

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 46 of 2016

PETROFUEL (T) LTD. PLAINTIFF

VERSUS

GRAND CONFECTIONARY'S BAKERY LTD. DEFENDANT

DEFAULT JUDGEMENT

Date of Last Order: 15/2/2023

Date of Judgement: 17/3/2023

AGATHO, J.:

The Plaintiff is a limited company incorporated under the Companies Act No. 12 of 2002 R.E 2002 engages in amongst other business, importation of petroleum bulk and sale thereof within the United Republic of Tanzania and the defendant is registered company under the Companies Act No. 12 of 2002 R.E 2002 conducting its business in Dar es salaam. The plaintiff sued the defendant claiming for payments of TZS 64,731,663 being an outstanding amount in respect of supply of bulk fuel oil to the defendant. For the better understanding the gist of this default judgement, I find it pertinent to reproduce the historical background giving rise to this suit. It is stated that, on 4th June, 2014

plaintiff entered into purchase and supply agreement for supply of bulk fuel oil products. It was agreed, among others, that Plaintiff to supply bulk fuel oil products to Defendants for duration of 12.

It was further stated that after the execution of the agreement the plaintiff on diverse dates between 20th October, 2014 and 18th May, 2015 performed its contractual obligation by supplying the bulk oil products and the same it proceeded to issue the defendant with invoices for fuel supplied. However, the defendant failed to honour his obligations under the agreement. The plaintiff's continued to make follow up and demand for payments of the outstanding balance but the Defendants refused, failed and/or neglected to pay the outstanding amount. Following the defendant's unexplained refusal to pay the outstanding balance plaintiff on 8th April, 2016 instituted the instant suit praying for judgement and decree as follows; -

- i. The Defendant to pay the plaintiff the sum of Tanzania Shillings 64,731,663 as per paragraph 3 of the plaint.
- ii. The Defendant to pay the plaintiff interest on the principal amount compounded at 2% per month from the date payment become due till the date of judgement.

iii. The Defendant to pay the plaintiff interest on decretal amount at the court's rate from the date of judgement till when the decree is fully satisfied.

iv. The defendant pays the plaintiff costs and incidental to the suit.

When the suit was called on for mention on 12th May, 2016 the learned counsel for defendant one Mr. Alex Balomi admitted that they were served with summons to file written statement of defence on 6/ 5/2016 and the same they intend to file their defence on or before 30/5/2016. However, the defendant did not file the defence rather it opted to file Misc. Commercial application No 93 of 2016 requesting stay the proceeding so as to refer the matter for arbitration. Upon the determination of the said application this court, before Hon. Mansoor, J. dismissed the application and on the same date defendant was granted leave to file written statement of defence but no defence filed rather defendant filed notice of appeal against the decision in Misc. Commercial application No 93 of 2016. In the circumstance, this suit on 16th November, 2016 adjourned *sine die* to perve the appeal at the Court of Appeal.

When the matter come for orders on 11/10 /2022, Mr. Ishengoma Learned Advocate for plaintiff informed this court that, the notice of

appeal in respect of this matter was struck out on 06/10/2022, hence he prayed to serve the defendant summons to file defence. The application was granted, and the court ordered that defendant be served the summons vide process server and the same defendant was served on 12th October, 2022. When the matter came for mention for orders Ms. Hilda Mavoja entered appearance for plaintiff and informed the court that, the efforts to serve the defendant by normal means are vain as a such she requested for substituted service. This court before Magoiga, J. on 13th October, 2022 granted her prayer and service was effected by a way of publication on Mwananchi newspaper dated 20th October, 2022. In her publication the defendant was ordered to file her written statement of defence within 21 days and after the lapse of the 21 days no defence was filed, nor was there an application for extension of time for filing one and no appearance was made by the defendant.

In the circumstance, Ms Hilda Mavoja learned Advocate for plaintiff pursuant Rule 22(1) of the High Court (Commercial Division) Procedure Rules, GN 250 of 2012 applied for default judgement. The application has been supported by the affidavit of Mr. Anoop Kumar Director of the plaintiff conversant with facts the matter deponed. I granted the prayer to proceed under Rule 22 of this court's Rule

because publication in the Mwananchi newspaper in law is a prime facie proof that, the defendant was dully served but for the reasons known best to defendant, no written statement of defence has been so far filed nor any application for extension of time made to file one as a such defendant has relinquished his right to defend this suit.

It is worth noting that, granting of default judgement is not an automatic, for the plaintiff to be granted default judgement the three ingredients mentioned under Rule 22(1) of the Rules must co-existed. That is to say, there is proof of service to the defendant who has failed to file her written statement of defence and appear in the court, plaintiffshave made an application to the court in prescribed Form No. 1 to the 1st schedule of the Rules, and the said form is accompanied with the affidavit in proof of the claim. On top of that I directed the deponent (Anoop S. Kumar) to appear before the Court. He entered appearance and testified as PW1. Having that in mind and going back to this in statant suit, I have no hesitations whatsoever, that the plaintiff in this suit has satisfied the requirements of Rule 22(1) of the High Court (Commercial Division) Procedure Rules, GN 250 of 2012 as a such this suit is fit for default iudgement.

