IN THE HIGH COURT OF TANZANIA

(COMMERCIAL COURT)

AT DAR ES SALAAM.

COMMERCIAL CASE NO. 163 OF 2017

DR. SUSAN ALPHONCE KOLIMBA .....PLAINTIFF.

VERSUS

SIMAGUNGA GENERAL TRADING CO. LIMITED ..... 1ST DEFENDANT.

DONALD XAVERY SIMAGUNGA ..... 2ND DEFENDANT.

Date of Last Order: 03/03/2020

Date of Judgement: 27/03/2020.

JUDGEMENT.

MAGOIGA, J.

The plaintiff, Dr. SUSAN ALPHONCE KOLIMBA by way of plaint filed in this Court on 06th day of November, 2017 instituted the instant suit against the above named defendants praying for judgement and decree in the following orders, namely:-

a. Payment of a total sum to a tune of Tanzania shillings 145,000,000.00 being a refund of the plaintiff's money for breach of contract due to undelivered buses by the defendant.

b. Payment accrued on price fluctuation and loss on exchange rate as per oral agreement.

c. Payment of loan interest and charges arrived from the loan used to purchase price.

d. Payment of the interest at commercial rate of 21% (on the TZS.145,000,000.00) from 1st day of May, 2016 to the date of judgement and full payment.

e. Court's interest in (a), (b), and (c) above at the rate of 7% per annum from the date of judgment to the date of full and final payment.

f. General damages in respect of the breached of contract as the Court deem fit and just for the pain and suffering, mental anguish, financial stress and loss of investment.

g. Costs of this suit be borne by the defendants.

h. Any other relief(s) that this Honourable Court may deem fit and just to grant.

Upon being served with the plaint, the defendants filed a joint written statement of defence disputing the entire claim of the plaintiff, save for unpaid balance of the purchase price to the tune of TZS. 45,000,000.00 out of TZS. 400,000,000.00. In the circumstances, the defendants prayed that the instant suit be dismissed with costs.

The facts of this suit as discerned from the pleadings are simple and straightforward. That on 5th December, 2015 the plaintiff entered into agreement with the defendants which was reduced into Memorandum of Understanding (MOU) executed by the second defendant on behalf of the 1st defendant, for supply of two brand new units of HIGHER buses. The said buses were model KLQ613DFB built on 6*2 chassis, make DONGFENG CUMMINIS and the engine 360HPEURO worth USD.304,001.04. In the said MOU the parties agreed, among others, the price of the buses, date of delivery, mode and schedule of payment of the purchase price and the place of delivery of the buses.

The facts further go that on the same date the defendant issued pro forma invoice number P/I No. 01814 to the plaintiff for the additional terms of the purchase of the two unit buses. Further terms were that upon payment of 60.21% of the purchase price by the plaintiff the two unit buses were to be

delivered within 90 days from the date of the deposit of the agreed advanced purchase price. Facts went on that in compliance with the terms of the MOU, the plaintiff borrowed from CRDB BANK TZS. 500,000,000.00 and on the same date the plaintiff deposited TZS.400,000,000.00 (Equivalent to USD186,066.00) into the personal account of the 2nd defendant as per clause 7 of the MOU. In acknowledgement of the money received, the 2nd defendant issued acknowledgement letter of TZS.400,000,000.00 which was equivalent to USD.186,066.00 as advance payment.

Facts went on that despite the plaintiff performing her contractual obligations, the defendant breached the terms of the agreement of the sale and the entire subsequent oral agreement by the defendants' failure to deliver the buses and refused to refund back all monies had and received from the plaintiff.

Further facts are that discussions were held of which the defendants agreed to refund the purchase money received to the tune of TZS.400,000,000.00, plus TZS.30,000,000.00 being fluctuation and loss of exchange rate. But it is also alleged that contrary to that agreement, the defendant have only managed to refund TZS.285,000,000.00,leaving an outstanding balance of

TZS.145,000,000.00 unpaid plus the price fluctuation and loss on exchange rate of TZS.60,000,000.00. Therefore, failure to pay the money has caused the plaintiff to suffer hence a claim of general damages for reasons pleaded in paragraph 15 of the plaint, hence this suit.

The plaintiff at all material time has been enjoying the legal services of Messrs. Seleman Almas, Deusdedit Luteja and Hassan Kiangio, learned advocates. On the other hand, the defendant has been enjoying the legal services of Mr. Ally Jamal, learned advocate.

