IN THE HIGH COURT OF TANZANIA
COMMERCIAL DIVISION
AT DAR ES SALAAM

COMMERCIAL CASE NO 76 OF 2015

BETWEEN
KILIMANJARO TRUCK COMPANY LIMITED ----------PLAINTIFF

VERSUS
TATA AFRICA HOLDINGS TANZANIA LIMITED----------1ST DEFENDANT
HARVEST TANZANIA LIMITED ---------- -------2ND DEFENDANT

JUDGMENT

SONGORO,

Kilimanjaro Truck company Limited, the plaintiff filed a suit against TATA Africa Holding Limited and Harvest Tanzania Limited, the 1st and 2nd defendants respectively applying for court order of releasing plaintiff's two motor vehicles which were impounded on 13/5/2015 for the purposes of recovering the alleged outstanding loan. Next, the plaintiff prays for judgment and decree against the defendants and applies for the follows reliefs;-

1) A declaration that, the impounding of the two motors vehicles is void abinitio.

2) A declaration that, the defendant exercised their powers unlawfully.

3) A declaration that, the defendant have unlawfully interfered with the plaintiff business and therefore has occasioned loss to the plaintiff business.

4) An order to stop defendants from interfering with the plaintiff smooth operation of the motor vehicles.

5) Payment of specific damages to the tune of shs 200,000,000/-

6) Payment of general damages to be assessed by the Court.

7) Payment of interest at the applicable commercial rate of 25% from the date of the institution of the suit to the date of judgment.

8) An order for payment of 12% interest per annum on the decretal amount from the date of judgment to the date of full settlement of the decree.

9) Cost of the suit.

10) Any other relief the court deems fit

In response to the plaintiff `s claim both defendants filed Written Statements of defence and opposed the plaintiff s claims.

The first defendant explained there was a contract entered on the 1/11/2013 where the plaintiff through Rolland Sawaya the managing director of the plaintiff company and was supplied with 10 lorries/Tippers.

The 1st defendant further explained in the plaint that, the costs of each lorry was shs 133,673,300, and for 10 Lorries their costs was shs 1,336,763,000/= and payment was based on the agreed scheduled. But the plaintiff defaulted to pay a sum of shs 936,763,000/=.

In addition to the written statement of defence, the 1st defendant also raised **a** counter- claim and prayed for an order of payment of shs 661,335,849 being an outstanding sum, interests of 24% per month, general damages, and costs of the suit.

On the part of the second defendant he also filed a written statement of defence and opposed the plaintiff claim. He also contested that, his act of impoundment of motor vehicles was legal and in accordance with contractual powers vested to the 1st

defendant which was delegated to him. So the 2nd Defendant prayed to the court to dismiss the plaintiff suit for lack of merit.

In light of the plaintiff claim and defendant defence, the court in consultation with the parties drew the following issue for determination;

1) Whether the motor vehicles were sold to the plaintiff on the basis of oral or written contract.

2) If the contract was written was signed by Mr Roland Sawaya

3) Whether the plaintiff has discharged the debt and if not what is the remaining balance

4) What relief are parties entitled too.

So, the plaintiff suit was heard and decided on the basis of the above mentioned agreed issues. During the hearing the plaintiff was represented by Mr. Hubert Nyange Learned Advocate; while the defendant was represented by Mr. Lucio Peter, Learned Advocate.

Therefore, on the 26/10/2017 the plaintiff suit was called for hearing and the plaintiff company called Roland Patrick Sawaya who was PW1.But, PW1 took an oath and was called to the witness box for cross examination. However Pw1 reported to the court that, is sick and unable to proceed with cross examination by the defence counsel.

The court considered the circumstances of the case that, is one of the oldest cases and claim raised by Roland Sawaya in the court room on the hearing date that, **is** sick and unable to undergo cross examination and re-examination in the witness box, the court relying under Rule 56 (2) of the High Court Commercial Division Procedural Rules GN 250 OF 2012 it decided that, since the witness is unable to be cross examined, his witness statement of Roland Sawaya be taken as part of the plaintiff evidence on the basis that, the witness statement was filed in

court. Subsequently PW1 was discharged and Mr. Nyange prayed to close the plaintiff's case an order which was granted.

Now turning to the witness statement of Roland Sawaya which was filed in court on 22/9/2016, the witness told the court that, is the Director of the plaintiff's company. Then he stated that, in year 2013 a marketing officer from the defendant's company came to his office and informed him that, is promoting the sale of ten TATA motor vehicles.

