

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

**COMMERCIAL CASE NO. 83 OF 2021**

**BETWEEN**

**RAPHAEL LOGISTICS (T) LIMITED..... PLAINTIFF**

**VERSUS**

**PANAFRICA ENERGY (T) LIMITED.....DEFENDANT**

**AND**

**ZANZIBAR MARINE AND DIVING LIMITED.....1<sup>ST</sup> THIRD PARTY**

**AJE MARINE COMPANY LIMITED .....2<sup>ND</sup> THIRD PARTY**

**TANZANIA PORTS AUTHORITY.....3<sup>RD</sup> THIRD PARTY**

**JUDGMENT**

Date of last order: 31/10/2023

Date of judgment:12/12/2023

**MKEHA, J.**

In this suit, the plaintiff is claiming some reliefs against the defendant.

According to the plaint, the plaintiff specifically prays for judgment and decree against the defendant as follows:

- (a) A declaration that the defendant is in breach of hire agreement;
- (b) An order that the defendant shall pay to the plaintiff sum of TZS. 35,594,660/=;
- (c) An order directing the defendant to pay to the plaintiff sum of USD 100,000;
- (d) An order directing the defendant to pay to the plaintiff sum of TZS. 68,150,000/= from 19<sup>th</sup> May to 9<sup>th</sup> July, 2021;
- (e) An order directing the defendant to pay the plaintiff TZS. 1,363,000/= per day from 9<sup>th</sup> July, 2021 to judgment and till payment in full;
- (f) An order directing the defendant to pay the plaintiff sum of Euro 150,000 being the purchase value of the mobile crane;
- (g) An order directing the defendant to pay all interests which the plaintiff has incurred and continues to incur;
- (h) Payment of general damages to the tune of TZS. 100,000,000/=;
- (i) Payment of interest on the decretal amounts at the prevailing commercial rate;

- (j) The defendant be ordered to pay interests on the decretal amount at the court rate of 12% per annum from the date of judgment till the decretal amount is satisfied in full;
- (k) Costs of the suit be paid by the defendant and,
- (l) Any other reliefs this honourable court may deem fit to grant.

The following facts as obtained from the plaint are the basis for the claims listed hereinabove. That, the plaintiff is the owner of a 70-ton mobile crane make Liebherr-89582 with Reg. No. T 856. The same was bought by the plaintiff from a company named SAUDI LIEBHERR COMPANY LIMITED located in Jeddah, Saudi Arabia and its purchase price was Euro 150,000. In the purchase price, the plaintiff's own money was 30% of the purchase price and the rest which comprised of 70% of the purchase price was a loan from Stanbic Bank Tanzania Limited.

That, on 16<sup>th</sup> April, 2021 the defendant issued Purchase Order No. 21491 to the plaintiff, requesting to hire a 55-ton mobile crane for its slickline operations at Songosongo Island for 14 days commencing on 28<sup>th</sup> April, 2021. The hire period was further extended for 6 days which was to expire on 19<sup>th</sup> May, 2021. That, the agreed hire price was TZS. 1,363,000/= per day, standby charges were TZS. 831,900/=, mobilization and

demobilization costs were TZS. 1,652,000/=, and price for hiring flatbed truck for transporting dismantled parts of the crane was TZS. 944,000/=. That, the total outstanding amount of the purchase order was TZS. 35,594,660/=.

That, it was further agreed through the defendant's standard terms and conditions annexed to the purchase order that, the title and risk of the said crane would shift to the defendant upon delivery of the same at the agreed delivery site. And, the liability of the plaintiff on the crane ceased at the time she delivered it at the port of Dar es Salaam ready for loading onto the vessel for shipment to Songosongo Island and was supposed to resume when the crane should have been offloaded from marine vessel back to the yard. (Clause 17.0 of the defendant's standard terms annexed to the purchase order-part of **Exhibit P1**). That, the loading and offloading of the crane from the vessel was the sole responsibility of the defendant.

That, the plaintiff delivered the crane at the port but after expiry of the hire term, she was notified on 28<sup>th</sup> May, 2021 by the defendant's official that it was ready for pick up. When the plaintiff's officials went to collect the crane, they found it in bad condition as it could not function at all.

That, the plaintiff discovered that, the crane had been damaged damaged beyond repair because it sank at the Tanzania Ports Authority berth zero on 23<sup>rd</sup> May, 2021 during the offloading activity which she was not officially involved.

