

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

COMMERCIAL CASE NO. 116 OF 2021

PAN AFRICAN EQUIPMENT TANZANIA LIMITED.....PLAINTIFF

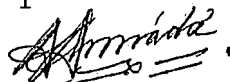
VERSUS

KAS FREIGHT LIMITED..... DEFENDANT

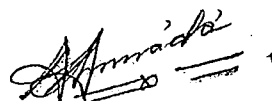
JUDGMENT

A.A. MBAGWA J.

The dispute in this suit stems from the alleged breach of contractual obligations in the agency agreement between the parties. The plaintiff is a private liability company whose main business, among other things, is import, sale and distribution of heavy mining and construction equipment. On the other hand, the defendant is a legal entity licensed to render with clearing and forwarding services. It is alleged by the plaintiff that sometimes in 2010, the plaintiff contracted the defendant for clearing its imported goods. According to the plaintiff, apart from the ordinary clearing duties, the defendant also was entrusted to pay import duties and other associated taxes. Their *modus operandi* was that the defendant was presenting invoices indicating amount required for payment of taxes and attendant costs to the plaintiff. Upon submission of the invoices, the plaintiff was remitting money claimed in the invoices to the defendant's bank account maintained at Stanbic Bank Tanzania Limited, Industrial

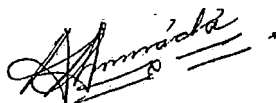


Branch. However, the plaintiff, to its dismay, came to learn that the defendant was not paying the due taxes to Tanzania Revenue Authority. This came to the plaintiff's knowledge on 26th day of 2016 through a demand notice from Tanzania Revenue Authority (TRA) requiring her to pay TZS 442,433,102.52 being the outstanding taxes for goods imported by the plaintiff between 2010 and 2013. Following the demand notice, the plaintiff, believing that all the due taxes were accordingly paid, resisted by filing objection at TRA. Nonetheless, the plaintiff's objection was dismissed. Still protesting the debt, the plaintiff filed a complaint to wit, Tax Appeal No. 09 of 2016 before the Tax Revenue Appeals Board but after hearing the evidence, the Board found that the due taxes for goods imported by the plaintiff were not paid by its clearing agent (the defendant). It was discovered that the defendant was submitting false documents hence paying under declared taxes based on the false documents. The Board found that the customs declarations (TANSAD) presented to Tanzania Revenue Authority by the defendant, **KAS FREIGHT LIMITED** were false and incorrect. Still dissatisfied, the plaintiff appealed to the Tax Revenue Appeals Tribunal via Tax Appeal No. 20 of 2016. Similarly, the appeal was dismissed on 10th March, 2021 for want of merits. As such, the plaintiff was left with no option than to concede payment of the alleged outstanding tax.

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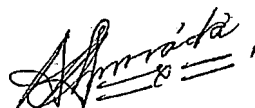
It is against this background, the plaintiff instituted the instant suit against the defendant for breach of contractual obligations through its fraudulent acts which led the plaintiff to suffer reputational and financial damage. On the above account, the plaintiff prays for judgment and decree against the defendant as follows;

- i) Declaration that the defendant breached its contractual duties by failing to pay to Tanzania Revenue Authority a sum of TZS 442, 443, 102.52 being import taxes due on the plaintiff's goods cleared by the defendant
- ii) Declaration that the defendant acted fraudulently and actively concealed the fraud to the plaintiff in failing to pay the required taxes to Tanzania Revenue Authority in breach of contractual obligation on its part.
- iii) An order for payment of TZS 442, 433, 102.52 being taxes paid to Tanzania Revenue Authority as a result of the defendant's failure to pay the appropriate taxes as required by law and as per the contractual arrangement with the plaintiff.
- iv) An order for payment of TZS 49, 227, 523.20 and USD 23, 611 being costs incurred by the plaintiff for legal representation in prosecuting the matter before TRA, the Tax Revenue Appeals Board and Tax Revenue Appeals Tribunal;

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- v) General damage as will be assessed by this Court arising from the plaintiff's reputational damage owing to the defendant's submission of false and incorrect documentation to Tanzania Revenue Authority in connection with payment of the said taxes;
- vi) Commercial interest at the rate of 25% per annum on the said amount calculated from 11th March, 2016 to the date of judgment.
- vii) Interest on the decretal amount from the date of judgment to the date of full and final satisfaction.
- viii) Costs of this suit; and
- ix) Any other relief as the Court may find just to grant.

