

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

COMMERCIAL CASE NO. 120 OF 2015

BETWEEN

DRTC TRADING COMPANY LIMITED -----PLAINTIFF

VERSUS

MEXONS INVESTMENT LIMITED-----DEFENDANT

JUDGMENT

SONGORO, J

DRTC Trading Company Limited, the plaintiff filed a suit claiming that, on or about 26th September, 2012 entered into contract of sale of fertilizer with Mexons Investments Limited, the defendant and delivered to the defendant 231 tons worth shs 205,440,000.

Further, the plaintiff claims that, the defendant paid part of purchased price and a sum of shs 82,940,000/= remained outstanding and unpaid since November, 2014. The plaintiff is therefore praying for following orders;-

- 1) That, the defendant be compelled to pay the plaintiff a sum of shs 82,940,000 as un paid sum per the contract.
- 2) That, the defendant be compelled to pay general damages for mental torture, disregard, humiliation and loss of prospective business opportunities.
- 3) That, the defendant be compelled to pay interests on the decretal sum at the rate of 18% per annum from the date of judgment to the date of full and final payment.

In response to the plaintiff claim of outstanding debt, Mexons Investment Limited, the defendant filed the written statement of defence and opposed the claimed amount.

Further, the defendant contested that, he made several orders of fertilizers and fully paid for all delivered consignments. Next the defendant further contested that, the plaintiff claim has been overtaken by event for reason that, the contract tenure which was one year has expired long time ago. So the defendant is not liable

In the light of the plaintiff claim, and defendant denial of the entire claim, the court in consultation with the parties framed five issues for determination being;-

- 1) Whether or not there was a contract for sale and purchase of fertilizers and if it was renewed.
- 2) Whether or not there was a breach of contract by any of the party.
- 3) Whether or not the defendant owes the plaintiff a sum of shs 82,940,000
- 4) Whether or not the defendant issued a cheque of shs 300,000,000 in favour of the plaintiff, and
- 5) What reliefs are parties entitled too.

So, the plaintiff suit was heard and determined on the basis of the above mentioned agreed issues. At the hearing of the suit Mr. Emmanuel Marwa, Learned Advocate appeared for the plaintiff; while Mr. Wellwel, Learned Advocate appeared for the defendant.

• In pursuing its claim, the plaintiff company summoned Matlida Luther who testified as PW1 and informed the court that, he is the marketing manager of the plaintiff`s company.

The witness then told the court that, on 26th September, 2012 plaintiff`s company entered into one year contract with defendant`s company for sale of 529 tons of fertilizer`s effective from 5th December, 2013.

PW1 then told the court that, defendant was supplied with fertilizers and made part payment. However by 4th November, 2014 the defendant had an outstanding balance of shs 82,940,000/= un- paid even to date.

As a commitment of agreed business, PW1 claims that, the defendant issued a cheque of shs 300,000,000 as payment of existing debts, and future business of purchase of fertilizers.

PW1 maintained in his testimony that, however when the plaintiff deposited the cheque in the bank to realize his debt, and cheques were returned dishonoured, and the matter was reported to Changombe Police Station where investigation was conducted. And in further follow up of his claim, the plaintiff instituted the present suit

The witness insisted in his testimony that, the plaintiff`s outstanding debt is shs 82,940,000, and claims for damages arising from loss of his money which was withheld by the defendant.

To support the plaintiff point that, the defendant was indebted , and issued a bounced cheque and the matter was reported to police PW1 tendered a report No CHA/RB/69/2015 and Cha/1R/66/2015 which was admitted as Exhibit P1.

The PW1 testimony that, the defendant was in- debted to the plaintiff was also supported by Aidan Mwabusila who testified as PW2, and Mary Getruda Musira who also testified as PW3.

In their testimonies both PW2 and PW3 testified that, the defendant was buying fertilizers from the plaintiff company and so far part of the money has remained un paid.

To substantiate that, plaintiff was supplying to the defendant tons of fertilizer`s and part of purchase price has remained un paid, PW3 tendered a document with title "*MKATABA WA KUUZA MBOLEA*" which was admitted as Exhibit P2, which stipulates the tenure of the agreement as one , types and amount of fertilizer`s to be supplied, and agreed purchase price as the one which operates in market, or subsidy price fixed by the Government.