That, due to the non-functioning of the said crane the plaintiff incurred and was continuing to incur severe monetary losses. That, the plaintiff's loss according to the plaint included USD 100,000 for failure to service the crane to customers who ordered for it, accrued hire price of TZS. 68,150,000/= from 19<sup>th</sup> May, 2021 to 9<sup>th</sup> July 2021 at the agreed rate of TZS. 1,363,000/= per day, purchase price of the said crane to the tune of 150,000 Euros, TZS. 35,594,660/= being the hire price from 28<sup>th</sup> April 2021 to 19<sup>th</sup> May 2021, 10% loan interest per annum each month to Stanbic Bank Tanzania Limited and TZS. 1,363,000/= being daily hire price for the crane.

On the other hand, the defendant filed her written statement of defence. In the written statement of defence, the defendant agreed on the existence of the hire agreement between herself and the plaintiff for a period of 14 days from 28<sup>th</sup> April, 2021 and its 6 days' extension. However, the defendant refuted the claim that it was her duty to offload the crane

from the vessel. The defendant further stated that, after expiry of the hire agreement, she loaded the crane into a vessel named LCT AJE 1 at Songosongo to be shipped to the Dar es Salaam port and informed the plaintiff accordingly. In addition to the written statement of defence, the defendant also filed a third party notice against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> third parties.

The defendant impleaded the above named third parties in this suit because she believed that the reliefs claimed by the plaintiff against her were attributed to the sinking of the crane and the investigation report by the Tanzania Ports Authority which revealed that, at the time of the sinking of the said crane the marine vessel which carried it was owned by the 2<sup>nd</sup> third party but operated by the 1<sup>st</sup> third party. Also, the sinking of the said crane was attributed by negligence of the employees of the 1<sup>st</sup> and 3<sup>rd</sup> third parties. That in case the defendant is adjudged liable to the plaintiff, the third parties should compensate the reliefs claimed by the plaintiff.

All third parties filed their respective written statements of defence. In her written statement of defence, the 1<sup>st</sup> third party noted the fact that on 20<sup>th</sup> May, 2021 the defendant loaded a crane on board the ship LCT AJE 1 at Songosongo. That the said ship arrived at Dar es Salaam port on 20<sup>th</sup> May,

2021. The 1<sup>st</sup> third party further stated that, the said ship was not operated by her as she only hired it for specific voyages. That she was not responsible for any contribution or indemnification to the defendant from the carelessness, negligence and unprofessional conduct of the ship captain one Kombo Mwarabu Ali, the master of LCT AJE 1.

On the other hand, the 2<sup>nd</sup> third party in her written statement of defence admitted the fact that the marine vessel which carried the crane in dispute at the time of its sinking was owned by her. She further stated that, she was engaged by the 1<sup>st</sup> third party to transport the crane in dispute from the port of Dar es Salaam to Songosongo Island and from Songosongo Island back to Dar es Salaam and this was duly executed. That, discharging of the said crane was the responsibility of the 1<sup>st</sup> third party and 3<sup>rd</sup> third party's officers. Save for the above stated, the 2<sup>nd</sup> third party denied liability to the crane in dispute.

Also, the 3<sup>rd</sup> third party denied liability to the defendant because she did not contribute to the sinking of the crane in dispute. That, she advised the 2<sup>nd</sup> third party to offload the crane at night when the tide is high, but on their own will and risk they decided to offload the crane in the afternoon when the tide was low.

Before commencement of hearing, the following issues were framed for determination:

1. Whether the defendant owes the plaintiff crane hiring charges, mobilization and demobilization costs.
2. Whether the defendant is responsible for the sinking of the crane.
3. Whether the plaintiff suffered damages due to the sinking of the crane.
4. Whether the defendant is liable to compensate the plaintiff for the damages suffered due to the sinking of the crane.
5. If the 4<sup>th</sup> issue is determined in the affirmative, whether any or all of the 3<sup>rd</sup> parties are liable to indemnify or contribute to the defendant and to what extent.
6. To what reliefs are the parties entitled.

During hearing of this suit, the plaintiff was represented by Mr. Fikiri Liganga learned advocate and the defendant was represented by Mr. Timon Vitalis and Tumaini Michael learned advocates. The 1<sup>st</sup> third party was represented by Captain Bendera learned advocate. The 2<sup>nd</sup> third party was represented by Mr. Mwita learned advocate and the 3<sup>rd</sup> third party



was represented by Mss. Grace Lupondo and Jaquiline Kinyasi learned State Attorneys.

Only one witness testified for the plaintiff. The witness happened to be Mr. George Joseph Oisso (PW1). The defendant too produced one witness, Ms. Stella Nissa Ndossi (DW1). On the other hand, the 1<sup>st</sup> third party had one witness, Mr. Khamis Mohamed Amran, as it happened to the 2<sup>nd</sup> third party who also brought one witness, Mr. Kombo Mwarabu Ally. The 3<sup>rd</sup> third party too, produced one witness, Mr. Sadikiel Avunilwa Makono.