Then they first orally agreed on sale of 10 TATA Motor Vehicles at price of shs 1,336,763,000 and each Truck cost shs 120,000,000/=. Further, they agreed that, two light trucks will be issued as bonus and free as appreciation for purchase of 10 trucks.

After oral discussion and negotiation Roland Sawaya claim that, he consulted the management of the plaintiff company and on 20th September, 2013 he sent a purchase order No 1859 for purchase 10 trucks and made upfront payment of shs 400,000,000/=. Since there was no written agreement it was planned that, the plaintiff company will pay a sum of shs 93,676,300 each month for a period of ten months.

The witness further claimed that, in the purchase of 10 trucks there was no written agreement and the alleged contract had no his signature as the one which appears on his purchase Order No 1859.

The witness then claim that, after he purchased the trucks they did not work efficiently and did not get cargo business.

Also, he claim that, after they purchased the trucks there was a lot of rainfalls and they did not get sufficient business to repay the debt.

It was the argument of PW1 that, in their understanding there was clause or agreement which allowed the defendant to seize the motor vehicle in case there is a default in payment of debt. He insisted that, there was an agreement that, if there is default then would have attracted and increased the amount of interests. So was wrong for the 1st defendant to use the 2nd defendant to seize two trucks due to none payment of debt.

The witness then argued that, by seizing two motor vehicles, the defendants have caused the plaintiff to suffer loss of shs 500,000 per day. PW1 stated that, even after the ruling of the court dated 6/5/2016 in Commercial Court Civil Application No 169 of 2015 defendants have continued to detain the said two trucks for none payment of debt. The plaintiff then claim is ready to pay the defendant`s debt of shs 596,000,000 by way of set off which the court may grant in the current plaintiff claims. On the defendant`s counter claim the plaintiff prays that, the claim be dismissed for lack of merit. Basically, that, is the plaintiff claim.

On the part of 1st defendant Mr. Welwel Learned Advocate of the TATA Africa Holdings Tanzania Limited Mr. Wellwel ,Learned Advocate of the 1st defendant that, they had Prashant Shukla as their witness and has filed a witness statement. The counsel then informed the court that, Prashant Shukla was an employee of the 1st defendant company and was residing in Tanzania. However, Prashant Shukla has quit his employment with the 1st defendant`s company and is no longer in the country. Mr. Wellwel then applied to substitute the witness statement of Prashant Shukla with another statement.

The court after considering the request made by Mr Wellwl Learned Advocate of the 1st defendant of substituting the witness statement it reject that, prayer and instead it directed that, since Prashant Shukla has recording and file his witness statement he remains to be the 1st defendant for all other purposes and his statement

under the Rule 56(2) of the High Court Commercial Division Procedural Rules GN 250 of 2012 shall be treated as testimony of a witness who has not appeared for cross examination and shall be accorded the weight it deserve under the law, "which is lesser"

On the part of defendants, Deogratias Mambia was called and he testified as DW1. While in the witness box, DW1 informed the court that, has no Exhibit to tender and is relying on his witness statement filed in court on the 22/9/2016.

Thus in his testimony DW1 told the court that, he was operation manager of Harvest Tanzania Limited the 2nd defendant. Then DW1 explain their company duty is that, they receives file assigned to them by various companies to enforce debt collection and received un paid debt.

The witness then informed the court that, they were assigned by the 1st defendant`s company to recover unpaid purchase price of 10 trucks which were due for payment from the plaintiff`s company. So DW1 claim were tasked by the 1st defendant to repossess the trucks for unpaid debt and in March 2015 they issued a demand letter to the plaintiff requesting him to settle the outstanding purchase price but the plaintiff remained mum.

Subsequently in May and June 2015 they managed to impound two out of ten motor vehicles which were supplied to the plaintiff by the defendant. It was the argument of DW1 that, the 2nd defendant acted on the instruction of 1st defendant who had every legal right to impound the said motor vehicles due none payment of outstanding purchase price. DW1 then prayed for dismissal of the plaintiff suit.

After the court took witnesses testimonies, the counsels from both sides with the leave of the court made their closing submissions.