Further DW3 also tendered seven tax invoices which shows defendant was supplied with fertilizers. Seven tax invoices were collectively admitted as Exhibit P3. Further, PW3 tendered a DRTC Trading Company Ltd Statement of Mexson Investment Limited, which

was admitted as Exhibit P4, and a CRDB Bank Cheque dated 6/4/2014 of shs 300,000, 000 which was admitted as Exhibit P5.

Next, PW3 tendered a demand letter which was sent to the defendant which was admitted as Exhibit P6, also a Board Resolution authorizing the plaintiff`s company to sue was admitted as Exhibit P7. Finally PW3 closed her testimony by praying that, the court enter judgment as per plaint in favour of the plaintiff. Then the plaintiff case was closed.

After closure of the plaintiff case, the defendant also opened his defence by calling Mexson Jefta Sanga who testified as DW1. Relying on his witness statement DW1 stated that, is the managing director of the defendant`s company. He then admitted that, he his company entered into *one year contract* of purchasing fertilizer from the plaintiffs company.

It was part of his evidence that, contract of purchase of contract commenced 26/9/2012 and expired on 25/9/2013. DW 1 maintained in his witness statement that, the defendant made several orders and paid for all fertilizer`s supplied to his company before the expiry of the agreement.

The witness then insisted that, after the expiry of contract, he did not execute another agreement and there was no unfulfilled obligation. DW1 completely denied that, defendant did not issue any cheque to the plaintiff for the purposes of payment of supplies of fertilizer made to him under the contract.

He also explained to the court that, CRDB Bank cheque Exhibit P5 was not a bankable cheque. Further, there was no contractual relationship between the plaintiff and defendant by the moment the cheque was issued, and even when the cheque was dishonoured.

On the claim that, a cheque was dishonoured DW1 maintained in his testimony clarified that, a cheque-Exhibit P5 was dishonoured because it was not a bankable

cheque. In his further testimony DW3 maintained in his evidence that, he even never received a demand letter from the plaintiff or Crest Attorney demanding repayment of loan. Also, DW 1 defended the defendant company that, it did not breach any term of the agreement and the contract expired after one year. So, DW1 prayed to the court to dismiss the plaintiff claim for lack of merit. After DW1 testified, the defence side closed its defence.

After each side closed its case, both counsels with the leave of the court submitted their closing submissions.

On his part Mr. Emanuel Marwa, Learned Advocate first stated that, the plaintiff claim is of shs 82,940,000/= arising from the contract of supply of fertilizer's. The counsel then in addressing the 1st issue of whether or not there was contract, he submitted that, issue has been proved by testimonies of PW1, PW2, PW3, and Exhibit P2 *Mkataba WA Kuuza Mbolea*.

The counsel then relying on seven tax invoices and delivery notes Exhibit P3 submitted that, they proved that, the supply and delivery of fertilizer's and the business continued between the plaintiff and defendant even after the expiry of one year contract.

He then explained to the court that, although the tenure of the contract was one year but supplies and deliveries of fertilizers continued, impliedly that, shows and prove that, a contract was renewed and exceeded one year.

Responding to the issue whether or not the defendant breached the contract, Plaintiff`s counsel submitted that, going by the testimony of PW1, PW2 and PW3 the defendant did not fully pay for the entire consignment of fertilizer's supplied to him by the plaintiff.

It was therefore the views of the plaintiff`s counsel that, none payment for full purchased price of fertilizers, amounted to breach of contract. He also added that, bearing in mind

that, the defendant issued a cheque to plaintiff, and a cheque was dishonoured that, also shows the defendant breached the contract.

Addressing to a point of whether or not the defendant owe the plaintiff a sum of shs 82,940,000/= the plaintiff counsel submitted that, Exhibit P4 the DRTC Trading Company Ltd Statement of Mexson Investment shows the defendant is in-debted to the above stated amount.

Also, submitting on issuance of cheque- Exhibit P5, the Plaintiff counsel submitted that, it was issued in favour of the plaintiff for payment of debts which were due and was dishonoured due to insufficient funds in the bank account. The plaintiff`s counsel indicated that, cheque are usually issued as security for un paid loan. Finally, responding to a point of what reliefs are parties entitled too, the plaintiff counsel prayed that, the plaintiff claim has been proved on the balance of probability and prayed for judgment and decree in favour of the plaintiff.

