IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 105 OF 2017

A-ONE PRODUCTS AND BOTTLERS LIMITED ..... PLAINTIFF.

VERSUS

TECHLONG PACKAGING MACHINERY LIMITED .... 1ST DEFENDANT.

HONG KONG HUA YUN INDUSTRIAL LIMITED..... 2ND DEFENDANT.

Date of Last Order:19/09/2019.

Date of Judgement: 27/09/2019.

JUDGEMENT.

MAGOIGA, J.

This is a default judgement. The plaintiff, A-ONE PRODUCTS AND BOTTLERS LIMITED by a plaint instituted the instant suit against the abovenamed defendants jointly and severally praying for judgement and decree in the following orders:

a. The defendants jointly and severally pay the plaintiff the sum of USD. 4,845,362 as per para. 16 herein above;
b. The defendants pay the plaintiff interest as the commercial rate on (a) from the date of payment of the invoice amount was paid to the 1st defendant through the 2nd defendant till the date of judgement;

c. The defendants pay the plaintiff interest on decretal amount at the Court's rate of 11% per annum from the date of judgement till the decree s fully satisfied.

d. The defendants pay the plaintiff's costs of and incidental to the suit;

e. Any other relief(s) that the honourable Court may deem fit.

The facts of this suit as gathered from the plaint are straight forward. The parties herein above entered into partly oral agreement and partly through a proforma invoice that was accepted and paid for by the plaintiff to the defendants and partly through correspondences by various emails. In that arrangement, the plaintiff purchased moulds of 240/260 ml soft drinks packaging machines for its factory. The facts go that upon the plaintiff got the invoice which was fully paid to the defendants through the Letter of Credit together with the payment made for the purchase of 3 complete filling lines for 24,000 BHP through a separate contract but on request of the defendants the payment for invoice number CTI 2012- 0918 was made by the plaintiff. It is stated further that consequent upon the payment of the purchase price, the 1st defendant designed the bottles and the plaintiff agreed as to the design, paving way for the production of the mould as ordered. Pursuant to finish making the bottles, and upon delivery of the

moulds to the plaintiff by the 1st defendant, and upon the 1st defendant's engineers attempted to install them, the engineers opined that the said moulds could not be installed without having their changeovers parts. It is also stated that in consequence of the advice given by the 1st defendant' engineers, the plaintiff ordered the changeovers parts for the 240/260 ml bottle moulds. In additional to the above order the plaintiff ordered another two sets of moulds for 330 ml. bottles of carbonated soft drinks and malt drinks respectively with changeovers parts and the price for this order was fully paid for through bank transfer.

Further facts are that the 1st defendant failed to deliver the said order and this was despite the fact that the moulds would be made within 45 days of payment of the purchase price, but the 1st defendant failed to honour this schedule. Pursuant to that failure which is breach of contract, the 1st defendant advised the plaintiff instead of refund, the money be used for other purchases. Upon that advise, the plaintiff ordered for 1.2 litres blow mould and 1.7 litres blow mould and changeovers parts. The plaintiff paid for the invoice referred and it was agreed that delivery will be done within 45 days of the payment and confirmation of the bottle drawings on the 15th September 2015.

It was further stated that despite several follow ups, the delivery of the 1.2 litres and 1.7 litres moulds were supplied but the changeovers parts for 1.7 litres were not supplied and the 1st defendant was informed of this discrepancy immediately. Despite the 1st defendant's promises to rectify the deficiencies, the changeovers parts to date they have not been supplied. In the circumstances the plaintiff considered this breach of contract which has caused the plaintiff to suffer loss of business as particularized in the plaint.

In essence this suit revolves around non-performance of the contract on the part of the defendants for failure to deliver the moulds, refund of the money paid and non-deliver of changeovers parts; hence this suit for prayers as contained in the plaint.

In order to grasp as to why this is default judgement, I find it apposite albeit in brief to know the history of what happened. The record is loud and clear that on 07/09/2017 when this suit was called for orders, Mr. Gaspar Nyika, learned advocate from IMMMA Advocates for defendants appeared and was recorded praying for time to file their written statement of defence. His prayer was granted without objection and was consequently given 21 days within which to file their written statement of