PW1 was the plaintiff's accountant. He commenced his testimony by tendering his witness statement as evidence in chief, whereby the same was admitted as such. According to the witness statement of PW1, on 16<sup>th</sup> April, 2021 the defendant issued a Purchase Order NO. PO 21491 to the plaintiff, requesting to hire a 55-ton mobile crane for her slickline operations in Songosongo Island for a period of 14 days commencing from 28<sup>th</sup> April, 2021. That, the hire period was extended for 6 days to make the expiry date be 19<sup>th</sup> May, 2021.

That, the hire price was agreed to be TZS. 1,363,000/= per day, with additional standby charges of TZS. 705,000/=. Copy of the purchase order was admitted into evidence as Exhibit P1.

Further, the witness statement indicates that the total amount payable and outstanding under the purchase order from 28<sup>th</sup> April, 2021 to 16<sup>th</sup> June, 2022 was TZS. 534,452,660/=. That the breakdown of this figure was given in the witness statement as follows: That, TZS. 35,594,660/= was for crane hiring costs from 28<sup>th</sup> April, 2021 to 19<sup>th</sup> May, 2021, TZS. 68,150,000/= for crane hiring costs from 19<sup>th</sup> May 2021 to 9<sup>th</sup> July 2021 when this case was instituted in this court, and TZS. 430,700,000/= was for crane hiring costs from 9<sup>th</sup> July 2021 to 16<sup>th</sup> June 2022. That, the amounts stated above had not been paid by the defendant to the plaintiff.

The witness statement further indicated that, the plaintiff and defendant agreed that the liability of the plaintiff on the crane ceased to exist at the time the plaintiff delivered the crane at the port of Dar es Salaam ready for loading by the defendant onto the marine vessel for shipment to Songosongo Island and would resume at the time the crane was ready for pick up from the port back to the yard after it had been offloaded by the defendant from the marine vessel. That the loading and offloading of the

crane into and from the marine vessel was the sole responsibility of the defendant. The plaintiff was to be notified to pick up the crane after it had been offloaded from the vessel by the defendant. That, after expiry of the hire term, the plaintiff was expecting for notification from the defendant. That, whereas the expected notification was never received by the plaintiff, after some days, she learnt that, the crane had sunk at the port of Dar es Salaam.

The witness statement also indicates that, on 28<sup>th</sup> May 2021 the plaintiff received an email from the defendant's employee one Francisca Yona saying that the crane was ready for pick up from the port of Dar es Salaam. In response to the said email, the plaintiff's officials went to the port to collect the crane but they found it in a bad condition to the extent of it not functioning at all. When the defendant was notified on the condition of the crane, she denied responsibility and liability.

PW1 further stated that, following the defendant's denial of liability, the plaintiff issued her with a demand notice dated 14<sup>th</sup> June 2021 demanding payment of all the outstanding sum and the defendant replied the said demand notice by denying liability on 23<sup>rd</sup> June 2021. The two emails from the defendant to the plaintiff were collectively admitted into evidence as

Exhibit P2, the demand notice from the plaintiff to the defendant was admitted as Exhibit P3, and the reply to the demand notice was admitted into evidence as Exhibit P4.

PW1 stated further that, the plaintiff requested for official report of TPA and upon being supplied with the same in October 2021 he (PW1), personally noted in the said report that the plaintiff's crane was damaged beyond repair due to its sinking at the Tanzania Ports Authority berth zero on 23<sup>rd</sup> May 2021. He noted further that, the mobile crane in question was being transported from Songosongo Island to Dar es Salaam by a ship named LCT AJE 1, owned by AJE MARINE CO. LTD and captained by Mr. Kombo Mwarabu Ally. That the same was hired by the defendant.

PW1 finalised his evidence by stating that, due to the plaintiff's crane being in total damage beyond repair, the plaintiff could not service other customers with the said crane. To wit, PW1 stated that on 21<sup>st</sup> December, 2021 the plaintiff received a purchase order No. S17-4509960632 from Serengeti Breweries (T) Limited for hiring two mobile cranes with 130 ton and 70 ton. That, the total hiring value for a 70-ton crane was USD 133,539.20 but the plaintiff could not perform due to her 70-ton's crane

being in total damage. The said Purchase Order from Serengeti Breweries was admitted into evidence as Exhibit P5.

Upon being cross examined by Mr. Timon Vitalis learned advocate for the defendant, PW1 had the following to say: That, he was not there when the accident happened; That, he was not involved in the investigation relating to the cause of accident; That, charges for hiring the crane were timely paid by the defendant, That, the plaintiff was only claiming the crane back and the loss of use of the crane; That, demobilization did not include offloading costs; That, he did not present any technical report to the effect that the crane had been damaged beyond repair.