On the part of defence counsel, Mr. Wellwel responded to the first and second issues by pointing out that, in the 26th September, 2012 the plaintiff and defendant entered into contract for sale and purchase of fertilizers. Secondly, he pointed out that, the contract has a term of one year from 26th September, 2012 to 25th September, 2013. He then explained that, the dispute before the court which is also found on contract is whether or not the contract was automatically renewed. The counsel then submitted to the court that, according to the agreed tenure, the contract between the two ended on 25th September 2013. And it follows therefore that, after the expiry of the contract the defendant did not have any other outstanding legal obligation under the expired contract. .

Moving on the issue of whether or not the defendant is in-debted to the plaintiff to the sum of shs 82,940,000, the defence counsel submitted that, defendant has refuted the said claims. So the plaintiff claim of shs 82,940,000/= is not legally maintainable.

Also, on plaintiff claim for damages Mr. Wellwel submitted that, the plaintiff in his evidence did not prove if he suffered any damages. Then relying on a decision between Zuberi Augustino Versus Ancient Mugabe 1992 TLR 137 (CA) at page 139 which decided that, special damages must be specifically pleaded and proved and he further submitted that, plaintiff did not prove any damages therefore the claim is not legally maintainable.

He then explained the defendant made payments, but the plaintiff is not aware of the paid sum. Therefore, it was on the part of the plaintiff to state in his evidence, the amount of money paid and what the outstanding sum is. The counsel also pointed out that, Section 110 of the Evidence Act Cap 6 requires the plaintiff to prove each and every allegations on his claims and there is no specific proof which established that, a sum of shs 82,940,000 is still outstanding.

Referring to the testimony of PW3 the counsel maintained it too general in the sense that, she only maintained that, the defendant left the outstanding claim of shs 82,940,000/= unpaid without substantiating her point.

The defence counsel also prayed to the court to discard the alleged statement of DRTC Trading Company Ltd and Mexson Investment Ltd Exhibit P4 on the ground that, its details are problematic may not be relied, in particular where there is no even statement which shows the total amount of fertilizer's which was supplied to the defendant. . In respect of issued cheque the defence counsel submitted that, it was issued as security for supplies of fertilizers made during the contract period. .

Mr Wellwel that, submitted that, a cheque was not issued to pay for any purchase, but it was just a security for payment for sold fertilizer's during the contractual period. . So he answered issue No 5 by stating that, Exhibit P5 was not a bankable cheque.

Submitting on the 5th issue of what reliefs are parties entitled too, the defence counsel submitted that, a claim sum of shs 82,940,000/= was not established and proved. Also the rest of the claims were also not proved. Therefore, he prayed to the court to dismiss with costs in favour of the defendant.

The court has had time considered plaintiff`s claims of unpaid loan of shs 82,940,000 and defendant denial and easily finds that, it is trite law that, under Section 110 (1) and (2) of the Evidence Act, 1967, Cap 6 R.E. 2002 whoever request a court to give judgment in his favour as to any legal right on the existence of any fact which he asserts, must prove that, the fact exist. It follows therefore that, the burden of proving claim contained in the plaint is on the plaintiff and a level of proof is that, of balance of probability.

Next, point which the court would like to underscore is that, contract which parties entered is basically governed by terms provided in the signed contract which has a title of Mkataba *wa Kuuza Mbolea*. In additional, due to the fact that, the contract is of sales of goods is also governed by terms and condition contained in Sales of Goods Act Cap 214 (R.E 2002).

With that, clarification in mind, I carefully analyzed the plaintiff evidence as well as the defendant evidence and find both parties are not disputing they entered into a contract of supply and purchase of fertilizer`s. The preamble of Exhibit P2 indeed reads as follows;-

Mkataba huu umefanyika leo tarehe 26 mwezi Septemba 2012 baina ya DRTC Trading Company Limited wa S.L.P 9110 DAR ES SALAAM ambaye katika Mkatabu huu atajulikana kama KAMPUNI. MEXON`S INVESTMENTS LTD WA S.L,P 506 NJOMBE Ambaye katika mkataba na WAKALA kwa ajili ya kuuza mbolea mbalimbali katika Kituo cha Njombe.