defence. Unfortunately, on the part of defendants, Mr. Nyika, learned counsel instead of filing written statement of defence, filed a petition seeking stay of this proceedings. The petition for stay of proceedings was rejected by Hon. A. Mruma, judge on 14/02/2018. Following that rejection, Ms. Faisal Salah, learned counsel for defendants from IMMMA Advocates who entered appearance in Court prayed for 21 days within which to file written statement of defence for the second time. Her prayer was granted as prayed but unfortunately this time around no written statement defence was neither filed. The suit was scheduled on 09/03/2018. On that day when the matter was called for orders, the learned counsel for defendants, Mr. Gaspar Nyika informed the Court that they have filed notice of appeal to the Court of Appeal and urged the Court to see that it has no more jurisdiction to continue with the case in the light of the case of AERO HELICOPTERS (T) LIMITED v. F. N JENSEN [1990] TLR 142. His move in this angle was equally rejected. The learned counsel for defendants found themselves out of time and tried their last luck to seek for extension of time within which to file written statement of defence, but unofrtunaltely their application was dismissed. In the circumstances, the learned counsel

for plaintiff made an application for default judgement as there was no defence at all as per Rule 22 (1) of the Rules.

This Court consequently rejected the prayer for making default judgement under the old Rule 22 (1) and instead ordered under Rules 2 and 4 read together with Order 14 (2) of the Civil Procedure Code, [Cap 33 R.E 2002] for plaintiff to prove his case. The learned counsel for plaintiff prayed to file witness statements and the Court granted the prayer. The witness statements were dully filed in this suit. Following a promotion of Hon. Mwandambo, Judge (as he then was) to the Court of Appeal and elapse of time, came the amendment of Rule 22 (1) of the High Court (Commercial Division) Procedure Rules, 2012 as amended by GN. 107 of 2019. The amendment among others abolished the automatic grant of default judgement unless and until the plaintiff not only applied for default judgement in a prescribed Form no 1 but the application must be accompanied by the affidavit in proof of the claim.

On 04/09/2019 the learned counsel for plaintiff prayed that he be allowed to filed an affidavit in proof of the claim in order to comply with the procedural law on this suit before the default judgement can be delivered. Guided by the above facts and chronological of events as narrated above, I

ordered the plaintiff's advocate to file an affidavit in proof of the claim in compliance with the new Rule 22 (1) as amended by G.N. 107 of 2019. Because same will achieve the same result to oral proof as they have the same status in judicial proceedings.

It should be noted that in this suit there are matters not in dispute, namely; **one**, there is no dispute that the defendants were dully served and in time instructed the Dar es Salaam based legal clinic of IMMMA Advocates to represent them in this suit and the learned counsel from that legal clinic have been attending and are still watching brief after they lost their chance to file written statement defence to date. **Two,** there is no dispute that the learned advocates from IMMMA Advocates twice prayed and were granted for time to file written statement of defence, first on 07/09/2017 and second on 14/02/2018 but defied this Court's orders by taking different course in the matter. **Three,** there is no dispute that upon realizing that they have lost their precious opportunity to be heard, they decided to file revision in the Court of Appeal but which was dismissed. And **Fourth**, there is no dispute that their last attempt to filed written statement of defence out of time was equally dismissed.

The amendment of Rule 22 (1) as amended by G.N. 107 of 2019 has made a big turnaround in granting default judgement by this Court. Now Rule 22 (1) for easy of reference provides as follow:

"Rule 22(1). Where a party required to file written statement of defence fails to do so within the specified period or where such a period has been extended in accordance with sub-rule 2 of Rule 20 within the period of such extension, the Court may, upon proof of the service and on application by the plaintiff in Form No. 1 set out in the Schedule to these Rules accompanied by an affidavit in proof of the claim, enter judgement in favour of the plaintiff." (Emphasis mine)

This Court faced with similar situation in the case of NITRO EXPLOSIVE (T) LIMITED v. TANZANITE ONE MINING LIMITED, COMMERCIAL CASE NO. 118 OF 2018, observed in strong terms that before January 2019, under the High Court (Commercial Division) Procedure Rules, G.N.250, the grant of default judgement was mandatory and automatic upon the plaintiff proving that the defaulting defendant failed to file written statement of defence after prove of service and upon making an application in prescribed Form No. 1 to the First Schedule to the Rules.

In the above case the Court went on to hold that under the new Rule as quoted above the plaintiff who want the Court to grant default judgement in his favour must prove the following:

i. Proof of the service to the defendant but who has failed to file written statement

ii. The plaintiff must make an application in the prescribed Form no. 1 to the First schedule to the Rules.

iii. That the said application in Form no. 1 **must be accompanied by an affidavit in proof of the claim.** (Emphasis mine).