Responding to questions by Captain Bendera learned advocate PW1 told the court that, he could not tell how the accident happened and who was negligent. The witness could not tell, how was the crane offloaded at Songosongo.

Responding to questions from Ms. Lupondo learned State Attorney for the 3<sup>rd</sup> third party, PW1 stated that, he could not tell with precision whether the plaintiff's crane operator was involved in offloading the crane at Dar es Salaam Port; That, he was unable to specify the plaintiff's claims relating to

hiring charges; That, the hiring charges had been paid; That, whereas the defendant had hired 55 tonnes crane, Serengeti Breweries had pressed an order for 70 tonnes crane; That, he had not testified on how the defendant hired 70 tonnes crane from the plaintiff; That, he had not proved the value of the crane in dispute; and that, he had not proved existence of loan between the plaintiff and Stanbic Bank.

For the defendant, the sole witness was Stella Nissa Ndossi (DW1). She was the Logistics Manager of the defendant. She began her testimony by tendering her witness statement as evidence in chief and the same was admitted to that effect.

In the said witness statement, DW1 stated that on 16<sup>th</sup> April 2021 their company (the defendant) issued Purchase Order No. 21491 to the plaintiff requesting to hire a 55-tonnes mobile crane for slickline operations at Songosongo Island for a period of 14 days commencing on 28<sup>th</sup> April 2021 to 11<sup>th</sup> May 2021. That, the hire was extended for further 7 days through Purchase Order No. 21948. The Purchase Order dated 09/07/2021 was admitted into evidence as Exhibit D1.

That, two separate Tax Invoices and TRA EFD receipts issued by the plaintiff were raised based on the two Purchase Orders. The said Invoices and EFD receipts were collectively admitted into evidence as Exhibit D2.

DW1 stated further that, the said Tax Invoices were jointly paid by the defendant from the defendant's Account No. 9120000375193 into the plaintiff's Bank Account No. 9120000643724. The amount paid was TZS. 40,530,460/= . Both Bank Accounts of the defendant and the plaintiff respectively, were being held at Stanbic Bank Tanzania Limited. That, the payments covered both, the crane hiring charges as well as mobilization and demobilization costs for both Purchase Orders.

It was the testimony of DW1 that, it was agreed that the crane hire days were to be activated when the crane arrived at the site and was to get off hire once it departed from the site and that *the hire included operator of the crane*. It was further agreed that, *the defendant was to pay for the delivery of the crane from the site to Dar es Salaam Port and the plaintiff was responsible for picking it from Dar es Salaam Port but costs of the mobilization and demobilization was the responsibility of the defendant.*

That, the crane arrived at Dar es Salaam port from Songosongo Island on Thursday 20<sup>th</sup> May, 2021 and at around 10:54 hours they were informed by Captain Bwatto of Zanzibar Marine and Diving Services Limited (1<sup>st</sup> third party) via email that offloading of the crane was to be discharged through a vessel's ramp on Monday 24<sup>th</sup> May, 2021 due to rising tide. Thus, the plaintiff was also copied the said email dated 21<sup>st</sup> May 2021. That, contrary to Captain Bwatto's advice, on 23<sup>rd</sup> May 2021 she saw pictures on social media of the crane sinking into the sea when the plaintiff's operator was offloading the crane. She also received a call from one Mr. Hamis of Zanzibar Marine and Diving Services Limited who informed her that the crane had sunk.

She further testified that no person from their company was involved in offloading the crane on 23<sup>rd</sup> May 2021 and that the crane was taken out of water on 27<sup>th</sup> May 2021. That their company informed the plaintiff to collect the crane from the port via email communication dated 3<sup>rd</sup> June and 14<sup>th</sup> June 2021 but she did not heed. The email correspondences were collectively admitted into evidence as Exhibit D3.

DW1 finalized her evidence by explaining the TPA Report. That, following the incident the defendant requested for the said report and she was



availed with the same on 25<sup>th</sup> August 2021. Also that, on 12<sup>th</sup> May 2022 the defendant had been served with another detailed Port Investigation Report by the plaintiff. From the said Reports, she noted that, the crane fell and sank while it was was being operated by the plaintiff's employee one Mr. Oliver Michael Mushi; That, the offloading of the crane was conducted by the plaintiff during low water tide when it was not safe; That, the negligence of the ship captain, employed by Zanzibar Marine and Diving Services Ltd contributed to the crane sinking incident; That, the ship LCT AJE 1 was being owned by AJE Marine Co. Ltd and that both reports exonerated their company from the incident. The said Reports were admitted into evidence as Exhibits D4 and D5 respectively.

During cross-examination, DW1 stated that the defendant had no contract with AJE MARINE COMPANY LIMITED but with ZANZIBAR MARINE AND DIVING LIMITED.