Then on the tenure of the contract item 1.1 of Exhibit P2 states it will be one from 26/9/ 2012 to 25/9/2013. Indeed item states that;-

“Pande zote mbili zimekubaliana mkataba huu wa kuuza mbolea utakuwa halali kwa muda wa mwaka Mmoja kuanzia tarehe 26 septemba 2012 to 25 Septemba 2013”.

Also on item 2.0 the tonnage and type of fertilizers were agreed upon by stating that,

The type and tonnage of fertilizer`s to be supplied as DAP -33 tons, Urea 330 tons, CAN 100 Tons and SA 66 TON

So in light of what I have stated above from preamble , and clauses 1.1, and 2.0 of Exhibit P2 I find and decide on the 1st agreed issue by stating that, there was a contract for sale and purchase of fertilizers which has a tenure of one year.

Moving to the second issue of whether or not the supply of fertilizer continued even after the expiry of contract Exhibit P2 the court find from testimonies of PW1, PW2 and PW3 that, the supply of fertilizer's also continues after 25/9/2013 a date which contract expired.

The testimonies of PW1, PW2 and PW3 on supply of fertilizer's after the expiry of contract is well supported by delivery notes and tax invoices which were and admitted as Exhibit P3.

Upon perusal of seven tax Invoices, delivery notes, and contract document, I find though the contract expired on 25/9/2013 but the evidence reveals supply and delivery of bags of fertilizer's to the defendant continued for several days . Exhibits P3 shows on 11/12/2013 three consignments were delivered and acknowledged by defendant and his agent. On 5/12/2013 one consignment was delivered and acknowledged by the defendant and his agents. Also on 7/12/2013 one consignment was delivered and acknowledged by the defendants and his agent. Further, on the 12/12/2013 two consignment were delivered and acknowledged by the defendant and his agents.

In brief a summary of consignment bags of fertilizer delivered and accepted by the defendant after the expiry of contract Exhibit P3 shows that, the defendant continued to accept and receive bags of fertilizer up to December, 2013, while the contract expired on 25/9/2013. The details of tax invoices shows thousands of bags of fertilizer were delivered as follows;-

<u>DATE</u>	<u>TAX INVOICE</u>	<u>NO./BAGS</u>	<u>UNIT PRICE</u>	<u>EXT. VALUE</u>
1. 11/12/2013	12062	660	43,000	28,380,000
2. 11/12/2013	12063	660	43,000	28,380,000

3.	12/12/2013	12064	660	43,000	28,380,000
4.	11/12/2013	12061	660	43,000	28,380,000
5.	7/12/2013	12058	660	41,000	27,060,000
6.	5/12/2013	12057	640	57,000	36,480,000
7.	12/12/2013	12065	660	43,000	28,380,000

Going by Tax Invoice cited above, defendant's acknowledgment of fertilizer after the expiry of the contract indicates a total of fertilizer bags which were delivered in December 2013 after the expiry date of contract were on or about 4,600 bags of fertilizers.

It also appears to me that, the list, and amount of fertilizer bags shown in Tax Invoices tally with DRTC Consignment Notes in terms of dates, and amount of bags of fertilizer's. The DRTC C/Notes even bears signatures of defendant's officials and drivers and in brief reads as follows;-

DRTC C/NOTE

	<u>DATE</u>	<u>C/NOTE</u>	<u>NUMBER OF BAGS</u>
1.	11/12/2013	33996	660
2.	11/12/2013	33997	660
3.	12/12/2013	33998	660
4.	11/12/2013	33993	660
5.	7/12/2013	33787	660
6.	5/12/2013	33786	640
7.	12/12/2013	33999	660

So from the testimonies of PW1, PW2 and PW3 and Exhibit P3 which includes tax invoices and consignment notes the court finds and decides that, bags of fertilizers were delivered, accepted and acknowledged by the defendant and his officials after the expiry of the contract.

With the above mentioned set of facts that, implies that, a contract of sale existed between the parties even after the expiry of contract for reason that, pursuant to Section 5 of the Sales of Goods Act Cap 214 a contract of sale may be implied from the conduct of parties. With that, court finding the next legal issue and legitimate question for determination is whether or not the defendant is liable to pay for consignments of fertilizer which were supplied after the expiry of written contract.

It appears the defendant and Mr. Wellwel his advocate they take a hard stand that, the defendant is contractual liable on supplies made during the contract period. So the defendant is not liable and have nothing to do with supplied fertilizers delivered to him after the expiry of the contract.