On his part the plaintiff counsel, he submitted that, since Roland Sawaya PW1 appeared in court and was unable to be cross examined and be re-examined due to sickness he was not properly treated by the court when the court invoked Rule 56(2) of the High Court Commercial Division Procedural Rules GN 250 of 2012 because his case will be very weak. It was the views of the plaintiff counsel that, the applicability of Rule 56(2) of the GN 250 of 2012 violates a cardinal principle of the right to be heard.

In his further submission Mr. Nyange submitted that, there is no doubt on the 20/9/2013, the plaintiff placed an order No 1858 for the purchase of 10 trucks from the 1st defendant as shown in Annexture Exhibit D4 of the statement of Prashant Shukla. The terms of the order were simple that, (i) the amount of motor vehicles 10, (ii) an amount of shs 400,000,000/= will be deposited (iii)The remained balance is shs 936,763,000/= and (iv)manner of payment i.e shs 93,676,300 per month for ten months. (v) Interest of shillings of 31,000,000/=. So the plaintiff counsel indicated by its nature the sale of trucks was by credit and Exhibit D4 has a term which reads that a seller will have the right to repossess the vehicle(s) in case of default in the payment. But Mr Nyange indicated the written agreement is being denied by the plaintiff. Since payments were delayed the plaintiff counsel indicated that, the seller who was the 1st defendant was not happy with mode of payment and 2nd defendant on behalf of the 1st defendant wrongly repossess two trucks.

Addressing the 1st agreed issue of whether or not there was a contract. , the plaintiff counsel admitted that, there was an offer and acceptance. But the 1st defendant cannot prove if Mr Sawaya signed Exhibit D4. He then indicated that, the signatures which is contained in the Order Exhibit D1 and on the agreement differs and the agreement was denied by the plaintiff and Mr. Sawaya. .

So a clause of "repossession of motor vehicle" stated in the agreement may not be used to enforce a sale transaction entered on the 20/9/2013 between the plaintiff and defendant because was not signed by Mr Sawaya who is the Managing Director of the Plaintiff. Therefore in responding to the 1st and 2nd agreed issue Mr Nyange submitted that, the right to repossess the vehicles was not one of the terms of sale agreement. So the defendants' rights to repossess the vehicles did not exist unless there was a court order.

Moving on the 3rd and 4th issues Mr Nyange submitted that, the plaintiff suffered cumulative loss of shs 500,000,per day on each truck due repossession of the said motor vehicles. He also contested after the plaintiff repossess two motor vehicles the plaintiff was compelled to ground other 8 remaining trucks for 40 days for fear that, will be seized. So he prayed to the court to consider the damages suffered and make an award.

On remaining purchase price, the plaintiff counsel explained that, the 1st defendant in his evidence has not demonstrated by evidence that, is entitled to a sum of shs 661,335,849 stated in the counter claim. So the counsel prayed that, the Judgment be entered in favour of the plaintiff.

On the part of defendants, Mr Lusiu Peter, Learned Advocate, he submitted that, according to Roland Sawaya the agreement of sale of 10 motor vehicles was not in writing. He claim to be in oral agreement and it had no right to repossess the motor vehicle. He also claimed not to sign any agreement or sale. On the legitimacy of written sale agreement, the defence counsel submitted that, Mr. Roland Sawaya has never tendered any evidence to prove that, the agreement was entered by fraud. The counsel then added a mere statement of Roland Sawaya that, the agreement was forged has no basis at all. He then added that, the sale was done by a written agreement which is annexture D1 of the written statement of defence and was signed

by Roland Sawaya and is binding to the plaintiff and it has the term of repossession of truck in event of default of payment

On the defendant`s counter claim, the defence counsel submitted that, is not disputed because the plaintiff clearly admitted to be indebted. He also contested that, since the plaintiff abstained to liquidate the entire debt on the agreed schedule and the plaintiff defaulted to pay the liability definitely the 1st defendant is entitled to damages due to default on payment.

Since the 1st defendant has proved that, the plaintiff default to pay the outstanding price within agreed time, certainly the plaintiff is liable to pay the 1st defendant the pleaded damages and relief. So the defence counsel prayed that, the plaintiff suit be dismissed and the defendant counter claim be granted.

The court has considered the plaintiff claims including a prayer that, the defendant`s acts of impounding two trucks was " void abinitio" because was not sanction by any agreement, claim of damages to the sum of shs of 200,000,000/= and other reliefs, and find since it is the plaintiff who alleges that his motor vehicles were illegally seized defendants and caused him to suffer damages, I finds that, it is trite law derived from Section 110 (1) and (2) of the Evidence Act, 1967, Cap 6 R.E. 2002 that, whoever request a court to give judgment in his favour, as to any legal right on the existence of any fact which he asserts, he must prove that, the fact exist, and the level of proof is that, of the balance of probability.