The third parties also presented their evidence. The 1<sup>st</sup> third party's witness was Mr. Khamisi Mohamed Amran. His witness statement was admitted into evidence. His testimony was that, he was the Managing Director of the 1<sup>st</sup> third party. That on 18<sup>th</sup> May, 2021 they received a Purchase Order from the defendant and on 19<sup>th</sup> May, 2021 they responded to the

defendant by issuing two invoices for transportation services. The Purchase Order and the invoice dated 19<sup>th</sup> May, 2021 were admitted into evidence as Exhibits TP1 and TP3 respectively.

That, on the 20<sup>th</sup> May, 2021 the defendant loaded the crane on board the ship LCT AJE 1 at Songosongo. That, on 21<sup>st</sup> May, 2021 he was in his office with Mr. Seif Hemed Said who was the Managing Director of the 2<sup>nd</sup> third party and their consultant, Captain Mohamed Mikidadi Bwatto. While in the said office, Captain Bwatto informed them that the ship LCT AJE 1 arrived at Dar es Salaam on Thursday, 20<sup>th</sup> May 2021 and that, the crane would be offloaded on the 22<sup>nd</sup> May, 2021. That, Captain Mikidadi Bwatto warned the ship owner that due to low tide levels the ship could only discharge the crane on Monday the 24<sup>th</sup> May, 2021. Also that, Captain Mohamed Bwatto notified the defendant through an email regarding the said discharge.

The witness testified further that, they were not operators of the ship LCT AJE 1 as they only hired it for specific task of transporting the crane. That, the owner of the said ship was the 2<sup>nd</sup> third party who was also responsible for operating it, and that, the said Captain was not the master of the said vessel. The hire agreement between the 1<sup>st</sup> third party and the 2<sup>nd</sup> third party was admitted into evidence as Exhibit TP4.

That, the 1<sup>st</sup> third party was not responsible for any contribution or indemnification to the defendant from the carelessness and negligence of the ship Captain one Mr. Kombo Mwarabu Ally who was the master of LCT AJE 1.

In cross-examination, the witness stated that they had agreed with the defendant to load and transport the crane to Songosongo and back to Dar es Salaam. And, their agreement with the 2<sup>nd</sup> third party did not state who would be responsible for the loading and offloading of the crane.

The 2<sup>nd</sup> third party's witness was Mr. Mikidadi Mohammed Bwatto. He was the captain employed by the 1<sup>st</sup> third party. His witness statement was tendered and admitted as his evidence in chief. In his witness statement he stated that he was the Captain of the marine vessel owned by the 2<sup>nd</sup> third party. That, on 26<sup>th</sup> April, 2021 the 1<sup>st</sup> third party and AJE MARINE COMPANY LIMITED entered into an agreement to transport crane and other building materials from Dar es Salaam port to Songosongo and from Songosongo to Dar es Salaam port and thus, the said agreement was duly executed. That, he travelled from Songosongo Island and arrived at Dar es Salaam port on Thursday 20<sup>th</sup> May 2021.

He also testified that, the obligation to discharge the crane was not the responsibility of the 2<sup>nd</sup> third party according to the agreement between the 1<sup>st</sup> third party and the 2<sup>nd</sup> third party.

Mr. Sadikiel Avunilwa Makono appeared as the 3<sup>rd</sup> third party's witness. His witness statement was also admitted in court as his evidence in chief. The said witness statement indicates that he was the Assistant Operation Officer of the 3<sup>rd</sup> third party. His further testimony was that, in discharging his duty of loading and offloading of cargoes he came across a coastal ship known as LCT AJE 1. The ship entered the port of Dar es Salaam on 20<sup>th</sup> May, 2021. It was allowed to anchor at around 12:05 hours for purposes of offloading a mobile crane which weighed about 70 ton. The said vessel was operated by Captain Kombo Mwarabu Ally. That, the said vessel was not granted permission from the 3<sup>rd</sup> third party to offload the crane due to low water tides.

The witness stated that, on 23<sup>rd</sup> May 2021 offloading of the crane proceeded without authorisation from the 3<sup>rd</sup> third party. The crane was being operated by Mr. Oliver Michael Mushi from Rafael Logistics. Then, the crane fell and immersed into the water due to low water tides.

That, the crane was rescued on 24<sup>th</sup> May, 2021 and intense investigation was conducted by TPA's Department of Fire and Rescue and other departments. The incident report dated 23<sup>rd</sup> May, 2022 was tendered and admitted into evidence as Exhibit TP5. He closed his testimony by denying liability of the 3<sup>rd</sup> third party in terms of damages.

