

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)**

AT MWANZA

COMMERCIAL CASE NO. 04 OF 2022

BETWEEN

VEHICLES AND EQUIPMENT

LEASING (TANZANIA) LIMITED PLAINTIFF

Versus

STAR PLANET CONSULTANCY LIMITED DEFENDANT

Date of last order: 23rd February, 2023
Date of Judgment: 28th March, 2023

JUDGMENT

MKEHA, J.

The plaintiff, a limited liability company registered in accordance with the laws of Tanzania, is suing the defendant claiming payment of **USD 2,673,905.18** being the outstanding amount for mobilization costs and rental instalments charges in respect of thirty- three (33) vehicles and mining equipments allegedly rented by the defendant from the plaintiff.

In terms of the plaint, the plaintiff and the defendant had on 16/07/2021 entered into a Master Rental Agreement for renting of vehicles and mining equipments in accordance with the agreed terms and conditions of the agreement as well as terms and conditions contained into the particular Rental Schedules which had to be read together with the agreement.

According to the plaint and the agreement between the parties, apart from signing the Master Rental Agreement, the defendant had to submit a request for each specific equipment offering to rent the same from the plaintiff. The plaintiff would accept by signing the request as well as returning it to the defendant. Signing of a rental schedule by the plaintiff, after receipt of the defendant's request, would mean that, an agreement would come into effect between the parties for rental of the equipment referred to in that Rental Schedule on the terms and conditions set out in the Master Rental Agreement and in that particular Rental Schedule. The plaintiff had to mobilize the equipments from Tanga to Biharamulo and the defendant had to pay for the mobilization of the rented equipments. The defendant was obliged to pay monthly rental fees in respect of each rented vehicle/equipment on every 5th day of every month for which the agreement would remain valid. The defendant's liability would commence

on the date of delivery of the rented equipments to the defendant. The plaintiff was bound to invoice the defendant invoices consisting of bank details to enable smooth depositing of the rental charges. Delay in making payments on part of the defendant would attract a penalty of three percent (3%) per month on the delayed rental fees.

According to the plaintiff, the defendant failed honouring her obligations under the contract hence the present suit was instituted. The plaint indicates that, whereas the plaintiff delivered to the defendant 33 rented vehicles and mining equipments in August 2021 as agreed, up to when the plaintiff opted to institute this suit, the defendant had neither paid the outstanding amount of rental charges, nor returned the said 33 rented vehicles and equipments to the plaintiff.

Specifically, the plaintiff prays for judgment and decree against the defendant as follows: -

- (a) A declaration that the defendant is in breach of the Master Rental Agreement and its Rental Schedules;
- (b) An order terminating the said Master Rental Agreement and its Rental Schedules;

- (c) An order compelling the defendant to immobilize and return the Rented Vehicles and Equipments below listed at the defendant's cots from wherever they are to the plaintiff's premises at Plot No. 98 Nyerere Road, Ilala District, Dar es salaam: T579DDH, T537DMG, T581DMG, T876DHH, T879DHH, T882DHH, T635DCW, T638DMG, T944CTA, T282CSK, T872DHH, T657DHJ, T548DMP, T833DMG, T566DMG, T595DMG, T868DHH, T874DHH, T879DMP, T450CNM, 5DOUBLE LIGHT TOWERS, T880CMW, T845CMW, T162CML, MAN LOWBED KBX 644F, HP V193 SN-3CQ509287, HP P17A SN-3CQ 4043G8Y, HP 9205-AB2 VLB 9750, HP TRF53-40HXX, PICK-UP UAZ 168G, PICK-UP UAZ 424X, VAN UAV 044R, VAN UAV199Q;
- (d) An order compelling the defendant to return the above listed vehicles and equipments in accordance with the return conditions set out in Appendix 1 (Return Conditions) of the Master Rental Agreement;
- (e) An order for immediate payment of mobilization costs and rental instalments charges overdue as of 1st June 2022 of USD 2, 673, 905 .18;

- (f) An order for payment of rental instalments charges accrued from 1st June 2022 to the date of return to the plaintiff of the rented vehicles and equipments;
- (g) An order for payment of 3% per month as liquidated damages on overdue rental instalments and mobilization costs from August 2021 until fully paid;
- (h) An order for payment of interest on the decreed sum at court rate of 7% per annum till satisfaction of the decree;
- (i) An order for payment of the costs of the suit;
- (j) Any other and further reliefs as this Honourable court may deem just and fit to grant.

Through her written statement of defence, the defendant admitted existence of the Master Rental Agreement and delivery of some of the rented vehicles and equipments to the defendant's preferred premises. However, she denied indebtedness and payment obligation in respect of the said rented vehicles and mining equipments. The defendant insisted that, it was the plaintiff who breached the terms and conditions of the agreement.