The court on similar note emphasized that the affidavit in proof must be self-explanatory proving every claim in the plaint and the exhibits must as well be authenticated and that the three ingredients must co-exist for the judgement in favour of the plaint to be given.

The gist of this suit is on non-performance of contract on the part of defendants for failure to deliver parts to bottles bought or refund the amount of USD.112,140.00 paid through TT through Stanbic Bank. It is stated in the plaint, in the witnesses statements and in the affidavit in proof of the claim that failure to supply of 240/260 ml bottles changeover

parts along with line/mold not only rendered the bottles functionless but caused the plaintiff to suffer loss of business to the tune of USD.1,797,325.409. It is further stated in the plaint, witness statement and in the affidavit in proof of the claim that production losses due to extra change over time and integrated line efficiency caused loss to the tune of USD.472,903.00. Another claim is for business loss due to late supply of 1.7 litres blow bottles change over parts which was paid for in full causing a loss of USD.563,062.64 and lastly was the claim of business loss due to non-supply of bottle change over for filler and shrinking wrapping which is USD.1,899,931.46. Pursuant to the invoices as amply stated in the affidavit all the bottles were intended for business and the invoices and all T.T transferred to the defendants' accounts in China as exhibited in exhibit P5 in the affidavit with an amount of USD. 26,325,00 through StanBic Bank in Tanzania.

Guided by the above Court's interpretation of Rule 22 (1) there is no dispute that the plaintiff in this suit has proved that the defendant was timely served but failed to file written statement of defence. Even where extension of time was granted for filing written statement of defence none was failed. Also, it is not in dispute that the plaintiff has equally filed both

Form no. 1 and an affidavit in proof of the claim. Therefore, the three ingredients co-exist in this suit. However, that is not the end of the game. This Court is duty enjoined to scrutinize and see if the affidavit has qualified for grant of the default judgement.

I have had an opportunity to go through witness statements filed and the affidavit in proof of the claim and exhibits P1-21 annexed thereto with a very keen legal eye and my entire traversing of all these in their totality am satisfied that the plaintiff has been able to prove his claim as prayed in the plaint on balance of probability. This being the case, I hereby an unhesitatingly hold that the plaintiff is entitled to default judgement as prayed in the plaint. The reasons am taking this stance are not far to fetch. **One,** the plaintiff's intention to buy the bottles was calculated and intended for the use of his business and the defendant had a legal duty upon being paid consideration to supply the relevant parts of the bottles to the satisfaction of the plaintiff and the intended use. So, failure to perform her obligation as agreed, it cannot be other than that the defendants are in breach of the contract and the plaintiff is entitled to loss of profit. Failure to supply changeovers parts, the plaintiff suffered loss which is to be atoned to. **Two,** the affidavit in proof of the claim when read together with the

plaint, the witness statement alongside with the exhibits tendered, gives a true picture of what transpired in this suit. All emails communications and how the plaintiff was affected legally qualifies the plaintiff to be entitled to the claims in the plaint. **Three,** there is ample evidence even how the plaintiff arrived at those figures she is claiming in the plaint. The calculations made are sufficient to grant the amount as prayed in the absence of other evidence to the contrary.

Subsequently, in terms of Rule 22 (1) of the Rules, I hereby enter judgement for the plaintiff and pronounce as follows:

A. the defendants jointly and severally are ordered to pay the plaintiff the sum of USD.4,845,362.509 being losses whose details are provided in exhibits P18-21.

B. The defendant shall pay the plaintiff interest at commercial rate of 15% per annum on (A) from the date of payment of the invoice amount was paid to the first defendant through the 2nd defendant till date of judgement.

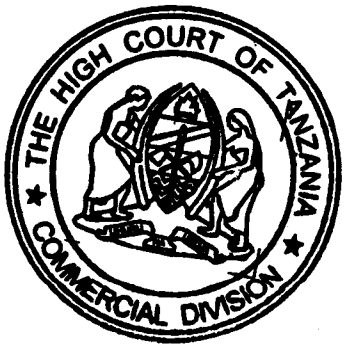
C. The defendant shall pay the plaintiff interest at Court's rate of 11% per annum of the decretal sum from the date of the judgement till payment in full.

D. The defendant is condemned to pay the plaintiff the costs of this suit.

In terms of Rule 22 (2) (a) and (b) of the Rules, I further order that the decree in this case shall not be executed unless the decree holder has, within a period of ten (10) days from the date of the judgement, published a copy of the decree in at least two (2) newspapers of wide circulation in the country and after 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 27th day of September, 2019.



S. M. MAGOIGA

JUDGE

27/09/2019