is attributed to the defendant, in the circumstance the plaintiff could have been awarded general damages. However, since there is no dispute that the defendant has also sustained loss due to the hijacking of the plaintiff's truck with registration No. T910 CCS and trailer with registration No. T124 ALM, the court finds it just and fair not to add salt to the fresh wound. The general damages cannot thus be awarded. That is probably why the plaintiff did not even seek such relief in her plaint.

Now turning to the last issue is to what relief are the parties entitled. The defendant's claims in the counterclaim are rejected for want of substance. The plaintiff's claims in the main suit are found to have merit as elucidated and substantiated above. This court therefore declares, and order as follows:

1. That the defendant has breached the terms and conditions of the three memoranda of understanding signed and executed between the parties in this suit.
2. The defendant shall pay the plaintiff USD 114,135.94 (US Dollars One Hundred Fourteen Thousand, One Hundred Thirty -Five and Ninety -Four Cents) only, being an outstanding amount from transport services provided by the plaintiff to the defendant.
3. The defendant shall pay interest on the decretal sum (in 2 above) at commercial rate of 25% from the date due to the date of judgement.
4. The defendant shall pay interest on the decretal sum at the court's rate of 7% from the date of judgement to the date of payment in full.
5. The costs of the suit shall be borne by the defendant.

It is so ordered.

DATED at DAR ES SALAAM this 30th Day of June 2023.

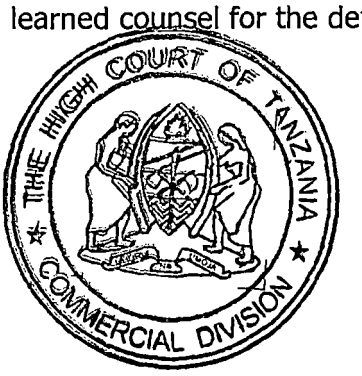
THE HIGH COURT OF TANZANIA COMMERCIAL DIVISION

U. J. AGATHO
JUDGE
30/06/2023

Date: 30/06/2023
Coram: Hon. U.J. Agatho J.
For Plaintiff: Mohamed Muya, Advocate
For Defendant: Bertha Bihondo, and Aneth Kelvin, Advocates

C/Clerk: Beatrice

Court: Judgment delivered today, this 30th June 2023 in the presence of Mohamed Muya, counsel for the Plaintiff, and Bertha Bihondo and Aneth Kelvin, learned counsel for the defendant.



U. J. AGATHO

JUDGE

30/06/2023