The main question to be determined is whether the plaintiff has proved his case on the balance of probabilities. I am aware that, grant of default judgement is not automatic the plaintiff has to proof his claim through the affidavit and the said affidavit must be self -explanatory proving every claim in the plaint and even exhibits annexed must as well be authenticated. In the affidavit deponed to prove the claim, the following documents were annexed to wit: copy of agreement for the supply of fuel, copy invoices and copy of delivery note as **exhibit P1-2**. The best evidence principle is that, the content of documentary evidence is established by primary evidence however out of necessity and impossibility of producing the primary evidence the court can admit secondary evidence. If that is the position then, for the secondary evidence to be admitted and acted upon the compliance of section 67 of the evidence Act [Cap 6 R.E. 2019] is mandatory. The case of **Edward Mwakamela V R [1987] TLR 121** underscore the point. In the instant suit all documents annexed to the affidavit their authenticity is questionable. However, the records and the contents of the affidavit are loud and clear that, original documents are no longer in the custody of plaintiff as were destroyed back 2016 due to forceful eviction of tenants. And the documentary evidence of eviction is also annexed to the affidavit. The PW1 also explained this in his oral testimony before the

Court. Therefore, since there is genuine explanation in both oral testimony and the affidavit as to why plaintiff tendered secondary evidence in proof of his claim, I am satisfied that this is a fit case to allow proof of the claim by secondary evidence. The circumstance of this case led the Court on 14/02/2023 to order the Plaintiff to bring a witness to testify. Thus Mr Anoop S. Kumar, PW1, the principal officer of the Plaintiff appeared in Court of 15/02/2023 to testify and tendered the documents which were admitted as exhibits P1 and P2 respectively. While the exhibit P1 is a photocopy of the agreement for supply of fuel between the Plaintiff and Defendant, the exhibit P2 are photocopies of summary claim, tax invoices and delivery notes respectively.

That being done, what follows is to gauge if the oral testimony and the affidavit of PW1 (Anoop S, Kumar) and the exhibits admitted prove the plaintiff's claim to the required standard in Civil Proceedings? Having carefully heard the testimony of PW1, and having gone through his affidavit and exhibits thereto I find no dispute that the plaintiff did supply bulk oil to the defendant. Also, there is no dispute that the defendant breached the contract as per paragraph 11 of the agreement. And there is plenty of evidence showing that the defendant failed to honour her obligation as a such the plaintiff is entitled to the

payment of TZS. 64,731,663 as the outstanding balance of the principal sum.

In the prayers made by the plaintiff, there is also prayer for payment of TZS.784,478,280 as interest on principal amount compounded at 3%. It should be noted that, the manner of charging compound interest is mainly based on terms agreed by the parties and stipulation in the agreement made between the parties. Not only that, but also the nature of business the parties transacted, trade and custom of the business, and intention of the parties. The contents of **exhibit P1** particularly paragraph 11 of the agreement is loud and clear that, any default in strict compliance of preceding conditions of payments shall be treated as breach of contract in such situation the supplier shall have the right to discontinue supplies until the bills are fully paid together with imposed penalty of compound interest of 3%. Moreover, it is trite law that sanctity of contract must be respect. In **Wallis v Smith (1882) L.R. 21 Ch. Div., 243** Sir George Jessel, MR held that courts should not interfere with what the parties have agreed in their contract. He held:

"It is of the utmost importance, as regards contracts between adult persons not under disability, and at arm's length that the Courts of Law should maintain the performance of the

contracts according to the intention of the parties; that they should not overrate any clearly expressed intention on the ground that the Judges know the business of the people better than the people know it themselves."

Looking at the evidence on record (clause 11 of exhibit p1 titled delay of payment includes 3% compound interest) and the entire factual circumstance surrounding this suit, there is no doubt that plaintiff is entitled to be awarded TZS 784,478,280 as interest on principal amount compounded at 3%. In the circumstances, I am inclined to enter a default judgment against the defendant and decree in favour of the plaintiff as follows;

- (i) I order the defendant to pay the plaintiff TZS 64,731,663/= being outstanding debt of fuel supplied and delivered to defendant;
- (ii) I order the defendant to pay interest on the outstanding amount compounded at 3% from the date the amount became due to the date of judgement;
- (iii) I order the defendant to pay interest on decretal amount at the court's rate of 7% per annum from the date of

judgement to the date of full and final payment of the decretal amount;

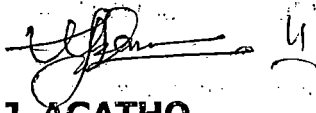
(iv) The plaintiff will have costs of this suit.

I further order in terms of Rule 22 (2) (a) of the the HCCD Procedural Rules 2012 as amended by G.N. 107 of 2019, that the decree in this suit shall not be executed unless the decree holder has, within a period of ten (10) days from the date of this judgement, publicize the decree in Daily Newspaper and Mwananchi Newspaper one copy each and a period of twenty-one days (21) from the date of expiry of the said ten (10) days has elapsed.

It is so ordered.

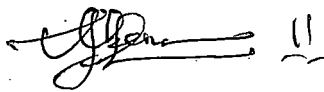
DATED at DAR ES SALAAM this 17th Day of March, 2023.




U. J. AGATHO
JUDGE
17/03/2023

Court: Judgment to be delivered by Hon. Minde, Deputy Registrar today, this 17th March, 2023 in the presence of the Plaintiff.




U. J. AGATHO
JUDGE
17/03/2023