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

- (i) Whether there was breach of terms of the contract and if the answer is in the affirmative, what were such terms?
- (ii) Whether it was the plaintiff or defendant who breached the terms of the contract.
- (iii) Whether the plaintiff suffered damages, if yes, to what extent.
- (iv) To what reliefs are the parties entitled.

Ms. Stella Rweikiza and Mr. David Rwechungura learned advocates represented the plaintiff. On the other hand, Messrs John Edward and Samwel Kazenga learned advocates represented the defendant. Whereas the plaintiff offered two witnesses, the defendant offered only one witness for cross examination.

Mr. Ivaney Pata Turyasingura, who happened to be the Chief Operations Officer of the plaintiff, appeared as the first witness in support of the plaintiff's case. He commenced his testimony in court by tendering his own witness statement as evidence in chief. The said statement was admitted without objection on part of the defendant. In the said statement, the

witness stated that, the defendant was looking for leasing mining equipments for pursuing a tender she had sourced from Stamigold at Biharamulo. In that regard, the plaintiff entered into a contract with the defendant for leasing mining equipments. Confirmation that the defendant had a mining contract with Stamigold resulted into execution of Master Rental Agreement between the plaintiff and the defendant in June/July 2021. Master Rental Agreement between the plaintiff and the defendant was admitted without objection as **Exhibit P1**.

The witness stated further in his witness statement that, upon signing the Master Rental Agreement the plaintiff issued 33 Rental Schedules for leasing vehicles and mining equipments to the defendant. The same were executed by the Directors of the plaintiff and the defendant companies. Whereas 14 Rental Schedules failed to pass the admissibility test in court, 19 Rental Schedules were admitted into evidence without objection and the same were marked as **Exhibit P2** collectively.

According to PW1, the plaintiff, in fulfillment of her obligation, mobilized, transported and delivered vehicles and equipments from Tanga to Biharamulo at Stamigold Company premises which was the defendant`s

preferred destination and handed over the same to the defendant. The witness statement indicates that, it was Mr. Patrick E. Masanja, Head of Administration of the defendant company who received the delivered vehicles and equipments on behalf of the defendant.

The witness stated in his statement that, pursuant to the terms and conditions of their agreement, the defendant was obliged to pay to the plaintiff mobilization costs for transporting the vehicles and equipments. According to PW1, the parties had agreed that commencement date of the rental period would be the respective date of delivery of the vehicles or equipments and the contract duration would be for 48 months.

The witness statement indicates further that, the defendant constantly breached the terms through her failure to pay the agreed rental fees. According to PW1, as from September 2021 to June 2022, the defendant was liable to pay the following costs: Mobilization costs to the tune of USD 204,461.59, USD 2, 469,443.58 as rental fees, USD 120,000 as consultation fees, USD 45453.35 as interest on loan, USD 277,227. 10 as interest on rental charges for delayed payment of rental fees, USD 102,694.00 as payroll refund, USD 51,471.00 as Insurance refund, USD

15,000.00 as Rig drill refund, USD 156, 845.05 as Petty cash refund and USD 16,107.00 for vehicles 'repair, making a total claim of USD 3, 458, 702.67

It was further stated that, following nonperformance of the leasing agreement and the need to mitigate further losses the plaintiff sought and obtained orders of the court against the defendant for return of the vehicles and equipments before the present case was finally determined. It was through Miscellaneous Commercial Application No 5 of 2022. According to PW1, the defendant did not comply with the court`s orders for return of the plaintiff`s vehicles and mining equipments. As such, the plaintiff had to collect them at her own costs.

Upon being cross examined, PW1 told the court that, he had a proof that the plaintiff did handover 19 machines to the defendant and that, he personally participated in delivering them thereby signing a delivery form in respect of each of the machines. Upon being re-examined, PW1 told the court that; the defendant had never refused having received the equipments.

Mr. Jakson Maina Gakungu appeared as the second witness in support of the plaintiff's case. This witness happened to be the plaintiff's Accounts Manager. He commenced his testimony in court by tendering his witness statement as his evidence in chief. The same was admitted without objection. The statement indicates that, PW2 was the person who issued Tax Invoices requiring payments from the defendant. According to the witness, despite issuance of invoices to the defendant as per the agreement, the latter never paid. The witness tendered in court Tax Invoices for the period between August 2021 to June 2022 as Exhibit P3 collectively. He also tendered a demand letter served upon the defendant as Exhibit P4. Responding to a question put to him by way of cross examination, the witness insisted that, all the invoices had been received by the defendant who affixed a seal to all the invoices to signify receipt of the same.

Mr. Stanslaus Mwita appeared as the sole witness in support of the defence case. The witness commenced his testimony by tendering his witness statement as his evidence in chief. The same was admitted without objection.