On the adversary, the defendant filed a written statement of defence (WSD) disputing the plaintiff's claims. The defendant stated that there was no existence of valid contractual terms requiring the defendant to pay Tanzania Revenue Authority (TRA) taxes in the sum of TZS 442,443,102.52 on behalf of the plaintiff. Further, the defendant contended that taxes are statutorily levied on the shoulders of importers and such obligation is non-transferrable. At paragraph 6.1 of the WSD, the defendant stated that the alleged fraudulent acts were perpetrated jointly by the defendant and plaintiff's unscrupulous employees without knowledge of either parties. Wherefore, the defendant averred that the

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plaintiff is not entitled to any of the reliefs sought. She thus prayed for dismissal of the suit with costs.

Upon completion of the pleadings, when the matter was called on for final pre-trial conference, the court, upon consensus of both parties, framed and recorded five issues as follows;

1. Whether there was a valid principal agent relationship
2. Whether the defendant breached her obligations under contractual relationship with the plaintiff.
3. Whether the defendant acted fraudulently.
4. Whether the plaintiff suffered damages as a result of the alleged breach of contractual relationship with the defendant.
5. To what reliefs are parties entitled to?

During hearing of this case, the plaintiff was represented by Mr. Wilson Mukebezi and Mr. Robert Mossi, learned advocates whilst the defendant had the services of Mr. Jimmy Mrosso, learned advocate.

In the endeavours to prove its case, the plaintiff marshalled one witness namely, Jane Musyani (PW1) and produced several documentary exhibits which were admitted and marked from exhibit P1 to P10. PW1 told the Court that, she personally dealt with the transactions in dispute. She recounted that sometimes in 2010 the defendant was

contracted by the plaintiff to be its clearing and forwarding agent. PW1 stated that the defendant was entrusted to clear the plaintiff's goods along with payment of all the due taxes. PW1 elaborated that, in the course of carrying out the contractual obligations, the defendant was raising invoices covering the due taxes and other necessary costs associated to the goods imported by the plaintiff, and upon submissions of the said invoices, the plaintiff was remitting money to the defendant's account maintained at Stanbic Bank, Industrial Branch. PW1 stated that she was personally corresponding with the defendant in respect of the clearance of goods. The plaintiff's witness tendered various correspondences in relation to the invoices for tax payments between the plaintiff and defendant (exhibit P3). Further, PW1 tendered exhibit P5 comprising transfer forms which were remitting money from the plaintiff's account to the defendant's account No. 1016013406 at Stanbic Bank. Jane Musyani (PW1) further told the court that despite remitting the money as claimed by the defendant, the plaintiff came to learn that the defendant was not paying the due taxes. She expounded that the plaintiff came to realise that the defendant was paying less amount than she was claiming and getting from the plaintiff. She recapitulated that this came to the plaintiff's knowledge when the TRA conducted post audit and served her with a



demand note (exhibit P6). PW1 told the Court about all the measures the plaintiff took including filing objections before TRA, filing Tax Appeal No. 09 of 2016 before Tax Revenue Appeals Board and later Tax Appeal No.20 of 2020 before the Tax Revenue Appeals Tribunal. PW1 tendered in evidence the judgments of the Tax Revenue Appeals Board and Tax Revenue Appeals Tribunal which were received and marked as exhibit P7 and P8 respectively. PW1 proceeded that having exhausted all the remedies to no avail, she agreed to pay the outstanding tax to wit, TZS 483, 134, 920/= although she had remitted the fund to the defendant to pay it and believed that the defendant acted accordingly. PW1 stated that owing to the defendant's fraudulent acts, the plaintiff suffered both reputational and financial damage. She thus prayed the Court to grant the prayers as contained in the plaint.