I have considered the defendant defence on the supplies of fertilizer's made after the expire of the contract, and quite frankly find in the signed contract Exhibit P3, there is no specific term which stipulates what will happen on supply of fertilizers which will be delivered after the expiry of the contract. While on this point I will like to state that, it is not the function of the court to insert any term on contract signed by the parties.

But after weighing carefully evidence from the plaintiff and defendant`s contract plus the fact defendant accepted delivery of fertilizer even after the expiry of the contract, the court is satisfied that, supplied fertilizers even after the expiry of the contract were for sale, and not for charity.

It seem to me even if contract of sale Exhibit P2 is silent on the fate of fertilizers delivered and accepted by the defendant after the expiry of the contract, or future goods the court is duty bound to infer from the defendant action of accepting bags of fertilizer's "as goods" which payments has to be made.

The above legal position was even insisted in the case between **Meral Hirji and Sons Versus General Tyre { EA} 1983 TLR p175 where** it was insisted that, court is the duty bound to imply reasonable terms where no specific terms to cater for specific scenario is provided for.

The same legal position is reinforced by Section 30 of the Sale of Goods Act Cap 214 [R.E 2002] which insist that, delivery of goods and payment of price are concurrent conditions. In other words delivery of goods and payments for goods goes together regardless whether there is a written contract or not.

The defendant defence of not paying for delivered bags of fertilizer's after the expiry of the contract would have been meaningful and valid, if he refused to accept fertilizer's which were accepted him pursuant to Exhibit P3. Going by Section 30 of the Sales of Goods Act whether there was a written contract or not, the defendant was a buyer who accepted bags of fertilizers. So was accepting outright sale, and as buyer must be ready and willing to pay the price in exchange fertilizers which he received. Further, Section 7 of the Sale of Goods Act Cap 214 [R.E 2002] states that;

Where by a contract of sale, the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.

Guided by the above mentioned cited Sections 7 and 30 of the Sales of Goods Act, the court find since defendant accepted delivery of bags of fertilizers, reasonably there was an implied contract of sale which must be ready to pay the price in exchange of goods which were listed tax invoices Exhibit P3

To conclude on the second issue of whether or not the supply of fertilizer continued even after the expiry of contract the court find and decides that, the plaintiff evidence fully established that, the bags of fertilizers were supplied and accepted by the defendant even after the expiry of the contract. In light of what I have stated above, the court a find and decide that, defendant is liable to pay for supplied bags done after the expiry of the contract for reason that, where there was a business of sale of goods, which always goes hand in hand with payments.

Moving to the 3rd agreed issue of Whether or not the defendant owes the plaintiff a sum of shs 82,940,000, I find there is a testimony of PW1, PW2 and PW3 and Exhibit P3 which shows defendant was supplied bags of fertilizers by the plaintiff. Also the same witnesses maintained a sum of shs 82,940,000 has remained outstanding and their testimony is supported by the DRTC Trading Company Ltd Statement Exhibit P4 which shows that, by 4/11/2014 the defendant has an outstanding debt of shs 82,940, 000.

It seems to me if the plaintiff has discharged his burden which shows about 4,600 bags of fertilizer's were delivered and accepted by the defendant after the expiry of the contract, and plaintiff has issued as Exhibit statement of account showing in-debteness I am convinced that, the presented evidence proves that, the defendant is in-debted to the sum of shs 82,940,000/= Because if the defendant is denying the liability, he would tendered receipts or invoices or bank pay slips which shows payment of all consignments were duly made. In view of Exhibit P4 and testimonies of PW1 PW2 and PW3 I find and decide on issue No 3 that, the defendant owes the plaintiff a sum of shs 82,940,000,

Turning to the issue whether or not the defendant issued a cheque of shs 300,000,000 in favour of the plaintiff, and , the court perused the testimony of Matlida Luther and find at paragraph 8 of her witness statement informed the court that, the Defendant issued a cheque of shs 300,000,000 as payment of his consignment and for future business I have also examined the CRDB Bank cheque No 0582 248 of Njombe Brach Iringa of shs 300,000,000 which was admitted as Exhibit P5 and find it was issued to the DRTC Trading Co Limited and was payable to by Mexons Investments Limited.