The witness stated in his statement that the parties had executed an agreement which required the plaintiff to deliver various equipments and vehicles to be used by the defendant at Stamigold Project at Bihalamuro in Kagera Region. According to the witness, the equipments and vehicles had to be delivered on or before 27/07/2021 and the contract had to commence on 01/08/2021. The witness stated that, the plaintiff delivered less vehicles and equipments contrary to the terms of the agreement and that, the said delivery was done out of time.

The witness went on to state that, more than 50% of the delivered equipments were out of operation. While conceding that the plaintiff might have suffered damages, the witness associated the said damages with delay in delivering and mobilizing the equipments on part of the plaintiff. The witness condemned the plaintiff for having been the first in breaching the contract.

During cross examination, the witness made the following admissions: That, the defendant had signed all the 19 Rental Schedules which had been admitted into evidence as Exhibit P2 collectively. That, it would not has been possible to deliver the vehicles and equipments on 27/07/2021

while requests for the same/ Rental Schedules were signed on 01/08/2021. That, eleven (11) machines were delivered to the defendant despite absence of written evidence proving actual dates of delivery. That, on 08/07/2022 the defendant was ordered by the court to return to the plaintiff, all the delivered vehicles and equipments.

In the parties` final written submissions, each party shifted blame to the other party. Whereas the plaintiff`s counsel insisted that the defendant was responsible for breach of the terms of the contract, the counsel for the defendant was insistent that, it was the plaintiff who was the first in breaching the terms of the contract. Save for minor clarifications, as usual, the lengthy submissions added nothing to the evidence already on record. Nevertheless, all the submissions have been considered in deciding the parties` dispute.

The first issue is **whether there was breach of terms of the contract and if the answer is in the affirmative, what were such terms?** In the witness statement of the defendant`s sole witness there was concession that the defendant breached the terms of the contract. The defendant`s witness stated that, it was the plaintiff who breached the

terms of the contract first. However, there was no counter claim filed by the defendant. During cross examination, DW1 admitted that the defendant had signed 19 Rental Schedules requesting vehicles and mining equipments from the plaintiff. The said rental schedules, whose signing by both parties constituted a binding contract, were admitted without objection as Exhibit P2. DW1 admitted further that it was impracticable to deliver the vehicles and equipments on 27/07/2021 while the defendant was yet to submit his requests to the plaintiff which requests were submitted by the defendant on 01/08/2021. DW1 conceded further that, despite absence of written evidence on how the rented equipments were delivered to the defendant, he could not deny the fact that eleven machines had been received by the defendant. DW1 further conceded that, the defendant had on 08/07/2022 been ordered by the court to return the rented equipments to the plaintiff.

As to what were the terms of the contract between the parties, Exhibit P1 provides an answer. Under the Agreement, the defendant was required to submit requests in the form of Rental Schedules to the plaintiff. Nineteen (19) Rental Schedules were submitted as requests to the plaintiff. See Exhibit P2 collectively. The plaintiff would signify acceptance by signing the

submitted Rental Schedules which would constitute a binding contract. This was done by the plaintiff. See again Exhibit P2. The plaintiff would mobilize the equipments to the defendant`s site. DW1`s concession that eleven (11) machines had been delivered, though on uncertain dates, suffices to prove that, the plaintiff did mobilize the said equipments to the said extent. Under the Agreement, the defendant was obliged to pay monthly rental fees in accordance with the terms contained in each rental schedule. Delay in paying the monthly rental fees would attract a penalty of 3% per month for late payments. The plaintiff was duty bound to issue invoices containing bank details to easen the task of making monthly payments on part of the defendant. Through the testimony of PW2, this was performed by the plaintiff. See Exhibit P3. According to the agreement between the parties, liability would commence on the actual date of delivery of the rented vehicles/equipments to the defendant. Clause 4 of all the 19 Rental Schedules contained a condition that, *‘once you accept the Equipment upon delivery, you acknowledge that it meets your express specifications and contains all accessories requested by you’*. Therefore, following DW1`s admission through cross examination that the defendant had received eleven (11) machines, though on unspecified dates, the defendant`s

defence that the delivered equipments were defective cannot be entertained.

Whereas PW2 testified to have issued Tax Invoices to the defendant, the latter did not pay monthly rental fees in respect of any specific rental schedule. Therefore, there was breach of the terms of the contract. The defendant breached the fundamental term of the agreement which required her to pay monthly rental fees in respect of each rented vehicle/equipment on every 5th day of every month for which the agreement would remain valid. See Exhibit P3 and the conditions regarding payments as per Exhibit P2 collectively.

The second issue is **whether it was the plaintiff or defendant who breached the terms of the contract**. Following the manner into which the court has responded to the first issue, it goes without saying that it was the defendant who breached the terms of the contract.

