

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**COMMERCIAL CASE NO. 81 OF 2022**

**YAHYA TWALIB SHAMSI t/a SHAMSI ENTERPRISES..... PLAINTIFF**

**VERSUS**

**FRECO EQUIPMENT SUPPLY LIMITED .....DEFENDANT**

*Date of last order: 2/11/2023*

*Date of judgment: 17/11/2023*

**JUDGMENT**

**A.A. MBAGWA, J.**

The plaintiff is a natural person trading as Shamsi Enterprises whereas the defendant is a company incorporated under the laws of Tanzania and authorised to deal with, among other things, the sale of motor vehicles. The dispute in this suit stems from the sale agreement of a brand-new tipper truck entered between the plaintiff and the defendant. The plaintiff contends that the defendant breached the terms of the agreement by its failure to deliver the said truck. Consequently, the plaintiff, instituted the present suit praying for judgment and decree against the defendant in the following orders:



- i. Declaration that the defendant has breached the terms and conditions of the sale agreement of the suit vehicle to the plaintiff and that the said sale agreement has become voidable.
- ii. That the defendant be compelled and ordered to refund the sum of USD 55,603.00 say United States Dollars Fifty-Five Thousand Six Hundred and Three only or its equivalent in Tanzania shillings at the current exchange rate to the plaintiff, being part of the purchase price paid to the defendant by the plaintiff.
- iii. Payment of commercial interest at the rate of 30% of the sum of USD 55, 603.00 say United States Dollars Fifty-Five Thousand Six Hundred and Three per month from the date of breach to the date of judgment.
- iv. An order for refund of all registration expenses incurred by the plaintiff in the sum of TZS 3, 176, 555.00 say Tanzania shillings Three Million One Hundred Seventy-Six Thousand Five Hundred Fifty-Five only.
- v. An order for payment of general damages in the sum of TZS 50,000,000/= say Tanzania shillings Fifty Million only or any part thereof as the Court in its absolute discretion may assess.
- vi. Payment of decretal interest at the rate of 7% per annum of the paid sum of USD 55, 603.00 say United States Dollars Fifty-Five Thousand Six Hundred and Three as per prayer (ii) above from the date of judgment to the date of full payment.



vii. Costs.

viii. Any other relief this Court may deem appropriate to grant

It is the plaintiff's contention that the plaintiff and the defendant on 8<sup>th</sup> December 2020 entered into a sale agreement of brand-new tipper truck at a consideration of USD 76,700.00. In a bid to fulfil the contractual obligations, the plaintiff paid, at different times, a total of USD 55, 603.00 being part payment of the purchase price. Besides, the plaintiff averred that he paid additional sum of TZS 3,176,555/= say Tanzania shillings Three Million One Hundred Seventy-Six Thousand Five Hundred Fifty-Five for registration. The plaintiff further alleged that when he was about to effect the last installment, the defendant refused to accept it and instead notified the plaintiff of its intention to terminate the contract. Consequently, the duo agreed to terminate the sale agreement on 24<sup>th</sup> March 2022. It was the plaintiff's averment that through the termination agreement dated 24<sup>th</sup> March 2022, the defendant agreed to refund the plaintiff a sum of USD 55, 603.00 being purchase price partly paid by the plaintiff as well as registration costs in the sum of TZS 3, 176, 555.00 say Three Million One Hundred Seventy-Six Thousand Five Hundred Fifty-Five. Nonetheless, the plaintiff complained that the defendant failed to refund both the purchase price and registration costs paid by the plaintiff despite



several reminders from the plaintiff. In the circumstances, the plaintiff was left with no option except to institute the present case.

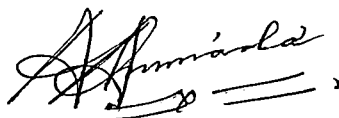
Upon service, the defendant filed a written statement of defence contesting the plaintiff's claims. The defendant stated that she neither breached the sale agreement nor refused to refund the amount that the plaintiff had advanced. Instead, the defendant contended that it was the plaintiff who breached the sale agreement by his failure to pay in full the purchase price. In the end, the defendant prayed for dismissal of the suit.

During the final pre-trial conference, this Court, with the consensus of the parties, framed two issues, namely;

1. Whether the defendant breached sale agreement of brand-new tipper truck entered into between the plaintiff and defendant.
2. What reliefs are parties entitled to?

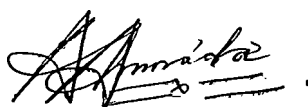
Throughout the prosecution of this case, the plaintiff was represented by Mr. Tumaini Mfinanga and Mr. Michael Muhina, learned advocates whereas the defendant enjoyed the legal services of Mr. Barnabas Lugua, learned advocate.

In the endeavours to prove his case, the plaintiff paraded one witness namely, Shamsi Twalibu (PW1) and tendered three documentary exhibits

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to wit, sale agreement of a brand-new tipper truck (exhibit P1), statement of outstanding balance in respect of the purchase price (exhibit P2) and agreement to terminate purchase contract and refund of the paid amount (exhibit P3).