Likewise, since the 1st defendant has raised a counter claim for re- payment of outstanding purchase price of shs 661,335,849 and other reliefs, also the burden of proving reliefs stated in the counter claim lies on the 1st defendant. The level of proof on the shoulders of the 1st defendant is also of balance of probability.

Guided with the above mentioned legal position on the burden of proof,, I straight went to determine the 1st and 2nd legal agreed issues of whether or not the motor vehicles were sold to the plaintiff on the basis of oral or written contract, and two other sub issue if the contract was written or not and whether or not it was signed by Mr. Roland Sawaya or not. And if alleged contract if was written contained a contractual right to re-possess the motor vehicles in the event of default of paying a purchase price.

As it can be viewed from the proceedings the plaintiff`s claims is that the defendants unlawfully seized his two trucks and ultimately caused him to suffer losses and damages, is essentially based on the evidence found in a witness statement of Roland Sawaya. Also the defendant`s reliefs in the counter claim are essential supported by witness statement of Prashant Shukla Both Roland Sawaya and Prashank Shukla none of them was cross examined and re-examined on the details of their witness statements for reasons which I have explained earlier.

However under Rule 49 of the High Court Commercial Division Procedural Rules GN 250 of 2012 a witness statement of Roland Sawaya and Prashant Shukla which were filed in court are considered and taken as their examination in chief of the two witnesses.

Further, Rule 56(2) of the High Court Commercial Division Procedural Rules GN 250 of 2012 provides that, where a witness fails to appear for cross examination the court shall strike out his statement from the record, unless the court is satisfied that, there are exceptional reasons for witness`s failure to appear.

Now tuning to the witness statement of Roland Sawaya, the plaintiff witness he appeared in court but told the court that, he was sick and unable to undergo cross examination and re-examination respectively. The court discharged him but retained

his witness statement as his examination in-chief of a witness who failed to be cross examined and be re-examined in terms of Rule 56(2) of the GN 250 of 2012 due to his sickness.

Also, on the part of defendant witness Prashant Shukla the court was told by the defence counsel Mr. Lucio Peter that, the witness has left his employment and has returned back to his home country abroad. So it is difficult to summon him to attend the court session for cross examination and re-examination respectively. Likewise his witness statement was retained by the court pursuant to Rule 56(2) of the GN 250 of 2012 as a witness whose attendance may not be easily procured

So, the witness statements of the two witnesses who failed to appear for cross examination and re-examination were retained by the court on basis that are examination in chief of the two witnesses which were retained due of exception reasons explained above.

Now turning to the merit of the plaintiff claims, I find in paragraph 5 of the plaint, and witness statement of Roland Sawaya they stated that, in September 2013 they entered into oral agreement and agreed upon on purchase of 10 trucks with the 1st defendant. Also Roland Sawaya told the court that, there was no written agreement between the plaintiff and 1st defendant as per the defendant claim.

Also Roland Sawaya stated that, the plaintiff company paid a sum of shs 400,000,000 as 30% of purchase price and next paid additional sum which makes a total payment of purchase price to be shs 716,571,000. So the outstanding sum on the purchase price is of shs 516,428,680/=

On the 1st defendant act of repossession of two motor vehicles, Mr. Roland Sawaya stated in his statement that the oral agreement did not provide for

repossession of motor vehicles in the event of default rather it provide for remedy of interest in case of default in payment.

On the other hand Prashant Shukla in his witness statement, he stated that, on the 1st November 2013 the plaintiff and 1st defendant executed a written agreement of sale and purchase of 10 trucks and payments of purchase price was to be by installments. He further stated in his witness statement a that, the written agreement has agreed term that, in the event the plaintiff default to pay the purchase price then Tata Africa Holding Tanznaia Limited the defendant will have the right to repossess trucks.

In the view of competing two witness statements on the mode of agreement which was entered it seems to me they key legal issue for determination is whether or not the sale of trucks was governed by oral or written agreement and if there was a term of repossession of motor vehicle in case of default in paying purchase price.