In defence, the defendant brought one witness namely, Edward John Urio (DW1), the defendant's principal officer and produced one documentary exhibit to wit, a notice of offence issued by TRA (exhibit D1). In his witness statement, DW1 disputed the plaintiff's claims. Although DW1 admitted that the defendant was contracted to clear the plaintiff's goods, he denied the existence of principal-agent relationship on the ground that the defendant was duly registered and licensed as customs agent hence its principal was Customs and Excise Department

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(TRA)and not the plaintiff. Furthermore, DW1 told the Court that the defendant admitted the offence of under declaration of taxes in respect of goods imported by the plaintiff by using falsified importation documents. He tendered a notice of offence (exhibit D1) in which the DW1 as the defendant's director was given the option to compound the offence. DW1 insisted that the duties and taxes are levied on the importer of goods and this obligation is not transferrable. He finally prayed the Court to dismiss the plaintiff's suit with costs.

Upon conclusion of hearing, parties were allowed to file final written submissions in terms of rule 66 (1) of the High Court (Commercial Division) Procedure Rules, 2012. I compliment both counsel for complying with filing schedule. However, with due respect to the defendant's learned counsel, his submission was more attacking the ruling delivered by Hon. Nangela J in which he overruled the preliminary objections which had been raised by the defendant than addressing the Court on the evidence presented and legal position. Notwithstanding, I have considered the parties' submissions in my decision though I will not reproduce them verbatim.

Having appraised the evidence and upon canvassing the rival submissions, it is now high time to determine the issues framed.

The 1st issue is whether there was a valid principal-agent relationship. I have keenly analysed the parties' evidence and noted that it is not disputed by the defendant that she was contracted by the plaintiff to pay duties and due taxes arising in the course of clearing of the plaintiff's goods, among other duties. Exhibit P4 is a bundle of invoices prepared and issued by the defendant to the plaintiff. These invoices, among other information, contain the amount required for relevant taxes and agency fees. For example, in the invoice No. KFL/0088B/2011 dated 15/06/2011, the defendant claims TZS .3, 674,689.10 being payment required for customs duty and VAT. Besides, PW1 tendered a batch of documents (exhibit P5) which contains transfer forms through which the plaintiff was transferring money from its account to the defendant's account for purposes of clearing costs including due taxes. For example, in the transfer form dated 18/04/2012, the plaintiff transferred from its account No. 0140011904801 a sum of TZS 14, 789,871.00 to the defendant's account No. 1016013406 being payment in respect of invoice No. KFL/00/015/2012 which had been raised by the defendant. From the evidence presented, it is clear that the defendant was doing clearing works including payment of the due taxes on behalf of the plaintiff. In my view, the evidence on record sufficiently establishes principal-agent

relationship. This finding is further supported by the words used by the defendant in the invoice. To be specific, exhibit P4 is clear that the defendant was charging the plaintiff an agency fee of 1.5%. If the defendant were not an agent to the plaintiff, why would it charge the plaintiff an agency fee? Although there was no specific written agency agreement produced, the tendered exhibits along with sworn statement of Jane Musyani sufficiently established the existence of contractual relationship. I therefore hold that there was a valid principal-agent relationship between the plaintiff and defendant which is contemplated under section 134 of the Law of Contract Act.