After closure of hearing of this case, all parties filed their final written submissions accordingly. I will refer to the said submissions in the course of determination of the framed issues.

The 1<sup>st</sup> issue is whether the defendant owes the plaintiff crane hiring charges, mobilization and demobilization costs. On this issue the plaintiff submitted that on 16<sup>th</sup> April 2021, the defendant hired a mobile crane from the plaintiff for 14 days and the period was later on extended for 6 days. However, the defendant did not pay for the hiring charges, standby rate charges, mobilization and demobilization costs. On the other hand, the defendant insisted that she paid for all charges in the said hire agreement. She also stretched out that, the payment by the defendant of all the charges had been admitted by PW1, George Joseph Oisso during cross-examination. I am in total agreement with the defendant that, during cross-examination PW1 conceded that, he issued two invoices to the

defendant and both were paid by the defendant timely. In her further submissions, the plaintiff also claimed for crane hiring charges from when the purchase order in question ended up to the date of this judgment. Reason for this claim, was that the crane was still in possession and custody of the defendant. I find this claim to be lacking in merits because, much as the initial agreement came to an end, there was no evidence that the plaintiff and defendant entered into another agreement to that effect. Thus, the plaintiff's claim is tantamount to claiming reliefs on a non-existent contract. For that reason, the 1<sup>st</sup> issue is answered in the negative. The 2<sup>nd</sup> issue is whether the defendant is responsible for the sinking of the crane. The contention in this issue was on the duty of offloading the said crane after it arrived at the port of Dar es Salaam from Songosongo Island. On this issue the plaintiff submitted that, defendant was responsible for loading and offloading the crane into and from the marine vessel and that the said crane sank during an attempt to offload it by persons hired by the defendant. Therefore, the crane sank while in control of the defendant because it was still on board the marine vessel hired by the defendant. The defendant on the other side submitted that she was not responsible for offloading the crane that being the reason why, at the time of offloading

the said crane was being operated by Mr. Oliver Michael Mushi, the employee of the plaintiff. That, the said employee could not act for the defendant. The defendant insisted that, the plaintiff did not prove how those involved in deciding to offload the crane were acting as agents of the defendant.

There was no dispute to the fact that, the crane sank while on board a ship LCT AJE 1. Also, there was no dispute that the said ship was hired by the defendant to transport the crane in dispute from Songosongo Island to the port of Dar es Salaam. The hire agreement was executed between the defendant and the 1<sup>st</sup> third party. However, Exhibit TP5 has revealed that the ship was owned by the 2<sup>nd</sup> third party. TW3 testified in his witness statement that, on the fateful date the said ship was under control of Captain Kombo Mwarabu Ally who is the employee of the 2<sup>nd</sup> third party. Also, the crane was being operated by Mr. Oliver Michael Mushi, crane operator from the plaintiff.

The fact that, the said ship was hired by the defendant through the 1<sup>st</sup> third party implies nothing but the fact that, it was under instructions of the defendant. There was no evidence that, the ship was hired by the plaintiff.

Therefore, the defendant's contention that the plaintiff did not prove how those involved in deciding to offload the crane were acting as agents of the defendant is unfounded because they were hired by the defendant. Regarding the involvement of the employee of the plaintiff one Mr. Oliver Michael Mushi, the defendant's view was that he could not act under her instructions because he was the plaintiff's employee. I find this contention devoid of merit because the said Mr. Oliver Michael Mushi being the crane operator was under control of the defendant. This is evident from the witness statement of DW1 in paragraph 6 in which it was stated that the hire included the operator of the crane. And, in her evidence the defendant did not identify the operator of the said crane other than Mr. Oliver Michael Mushi. So, when the defendant hired the said crane she also hired Oliver Michael Mushi. As a result, Mr. Oliver Michael Mushi was also under instructions of the defendant even though he was the employee of the plaintiff.

Regarding the task of offloading the said crane from the ship when it arrived at the port of Dar es Salaam from Songosongo, I hold that it was the defendant's duty. I hold so due to the defendant's conduct before and after the said crane arrived at that port. To wit, conduct of the defendant



before arrival of the crane at Dar es Salaam port lies on hire of the ship LCT AJE 1. It was the defendant who hired the said ship, not the plaintiff. She hired the same from the 1<sup>st</sup> third party. This was supported by undisputed evidence of Mr. Khamisi Mohamed Amran who was the sole witness of the 1<sup>st</sup> third party.

Also, the defendant's conduct upon arrival of the said crane at the port of Dar es Salaam lies on the correspondences she had been making. It was the evidence of DW1 that the crane arrived at the port of Dar es Salaam on 20<sup>th</sup> May, 2021. On 21<sup>st</sup> May, 2021 at around 10:54 hours they were informed by Captain Bwatto of the 1<sup>st</sup> third party via an email that the crane could be offloaded on 24<sup>th</sup> May, 2021 due to rising tides. The said email was also copied to the plaintiff. The testimony of DW1 further provided that, the crane was taken out of water on 27<sup>th</sup> May, 2021 and thereafter, the defendant informed the plaintiff through an email to collect it but she did not heed.