It was the plaintiff's testimony that on the 8<sup>th</sup> day of December, 2020 the plaintiff and defendant entered into sale agreement of a brand-new tipper truck at the consideration of USD 76,700. In performing the contractual obligations, the plaintiff paid a total of USD 55,603 in different instalments namely, USD 26,176 was paid by the plaintiff's partner M.R. Building and Civil Engineering Co. LTD on 17<sup>th</sup> July, 2020, USD 16,595 on 12<sup>th</sup> December, 2020, USD 2, 139 on 24<sup>th</sup> January, 2021 and USD 10, 693 on 28<sup>th</sup> January, 2021. Besides, the plaintiff told the Court that he paid the defendant additional sum of TZS 3, 176, 555 for registration of the said truck. However, the plaintiff lamented that, to his dismay and contrary to the sale agreement, the defendant declined to accept the last instalment and pressed for termination of contract. As such, on 24<sup>th</sup> March, 2022 the duo executed an agreement to terminate the sale agreement on the conditions that the defendant would refund the plaintiff the said sum. To buttress his allegations, the plaintiff tendered the said agreement titled "***Hati ya Kusitisha Mkataba kwa Maridhiano***", and the same was admitted and marked exhibit P3. The plaintiff stated that the defendant



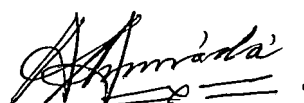
was bound to refund the money by 31<sup>st</sup> May 2022. During cross examination PW1 admitted that a sum of USD 15, 097 was not paid to complete the purchase price. PW1 also affirmed that they entered into agreement to terminate the sale contract. PW1 also admitted that he demanded the whole USD 55,603 to be paid into his account.

In defence, the defendant paraded one witness namely, FRED MALIMA (DW1), the defendant's managing director. The defendant strongly disputed the plaintiff's claims. DW1 stated that the plaintiff failed to pay in full the agreed purchase price of USD 76,700 hence they entered into agreement to terminate the sale agreement and refund USD 55,603 which the plaintiff had paid. DW1 expounded that to avoid audit query, it was agreed that the defendant would deposit the money into accounts it came from. As such, a sum of USD 29, 427 was to be deposited into the plaintiff's account whereas USD 26, 176 was to be paid into the account of M.R. Building and Civil Engineering. DW1 further told the Court that, to his surprise, the plaintiff deviated from the agreement and demanded the defendant to deposit the whole money into his account. The defendant witness reiterated that it is the plaintiff himself who breached the terms of both the sale contract (exhibit P1) and the agreement to terminate the sale contract (exhibit P3). In consequence, the defendant prayed for dismissal of the suit.

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I have keenly appraised the evidence and thoroughly navigated through the pleadings and submissions made by the parties. It is now high time to determine the issues framed.

To start with the 1<sup>st</sup> issue namely, whether the defendant breached the sale agreement of a brand-new tipper truck entered into between the plaintiff and defendant (exhibit P1). There is no dispute that on 8<sup>th</sup> December 2020, parties executed sale contract for a new-brand tipper truck at the price of USD 76,700. According to clause 3 of the sale agreement (exhibit P1), 50% of the purchase price which is USD 38, 350 was to be paid prior to the signing of the agreement and the remaining balance ought to be paid in lump sum by the Bank of Africa on behalf of the plaintiff. The defendant testified that after the signing of the contract, the plaintiff informed the defendant that M.R. Building and Civil Engineering Co. LTD would pay the remaining balance instead of Bank of Africa. According to the evidence of both the plaintiff and defendant, M.R. Building and Civil Engineering paid only USD 26,000. It is further, the plaintiff's own evidence to wit, statement of outstanding balance (exhibit P2) that up to 28<sup>th</sup> June 2021, the plaintiff had paid a total of USD 55, 097 only. DW1 stated that following the plaintiff's failure to fully pay the purchase price, the plaintiff asked for termination of the contract and a refund of the money he had advanced. As such, the duo executed



agreement for termination of sale contract (exhibit P3). According to exhibit P3, the plaintiff freely agreed to terminate the sale agreement of a brand-new tipper truck on condition that the defendant would refund him USD 29, 427. Indeed, the above evidence speaks against the plaintiff. There is no scintilla of evidence that suggests the defendant's failure to perform its contractual obligation. To crown it all, the plaintiff voluntarily entered into an agreement (exhibit P3) to terminate the sale contract (exhibit P1) after he had failed to pay the full purchase price. It is a settled law that failure to perform contractual terms amounts to a breach of contract. See **Simba Motors Limited vs John Achelis & Sohne GMBH and Another**, Civil Appeal No. 72 of 2020, CAT at Dar es Salaam. In the case at hand, the plaintiff failed to pay in full the purchase price and hence breached the terms of the sale contract (exhibit P1) in particular clause 3 which required the plaintiff to pay the 2<sup>nd</sup> 50% in lump sum. A similar position was restated by the Court of Appeal in the case of **Mirambo Mabula vs Yohana Maiko Sengasu and Another**, Civil Appeal No. 71 of 2020, CAT at Dar es Salaam. It is therefore a bizarre act for the plaintiff to claim that the defendant breached the terms of the sale agreement (exhibit P1). In view thereof, the first issue is answered in the negative.

As to what reliefs are parties entitled to, it is my findings that since the plaintiff has failed to prove his claims as hereinabove indicated, the only





course of action is to dismiss the suit with costs. I therefore dismiss the suit with costs for want of merits.

It is so ordered.

The right of appeal is explained.



  
A.A. Mbagwa

**JUDGE**

**17/11/2023**