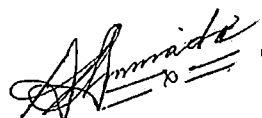
Coming to the 2nd issue whether the defendant breached her obligations under contractual relationship with the plaintiff, it is established that the defendant was contracted to clear the plaintiff's goods including payment of due taxes. It is also established that through invoices (exhibit P4) that, the defendant was claiming payments for clearing costs including due taxes and the plaintiff was remitting the required fund as exhibited through the transfer forms (part of exhibit P5). Despite remitting fund to the defendant as per invoice, the defendant was not paying taxes as indicated in the invoices submitted to the plaintiff. Instead, the defendant was falsifying the documents and consequently paying less taxes. This is established

through the plaintiff's evidence in particular the judgments of the Tax Revenue Appeals Board and Tax Revenue Appeals Tribunal (exhibit P7 and 8 respectively). Further, the fact is admitted by the defendant through DW1 Edward Urio who told the Court that the defendant, through him as director of the defendant company, admitted the accusations and agreed to compound the offence. DW1 also tendered a notice of offence issued by Tanzania Revenue Authority (exhibit D1) which tells it all that the defendant was charged for under declaration of taxes in respect of the plaintiff's imported goods through submission of falsified documents. The defendant does not dispute being paid by the plaintiff the fund for payment of taxes nor does it deny the fact that she did not pay taxes as indicated in the invoices she submitted to the plaintiff. DW1 stated that the alleged fraud was perpetrated by the plaintiff's and defendant's unscrupulous employees. However, there is no scintilla of evidence that implicates any of the plaintiff's employees. The evidence is to the effect that the plaintiff paid the necessary money but the defendant acted contrary to the agreement. The defendant's defence is, in my view, baseless because the plaintiff dutifully paid her the amount claimed in the invoices on trust that she would pay the dues accordingly. Indeed, the plaintiff fully discharged its obligations under agency agreement. On the basis of the evidence

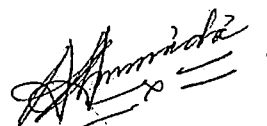
as analysed above, I hold that, by failure to pay the due taxes as she claimed in the invoices submitted to and paid by the plaintiff, the defendant breached the contractual obligations under the principal-agent relationship with the plaintiff.

The 3rd issue is whether the defendant acted fraudulently. PW1 testified that the defendant did not pay the due taxes as per the TRA assessment and the amount indicated in the invoices submitted to the plaintiff. She elaborated that after the plaintiff was served with a demand note from Tanzania Revenue Authority (TRA) and through tax investigation which was carried out by TRA, it was unearthed that the defendant was forging the bank deposit slips (payment slips) and submitting the same to TRA as such, the money indicated therein was not genuinely paid to TRA account. PW1 tendered the deposit slips (part of exhibit P5) which, according to the witness and the findings by the Tax Revenue Appeals Authorities, were forged documents. The defendant did not bring material evidence to controvert this fact. Admittedly, the act of forging the bank deposit slips (payment slips) connotes fraudulent intent on the part of the defendant. In view thereof, I am convinced that the defendant acted fraudulently.

The 4th issue is whether the plaintiff suffered damage as a result of the defendant's breach of contractual relationship with the defendant. PW1

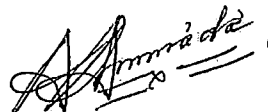
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testified that owing to the defendant's act, the plaintiff suffered reputational and financial damages. PW1 testified that the plaintiff was compelled to pay TZS 442,433,102.52 to TRA as the outstanding taxes which the defendant fraudulently failed to pay whilst she had already paid it to the defendant. She further stated that the plaintiff paid Messrs B & E Ako Law a sum of TZS 49, 227,523.20 being instruction fee for legal representation before the Tax Revenue Appeals Board and Tax Revenue Appeals Tribunal. PW1 also stated that the plaintiff paid the accounting firm known as KPMG a sum of USD 23, 611 as fee for representation in the objection proceedings before Tanzania Revenue Authority. To support the assertion, PW1 tendered Tax invoice from KPMG charging PAN AFRICAN EQUIPMENT for tax advice and filing of a case to the Tax Revenue Appeals Board together with payment voucher and payment advice from PAN AFRICAN to KPMG (exhibit P9). She also tendered and tax invoice from B & E AKO LAW charging PAN AFRICAN EQUIPMENT for representation in the Tax Revenue Appeals Board (exhibit P10). Besides, Jane Masyani told the Court that the plaintiff suffered reputational damage following the defendant's fraudulent acts of forging and submitting false documents to Tanzania Revenue Authority pertaining to the plaintiff's imported goods. On the above evidence, it goes without saying that the plaintiff incurred