In addressing above mentioned key issue, I have compared and analyzed competing arguments of the plaintiff and Prashant Shukla and Roland Sawaya on a point of whether or not, the sale of 10 trucks was based on oral or written agreement and find the testimony of Prashant Shukla though did not appear for cross examination and re –examination respectively, is more credible, reliable and truthful than the statement of Roland Sawaya who insist that, there was oral contract. The court finding that, a witness statement of Prashkant Shukla appears to be credible and truthful is due to the reason that is based on Agreement of sale of motor vehicle annexed to his statement, which was signed by TATA Holdings Tanzania Limited and Kilimanjaro Truck Co of P.O. Box 80478 Dar es Salaam.

The Sale Agreement which the statement of Prashkant Shukla is based was annexed to the witness statement as annex Exhibit D1, to the statement.

Next, I find the written sale agreement appeared is credible because in clause 2 it list down 10 cheques issued from Mlimani City NBC by plaintiff company as postdated cheques to guarantee future payment of purchase price. The agreement labeled as Exhibit D1 of the witness statement has a title at the bottom which reads as "

> *"AGREEMENT FOR SALE OF MOTOR VEHICLE; Between Tata Africa Holding (Tanzania Ltd & Kilimanjaro Truck Co Ltd"*

Also the agreement has the plaintiff's official stamp which bears plaintiff's comprehensive address of Box and Telephone Fax Addresses and signature.

The plaintiff's company in the plaint, and Roland Sawaya in his witness statement the pointed out that, the alleged written agreement is a forged therefore must not be relied by the court.

I have considered a plaintiff contention that, the written sale agreement was forged with the weight it deserved and find if that statement was true, prudently the plaintiff would have taken measures of reporting the alleged forgery to any law enforcing urgency so that, forensic investigation on alleged forged agreement may be conducted and a finding be made on whether or not the agreement was forged.

Since the plaintiff did not take any measures on alleged forged, written agreement the only inference which the court has is that, the plaintiff concerned that, the Written Agreement Annexture D1 was forged one has no basis, but a mere defence on the claims arising from the contract.

Another point which convinced the court that, the Written Agreement was not forged document is that, TATA Africa Holdings Company, the 1st defendant alone and without the plaintiff in put in the agreement would not have invented and forged number of 10 plaintiff cheques which were insert in the Written Agreement. A fact

that, plaintiff's 10 cheques numbers was inserted and re-written in the Agreement together with their maturity dates from 30/11/2013 to 30/8/2014 leaves the court with a reasonable inference that, the purchase of trucks was governed by a written agreement and the postdated cheques and the plaintiff fully participated in making the Written Agreement by issuing details of his own cheques and was a party to it

The court find and decides that without the in-put of the plaintiff company officials on details of his own cheques in the said Agreement, the 1st defendant alone would not have invented cheques number of the plaintiff company, signature on the cheques, plaintiff company seal on cheques and would not even secured the plaintiff cheques leafs without being issued by the plaintiff's company

Next, the court find the sale agreement was attested Emmanuel Dominic Hayuka, Learned Advocate and Commission for Oaths. It appears to me that, if the plaintiff has a firm believe that, the agreement was forged, reasonably he would have applied that Mr Emmanuel Dominic Hayuka the Learned Advocate who attested the agreement to appear before the court and testify in support of the plaintiff story on whether the agreement was forged.

Failure on the part of the plaintiff to call Emmanuel Dominic Hayuka, a notary and advocate who attested the agreement to support his story that, the agreement was forged, that's , water down the plaintiff's assertion that agreement is forged So, failure on the part of the plaintiff to take engage law enforcing agency to conduct forensic criminal investigation to ascertain if the written agreement was forged, that give credence to the 1st defendant assertion and a statement of Prashkant Shukla that, the sale of truck was done by written agreement.

So I find and decide that, on the basis of a statement of Prashkant Shukla , Written Sale Agreement and plaintiff cheques which were listed down in the

agreement the plaintiff and defendant entered into written sale agreement which falls under Section 3 of the Sales of Goods Act Cap 314. In deed the section defines a contract of sales of goods as;-

> *"Whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price, and there may be a contract of sale between one part owner and another"*

In view of the above, the argument of the plaintiff and Roland Sawaya that the sale agreement was orally made has no merit and is hereby dismissed. Instead I find there was written agreement, signed by both parties which also has official stamps and post address of the plaintiff company, telephone and email Number of the Plaintiff which is binding.