The third issue is **whether the plaintiff suffered damages, if yes, to what extent**. It is true that the agreement of the parties was a contract for ascertainable amount of money. The defendant admits existence of the contract between the parties. Despite admission on part of the defendant

that there was actual delivery of some of the machines, important evidence that could enable the court to ascertain the extent of specific damages suffered by the plaintiff is missing. Whereas under the agreement liability would commence on the date of delivery of the rented vehicles/equipments to the defendant, the plaintiff tendered no written evidence (as stated by PW1 in his statement) proving on what particular date any particular vehicle or equipment was handed over to the defendant. In the absence of such evidence it becomes hard to award specific damages to the plaintiff. The hardship is occasioned by the fact that, the court is not empowered to guess any particular date on which to commence counting accrual of monthly rental fees in respect of any particular rental schedule out of the nineteen (19) Rental Schedules (Exhibit P2).

Again, in the absence of evidence regarding specific dates on which the plaintiff delivered vehicles and equipments to the defendant, it becomes difficult to measure whether the plaintiff is entitled to USD 204,461.59 for mobilization costs as claimed. In any case, the claimed amount, it is presumed, had to be paid in respect of timely delivery of the said thirty-three (33) vehicles/equipments. Therefore, absence of specific evidence as to when actually the plaintiff delivered whatever she delivered to the

defendant, affects the court's ability to assess the amount of mobilization costs awardable to the plaintiff in the circumstances of the present case.

Admittedly, this is one of the cases in which it has been difficult to assess the actual pecuniary loss suffered by the plaintiff, irrespective the fact that the evidence on record suggests that the plaintiff must have suffered damages. The plaintiff is on record to have mobilized his vehicles and equipments from Tanga Region to the defendant's site at Bihalamuro in Kagera Region. All the nineteen (19) Rental Schedules indicate that, the contract period was for four (4) years. The monthly rental fees payable in respect of each rented vehicle/ equipment varied from USD 680, USD 6,025, USD 6,474, USD 6,474, USD 6,565, USD 9,164, USD 9,164, USD 10,592, USD 11, 492, USD 11,900, USD 11,900, USD 11,900, USD 11,900, USD 11,900, USD 11,900, USD 13,600, USD 17,710, USD 18,352 and 18,352 respectively. The difficultness in assessing the actual damages suffered is associated with absence of evidence of particular dates on which the plaintiff delivered the rented vehicles and mining equipments to the defendant. This is however not a sound reason for letting the wrongdoer go without paying for his breach of contract.

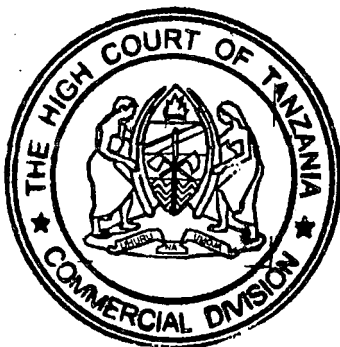
Before I award what I consider to meet justice in the circumstances of this case, I find myself compelled to adopt the reasoning of their Lordships in the following old English cases: **'Where it is clear that some substantial loss has been incurred, the fact that an assessment is difficult because of the nature of the damage is no reason for awarding no damages or merely nominal damages'**. *Read: CHAPLIN VS. HICKS (1911) 2 K.B. 786.* In other words, the fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages. Therefore, **'where precise evidence is obtainable....the court must do the best it can.'** *Read: BIGGIN VS. PERMANITE (1951) 1 K.B. 422.* In the circumstances of this case, I have found the two English cases to be relevant. Although they are not binding, I adopt the reasoning therein for purposes of doing justice to the parties in the present case.

For the foregoing reasoning, judgment is entered in favour of the plaintiff in the following terms: (i) A declaration is hereby made that the defendant is in breach of the Master Rental Agreement and its Rental Schedules. (ii) The defendant shall pay general damages to the plaintiff amounting to United States Dollars Seven Hundred and Fifty Thousands (USD 750,000).

(iii) The defendant shall pay court rate interest of 7% per annum to the plaintiff on the decretal sum above from the date of judgment to the date of payment in full.

(iv) The defendant is condemned to pay costs of the case to the plaintiff.

DATED at Dar es salaam this 28th day of March 2023.

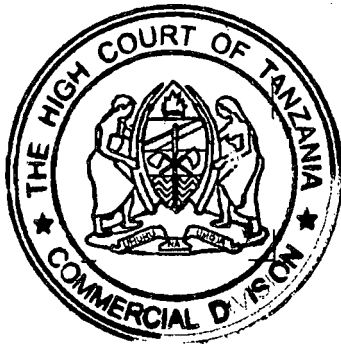



C.P MKEHA

JUDGE

28/03/2023

Court: Judgment is delivered this 28th day of March 2023 through virtual court, in the presence of the parties' advocates.




C.P MKEHA

JUDGE

28/03/2023