Thus, these correspondences are a vital indication that, the defendant was duty bound to offload the crane in dispute because there was no evidence that the plaintiff was involved save for the fact of her being copied with the email. If at all the plaintiff was the one responsible for offloading the

crane, Captain Bwatto could have contacted her instead of the defendant. Also, the defendant could not have informed the plaintiff to collect the crane after it was rescued from water. That is all. The defendant's own standard terms annexed to the Purchase Order (**Exhibit P1**) indicate that, the title and risk of the said crane would shift to the defendant upon delivery of the crane to the defendant and that, liability of the plaintiff would cease at the time she delivered the crane to the defendant. There was no denial, the plaintiff actually delivered the crane to the defendant. Therefore, the 2<sup>nd</sup> issue is answered in the affirmative due to two major reasons: one, the defendant was duty bound to offload the crane upon its arrival at the port of Dar es Salaam. Two, the crane sank before it was offloaded and it was still in the hands of the defendant on board a ship LCT AJE 1.

The 3<sup>rd</sup> issue is whether the plaintiff suffered damages due to the sinking of the crane. On this issue, the plaintiff's submission was that, as a result of the sinking of the said crane on 23<sup>rd</sup> May, 2021 the plaintiff has suffered monetary losses. According to the plaintiff, she suffered losses in terms of crane hiring charges for the entire hire period to the date of this judgment, USD 246,432 as rental fees to other interested customers as per Exhibit P5,

and general damages of TZS. 100,000,000/= because the defendant had not rectified the defects to the crane resulting from its sinking.

The defendant submitted that, there was no evidence that the crane was damaged. That Exhibit P5 which was relied upon by the plaintiff to prove damage of the crane beyond repair did not support that fact.

Regarding the contention on losses related to crane hiring charges, I have already held in the 1<sup>st</sup> issue and I so hold that, the plaintiff failed to prove existence of the said charges against the defendant.

In terms of the USD 246,432 losses, the plaintiff relied upon Exhibit P5. It was Purchase Order No. S17-4509960632 dated 21.12.2021 from Serengeti Breweries Ltd Moshi to the plaintiff. I have carefully read its contents. I have noticed that, the said Serengeti Breweries Ltd ordered for two cranes from the plaintiff, namely; crane 130t and crane 70t. The total price for each crane was 112,893.37 USD and 133,539.20 USD respectively.

After carefully considering the plaintiff's submission in relation to Exhibit P5, I have observed that the amount of 246,432 USD claimed by the plaintiff, included price for both, crane 130t and crane 70t. I find it not

right because the crane which is the subject of this dispute is not 70t, not 130t.

Therefore, I disregard the crane 130t together with its price and remain with the crane 70t with its price 133, 539.20 USD according to Exhibit P5. Thus, the loss claimed by the plaintiff is reduced from 246,432 USD to 133,539.20 USD. Now, the vital question is whether the plaintiff suffered loss to the tune of 133,539.20 USD as per Exhibit P5? The law is clear that the burden of proof on existence of any fact lies on a person who so alleges. This is stipulated under section 110(2) of the Evidence Act [Cap. 6 R.E 2022]. See also, **INDUSTRIAL GASES AND CHEMICAL LTD & 2 OTHERS VS. AZANIA BANK LTD (CIVIL CASE NO.2 OF 2020) [2022] TZHC 10022.**

It is obvious from the plaintiff that among other damages, she claims 133,539.20 as loss of failed purchase order from Serengeti Breweries Ltd due to the sinking of the disputed crane in this suit, based on Exhibit P5. Looking at the nature of this claim, it is clear that the plaintiff was under the duty to prove not only existence of pending purchase order from Serengeti Breweries Ltd, but also that the said order was not honoured by her due to the sinking of the crane in dispute.

Through Exhibit P5 the plaintiff succeeded to prove existence of purchase order from Serengeti Breweries Ltd. However, I find that the plaintiff did not prove that, she in fact failed to honour the said purchase order. This is because there is no evidence of the plaintiff replying to the said order to the effect that she failed to honour it because of the sinking of the crane in dispute. Exhibit P5 is silent on that fact. The reply was of the essence because there was no evidence that the plaintiff's crane involved in the sinking incident was the only one she owned. It is trite law that, specific damages ought to be pleaded and proved strictly. See, **ZUBERI AUGUSTINO VS. ANICET MUGABE, (1992) TLR 137**. See also, **RELIANCE INSURANCE COMPANY (T) LTD AND 2 OTHERS VS. FESTO MGOMAPAYO, CIVIL APPEAL NO. 23 OF 2019, CAT, (UNREPORTED)**.