On the contention of repossession of two trucks which was done by the 2nd defendant on instruction of the 1st defendant the court find in item (iii) of Other Terms and Conditions of the Agreement for sale of motor vehicle between TATA Holding Tanznaia Ltd and Kilimanjaro Truck Co Ltd there is term which allowed repossession of trucks in the event of default of paying of purchase price. In deed clause 11 part of the agreement which reads OTHER TERMS AND CONDITIONS. And in item (iii) has a term which reads that, "

> "The seller will have the right to "re-possesses the vehicle(s) in case of default in payment"

In view of the abovementioned term on the right to repossess, and repeated statement of Roland Sawaya in his own witness statement that still there is outstanding payment, while on postdated cheques last and final installment was due and payable by 30/8/2014 the court find there is a consistent default in paying

purchase price of trucks which entitled the 1st defendant as a "seller" to exercise his right to repossess trucks due default in payments of outstanding installments.

It seem to me based from the written agreement which was signed by both parties, the 1st defendant has a right to repossess trucks because there was a default in payment of purchase. It certain that a repossession of truck in the event of default of payment of purchase price was one of the contractual promises which even plaintiff agreed too.

Courts of law in several decisions including in the case between Edward Simon Mamuya Versus Adam Jonas Mbala [1983] TLR 410 (HC), Hon Lugakingira J (as then was) have insisted that, where the Contract is writing, its terms can only be varied in writing. On the basis of the above mentioned decision, it is not legally maintainable for a mere written statement of Roland Sawaya to vary and contradict a written signed agreement.

So on the bases of decision on the cited case a mere statement of Roland Sawaya that the contract did not provide for repossession of trucks however strong it is may not vary the terms of written agreement which allowed the 1st defendant as a "seller" to repossession of truck in any event of default

To conclude on the 1st and 2nd agreed issues I find and decide that, 10 motor vehicles were sold to the plaintiff on the basis of written contract which has a clause giving contractual right to the 1st defendant to repossess trucks in the event the plaintiff default to pay any of the remaining installments.

Turning to the 3rd agreed issue of whether the plaintiff has discharged the debt the court find a question whether or not the debt has been paid is a question of fact. Next I find the plaintiff claim of payments may easily prove by production of bank pay slips of honoured cheques or any relevant and credible document`s showing

payment was done. And normally a debtor who is the plaintiff in this case has obligation to lead evidence which shows that payment has been made and entire debt has been discharged.

Now on payments made I noted from the Agreement that, plaintiff paid shs 400,000,000/= being 30 % of the purchase price. Then on the remaining balance of 70% Prashkant Shukla stated that, the plaintiff issued 10 postdated cheque of shs 93,676,300/=each. Shukla the stated out of 10 cheques only two were honoured meaning 8 cheques were dishonoured.

The court find since there is no evidence from the plaintiff that all ten cheques were paid by 30/8/2014 I agree with the plaintiff and Prashant Shukla that, a sum of shs 661,335,849 has remained outstanding and unpaid by the plaintiff

So the court answers issue agreed issue No 3 by stating that, the plaintiff has not discharged the entire purchase price and there is remaining balance is shs 661,335,849.

Moving on the 4th issue of what relief are parties entitled too, the court find the plaintiff has his own prayers and reliefs contained in the plaint. Likewise the defendants has their own prayers and relief in the counter –claim.

In respect of the plaintiff claims and reliefs in the plaint the plaintiff company was applying for a declaratory order that, the impounding of his two motor vehicles was "*void abinition*" and was also claiming for damages.

I have considered plaintiff prayers and find it was agreed by the parties in Agreement that the 1st defendant has a right to repossess the vehicles in the event there is default in payment of installments which are due. It followed that the repossession of two trucks done by defendants did not constitute an interference of plaintiff business or

his contractual right, because repossession of trucks was contractually justifiable under the Sale Agreement. In that, regard I find the plaintiff claims and reliefs from paragraphs 19 (a) to (J) of the plaint have no merit and are hereby dismissed for lack of merit.

Tuning to the 1st defendant reliefs in the counter claim that plaintiff be condemned to pay the remaining balance of 661,335,849, damages, interests and costs of the suit. Honestly I find what the 1st defendant is claiming is outstanding of purchase price which arises from sale and delivery of 10 trucks which the plaintiff took possession.