financial costs and other inconveniences on account of the defendant's fraudulent acts. Thus, I am satisfied that the plaintiff suffered damage as a result of the defendant's breach of contractual obligation.

As to what reliefs are parties entitled to, it is a settled position in contract law that a party who breaches the contract is liable to compensate the other. See Section 73 of the Law of Contract Act and the case of **Simba Motors Limited vs John Achelis & Sohne GMBH and Another**, Civil Appeal No. 72 of 2020, CAT at Dar es Salaam. In this case, the plaintiff testified on the damage she suffered including double payment of the taxes, instruction fees for representation, and reputation injury. Although the plaintiff tendered invoices from B & E AKO LAW and KPMG indicating the amount claimed, it is worth noting that the evidence presented was not conclusive proof of the payment of money indicated therein. The law is settled that invoices are not proof of payment. See **Ami Tanzania Limited vs Prosper Joseph Msele**, Civil Appeal No. 159 of 2020, CAT at Dar es Salaam and **Box Board Tanzania Limited vs Mount Meru Limited**, Civil Case No. 8 of 2016, HC at Arusha. In **Ami Tanzania Limited** (supra), the Court of Appeal had the following to say at page 16;

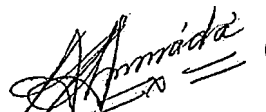
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'We are of the similar view that, in absence of receipts, bank transfer of money or letters of credits by the respondent to the supplier of the cargo, the invoice cannot be taken to be the proof of payment as it was a mere advice of the amount to be paid, it was a mere bill'

It is common cause that the fund allegedly paid to KPMG and Messrs B & E Ako Law are claimed as specific damages. This being the case, they ought to be strictly proved. Given that the plaintiff only tendered invoices, I am inclined to hold that they have not been strictly proved. However, much as it was established that the plaintiff was represented both at TRA during objection proceedings and before the Tax Revenue Appeals Board and later Tax Revenue Appeals Tribunal, I find it apposite to consider the alleged costs under general damages. This is because general damages need not to be strictly proved.

All the above considered, it is my unfeigned findings that the plaintiff has established its case on balance of probabilities. I therefore enter judgment and decree in favour of the plaintiff with the following consequential orders;

- (i) It is hereby declared that the defendant breached its contractual duties by failing to pay to Tanzania Revenue Authority a sum of TZS 442, 443, 102.52 being import taxes due on the plaintiff's goods cleared by the defendant.



- (ii) It is hereby declared that the defendant acted fraudulently and actively concealed the fraud to the plaintiff in failing to pay the required taxes to Tanzania Revenue Authority in breach of contractual obligation on its part.
- (iii) The defendant is hereby ordered to pay the plaintiff a sum of TZS 442, 433, 102.52 being taxes paid to Tanzania Revenue Authority as a result of the defendant's failure to pay the appropriate taxes as required by law and as per the contractual arrangement with the plaintiff.
- (iv) The defendant is hereby ordered to pay general damage to a tune of TZS 50,000,000/=.
- (v) Interest at the court's rate of 7% on the decretal amount under (iii) and (iv) from the date of judgment to the date of full and final satisfaction.
- (vi) Costs of this suit;

It is so ordered

The right of appeal is explained.




A.A. Mbagwa

JUDGE

25/08/2023