Also it appears that, the cheque was deposited on 9/5/2014 and has a red comment reading that, "refer to drawer' Honestly the court find from cheque itself I find the testimony of PW3 that, the cheque was issued by the defendant to be more credible because that, fact is supported by details of the cheque itself. Common sense dictates that, if the defendant is not the one who issued the said cheque to the plaintiff his conscience would have pushed him to report the matter to the police so that, investigation may be conducted to find out why his cheque which bears huge amount of money is in the hands of the plaintiff.

The passiveness of the defendant on the cheque Exhibit P5 which is in the hands of the plaintiff, convinces the court that, he had no quarrel with the said cheque and details contained therein. And since the defendant has failed to provide accurate business information as to why his cheque is in the hands of the plaintiff that, gives credence to the testimonies of PW1, PW2 and PW3 that, a cheque was issued as part payment of debt and the remaining amount to cater for future business. So on issue Whether or not the defendant issued a cheque of shs 300,000,000 in favour of the plaintiff, the court find and decide that, the defendant issued a cheque to the defendant.

On what reliefs are parties entitled too the court has considered evidence from both side and the defendant was supplied and acknowledged to receive bags of fertilizer's. Since I have already find and decide that, as per Exhibit P4 by 4/11/2014 the defendant has an outstanding debt of shs 82,940, 000 and no further payments were made , I find and decide that, by accepting the bags of fertilizer's after the expiry of the contract the defendant was accepting and promise to pay all his debt.

Since parties were bound on contract of sale of contract, and each of them was bound by his promises. Section 37(1) of the Law of Contract Cap 345 [R.E 2002] put obligation to the parties to a contract in a very straight manner by stating that;-

The 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.

Taking into account PW1, PW2, PW3 and PW4 and Exhibit P3- Tax Invoices shows that, fertilizers were delivered to defendant, it follows therefore under Section 30 of the Sales of Goods Act Cap 214 [R.E 2002] to the defendant as a buyer is liable to fulfill his promise of pay for outstanding debt of shs outstanding sum shs 82,940,000/-

On claim of damages the court noted from Tax Invoices that, fertilizers were supplied from year 2013 and still there is an outstanding amount. In other words a sum of shs 82,940,000 was withheld by the defendant, if released would have been released to the plaintiff would have been invested in plaintiff business. But that, opportunity was denied.

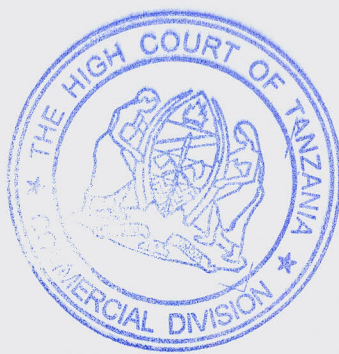
The cardinal principle in awarding damages is 'restitutio in integrum', that, is, the law will endeavor, so far as a money can do it, to place the injured person in the same situation as if the contract had been performed The said principle was stated in the case of Cooper Motor Corp. Ltd v Moshi/Arusha Occupational Health Services Civil Appeal No. 1 of 1990 (unreported). For that, reason, I hereby assess and award general damages to the sum of shs 25, 000,000/= because the defendant has stayed with plaintiff money for about 4 years.

So I hereby find that, the plaintiff has proved his claims on the balance of probability and enters judgment and decree in favour of the plaintiff as follows;-

- 1) The defendant is ordered to pay the plaintiff principle debt of shs 82,940,000
- 2) The defendant pays the plaintiff damages to the sum of shs 25,000,000
- 3) Further, the defendant is are hereby ordered to pay the plaintiff an interests on the granted sum in item 1 at the rate of 11 % per annum from the date the suit was instituted to the date of judgment.
- 4) Furthermore, defendant is ordered to pay the plaintiff an interests of 12 % per annum on the decretal sum from the date of judgment to the date decretal sum will be paid in full.
- 5) The defendants is hereby ordered to pay the plaintiff costs of pursuing the suit.

Finally the court decides that, the plaintiff suit succeeds as explained above, Right of appeal is fully explained to the parties

Dated and Delivered at Dar es Salaam on the 4th day of January, 2018.




H.T. SONGORO
JUDGE.

The Judgment has been delivered in the presence of Ms. Angelista Nashon Learned Advocate of the defendant and absence of the plaintiff and their counsel.