The court find it is trite law derived from Section 30 of the Sale of Goods Act Cap 214 [R.E 2002] hat, "delivery of goods and payment of price" are concurrent conditions in any sales contract. In other words whether or not there is a written agreement once sold goods like trucks are delivered to the buyer the seller is entitled to purchase price. So a mere fact the plaintiff accepted 10 trucks he was contractual obligation to pay purchase price.

Likewise it is trite law derived from Section 37(1) of the Law of Contract, Cap 345 that, parties to a contract, must perform their respective promises, unless such performance is dispensed with or excused under the provisions of this Act or of any other law.

The same legal position was stated by Courts in several decisions including a decision of EDWIN SIMON MAMUYA VERSUS ADAM JONA MBALA [1983] T.LR 410 at 414 where Lugakingira J (as then was) emphasized that;-

> .....*if a man gives a promise or assurance which he intends to be binding on him and to be acted on by the persons to who it was given then, once it is acted on he is bound by it.*

Also in the same case of Edwin Simon Mamuya versus Jona Mbala, Lugakingira J further stated that;-

> *Once the parties bind themselves in contract for a lawful consideration they are obliged to perform their respective promise,*

So going by Section 30 of the Sale of Goods Act Cap 214 [R.E 2002], Section 73 of the Law of Contract Cap 345, and cited decision in the case of Edwin Simon Mamuya versus Jona Mbala, I find and decide that the plaintiff being a party to the written agreement is under contractual obligation to full fill his promises including that, of repaying the remaining balance of shs 661,335,849.

Since the plaintiff is in default payment of outstanding purchase price, while it was agreed that, the last installment will be paid by cheque on *30/8/2014* and there is no evidence if all cheques were honoured plaintiff has committed series of breach on each cheque which was due and not honoured.

The court would like to stick to the words of Lord Diplock in the case of Photo Production Ltd Versus Securicor Transport Ltd [1980] 1 ALL ER 556 where he stated that;-

> "Where the contracting parties, have agreed whether by express words or by implication of the law then any failure by one of the parties to perform a particular primary obligation results into breach

Next, I find since the plaintiff committed multiple breaches, the 1st defendant is entitled to general damages arising from losses which he suffered as a result of plaintiff none payment of shs. 661,335,849.

The courts in several decisions including in the case of Stanbic Tanzania Limited Versus Abercrombie & Kent (T) Limited Civil Appeal No 21 of 2001 (unreported) the Court of Appeal stated that, general damages are the ones which the law will

presume to be the direct, natural or probable consequence of the action complained of and are , sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been if he has not sustained the wrong act.

Also, in the case of Victoria Laundry v Newman [1949] 2 K.B. 528 at p. 539 Asquith, C.J said "damages" are intended to put a party in the same position, as far as money can do so, as if his rights had been observed.

By not paying the outstanding balance, the plaintiff has denied the 1st defendant a sum of shs 661,335,849/= which would have been invested in profit business.

Since the plaintiff breach of repayment term persisted from 30/8/2014 when the last cheque and installment became due and payable I find that, since the paid sum was retained by the plaintiff from that day, it lead to financial losses on the part of the 1st defendant for about 4 years.

In that, regard I assessed a sum of shs 60 000,000/ to be general damages, an amount which will be enough to address losses which 1st defendant suffered during that period. Finally I find that, the 1st defendant has proved his claims in the counter claim on the balance of probability. In that, regard I hereby enter judgment in favour of the defendants against the plaintiff as follows;

1. Plaintiff pays the 1st defendant a sum of shs 661,335,849/= as the remaining purchase price of 10 trucks.

2. Plaintiff pays the 1st defendant a sum of shs 60, 000,000/= as damages as general damages for losses suffered.

3. Plaintiff pays the 1st defendant interest of 8% per annum of the principal debt granted in item 1 above from the date of filing a suit to the date of Judgment.

4. Further, the plaintiff to pay the 1st defendant an interest of 12 % per annum on the decretal sum from the date of Judgment to the date the decretal sum is paid in full.

5. The plaintiff is ordered is to pay the 1st and 2nd defendant costs of pursuing the suit

Consequently, I hereby dismiss the plaintiff plaint, for fall short of proof and defendant has proved his counter claim on the balance of probability and it succeed as explained above

Dated and Delivered at Dar es Salaam this 7th day of June, 2018

H.T.SONGORO
JUDGE

The Ruling was delivered in the presence of Mr. Terry Hamilton, Principal officer of the plaintiff company and Mr Peter Lucio, Learned Advocate of the Defendants