It is obvious that the losses claimed by the plaintiff under Exhibit P5 are specific in nature, hence the plaintiff was duty bound to prove them strictly as per the above cited principle and authorities. Due to the foregoing reasons, I find that the plaintiff has failed to prove that she failed to honour purchase order from Serengeti Breweries Ltd due to the sinking of the crane in dispute. Again, while responding to questions put to him

during cross examination, PW1 admitted that he had not adduced evidence on the market value of the crane in dispute and that, he did not produce in court any technical report to the effect that, the crane had actually been damaged beyond repair.

As to the claim for general damages, I hold that it is the sole discretion of the court. The discretion can be exercised by taking into consideration of all relevant factors of the case. See, **COOPER MOTOR CORPORATION LIMITED VS. MOSHI ARUSHA OCCUPATIONAL HEALTH SERVICES [1990] TLR 96.**

Therefore, I have taken into consideration of all relevant facts in this case specifically the undisputed fact that the plaintiff's crane was involved in an accident of sinking into the sea while in the hands of the defendant. Also, I have taken into consideration the fact that specific damages pertaining to the sinking of the said crane have not been strictly proved. However, the fact that the sinking of the crane rendered it defective to the extent of not being able to function properly remained undisputed, irrespective of the plaintiff's failure to adduce evidence that the same was damaged beyond repair. Since the sinking of the crane, the plaintiff has not been able to use the same for generation of income as it used to be. Where it is clear that

some substantial loss has been incurred, the fact that an assessment is difficult because of the nature of the damage is no reason for awarding no damages or merely nominal damages. Read: **BIGGIN VS. PERMANITE (1951)1 K.B. 422.** For the foregoing reasoning and on strength of the authority cited which I find to be persuasive, I hold that, the 3<sup>rd</sup> issue is partly answered in the affirmative only to the extent of general damages. For the rest, particularly on specific damages, it is answered in the negative.

The 4<sup>th</sup> issue is whether the defendant is liable to compensate the plaintiff for the damages suffered due to the sinking of the crane. This issue is answered in the affirmative because evidence is clear that the defendant was responsible for offloading the crane and the same was involved in the accident while in her possession.

The 5<sup>th</sup> issue is that, if the 4<sup>th</sup> issue is determined in the affirmative, whether any or all of the third parties are liable to indemnify or contribute to the defendant and to what extent. Much as this issue relates to liability of the third parties to the defendant, the plaintiff did not submit on it. The defendant submitted that, in case this court finds her liable for the sinking of the crane, the third parties be held liable for indemnification of the

whole claim to the defendant. By its nature, this issue depends on affirmation of the 4<sup>th</sup> issue and the said issue has already been answered in the affirmative. Hence, the remaining question is on liability of the third parties to the defendant. The evidence on record, particularly that of TPW3 indicates that, the vessel hired by the defendant was not granted permission by the 3<sup>rd</sup> third party to offload the crane due to low water tides and that, on 23/05/2021 the offloading of the crane proceeded without authorization of the 3<sup>rd</sup> party. This was not successfully challenged by the defendant. That being the position, I hold that, the 3<sup>rd</sup> third party is not responsible to indemnify the defendant for whatever liability. On the other hand, the defendant has successfully established being entitled to indemnification from the 1<sup>st</sup> and the 2<sup>nd</sup> third parties in the event she is found responsible of compensating the plaintiff which I so hold.

Basing on analysis and determination of the issues hereinabove, I hereby decree in favour of the plaintiff as follows:

1. The defendant shall pay the plaintiff general damages to the tune of TZS. 70,000,000/=.



2. The general damages in (1) above shall attract a commercial rate interest of 7% per annum from the date of this judgment till full satisfaction
3. The defendant shall bear costs of the suit. Right of appeal is fully explained.

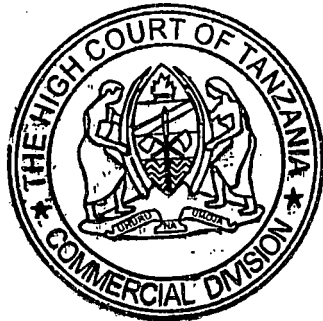
**DATED at DAR ES SALAAM** this 12<sup>th</sup> day of **DECEMBER** 2023.

  
**C. P. MKEHA**

**JUDGE**

**12/12/2023**

**Court:** Judgment is delivered in the presence of the parties' advocates.



  
**C. P. MKEHA**

**JUDGE**

**12/12/2023**