Before hearing the following issues were proposed by parties and adopted by this Court for the determination of this suit, namely:

1. Whether the defendants breached the terms of the MOU

2. What sum of money have the defendant paid to the plaintiff as a refund for the purchase of two Higher buses.

3. To what extent (if any) are the defendants indebted to the plaintiff on amount of the purchase price?

4. What reliefs parties are entitled to.

Before going into the details of the evidence on record, it is worth to note that the plaintiff's case was heard by Hon. Mwandambo, J (as he then was)

whereby, the plaintiff was the only witness in this case. The plaintiff tendered 7 exhibits in proof of her case. Following his promotion to Court of Appeal and myself transferred to this Court, I was assigned to continue with hearing of this case to its finality. I heard three witnesses for defence and the defendants tendered 4 exhibits to disprove the plaintiff claims.

The plaintiff in this suit by her witness statement adopted to form part of her testimony in chief under oath testified as PW1. PW1 told the court that on the 5th December 2015 they signed a Memorandum of Understanding executed between herself and the first defendant for purchase of two brand new HIGHER buses model KLQ6138DFP built on 6*2 chassis make of DONGFENG CUMMINS engine 360HP EUROII at a price of USD 152,000.00 each. PW1 went on to tell the court that on the same day he deposited Tsh.400, 000,000.00 equivalents to USD 183,066.00 being 60.21% of the purchase price. According to PW1, the remaining balance of the purchases price which is USD 120,934.00 was to be liquidated into nine equal installments from the date of delivery of the units. The said money was to be paid through account No. 300121112463 or 3001211226527 in the name of Simagunga HIGHER BUS sales at Equity Bank LTD alternatively through account No. 01503116731700 or 0250316731700 in the name of Donald

Xavery Simagunga. PW1 further testimony was that the two units were to be delivered within 90 days from the day of deposit and the ownership was to be jointly registered in the name of the 1st defendant and the plaintiff.

PW1 went on to tell the court that in compliance with terms of Memorandum of Understanding raised a pro forma invoice with serial number P/I No. 0814 which was admitted in evidence and marked as exhibit P2. PW1 further testimony was that to meet her obligations in accordance with MOU and the pro forma invoice, she sought and obtained a quick credit facility from CRDB BANK PLC of TSh. 500,000,000.00 charged interest of 14.5% per annum which was to accrue on daily basis and that the same was to be paid in 57 monthly installments in compliance with the loan agreement. Loan facility letter- Personal loan for Tsh.500, 000,000.00 was tendered and admitted in evidence as exhibit P3.

Further testimony of PW1 was that on 5th December 2105 upon disbursement of the money into the her account, she withdrew Tsh. 400,000,000.00 and deposited the same to the bank account number 0150316731700 held by the 2nd Defendant at CRDB Bank in Mlimani City branch. CRDB Bank cash withdraw slip dated 5th December 2015 of Tsh.400,000,000.00 was admitted in evidence as exhibit P4. PW1 went on

to tell the court that Tsh. 400,000,000.00 was acknowledged by the 2nd defendant being payment of purchase of two units of HIGHER buses. A document with reference number SGTCL/HQ/2015/05/03 dated 5th December 2015 and a CRDB bank slip dated 5th December 2015 of Tsh.400,000,000.00 deposited into the bank account of the 2nd respondent were admitted into evidence as exhibit P6 and P5 respectively.

PW1 went on with her testimony that despite performing her duties as agreed in the MOU and the pro forma invoice by timely effecting the initial payment of the purchase price, the defendants failed to deliver the two units of HIGHER buses within 90 days and even failed to seek extension of time for delivery of two units of HIGHER buses. And even the oral agreement to refund the money has not been honoured, hence a second breach of the contract.

It was further testimony of PW1 that failure to deliver the buses, the plaintiff and the 2nd defendant held several discussions with a view of settling the matter amicably and the second defendant promised to refund Tsh. 400,000,000.00 the money she paid him plus Tsh. 30,000,000.00 being price fluctuation and loss of exchange rate to be paid from 1st May 2016 to the date of full payment.

Further testimony of PW1 was that failure to refund is a continuous breach of the agreement and has plunged her into financial trauma.

PW1 in the circumstances wrote a demand letter to the defendants claiming the refund which was not heeded necessitating the institution of this suit, hence this judgement and decree for orders prayed in the plaint. PW1 tendered in evidence a demand note with reference number GR/DEMAND/KOLIMBA/2017/23 dated 10th August 2017 which was admitted in evidence as exhibit P7.

Under cross examination by Mr.Jamal, learned advocate, PW1 told the court that she is a Phd Holder of Laws from Moscow, Russia and that she participated in negotiation for the purchase of the buses. PW1 told the court that Dr. George Yesse Mrikaria to whom she is married, witness the MOU and was as well asked to follow up the refund. PW1 told the court that she was never told about any condition for the operation of the busses but the only conditions she remember were the ones contained in the MOU. PW1 when referred to exhibit P1 she said that upon failure by the defendant to fulfill the terms of the MOU they agreed that the defendant should refund Tsh. 400,000,000.00 and Tsh. 30,000,000.00 as compensation.PW1 equally admitted that to the date of institution of the suit, she did not know that the

purchase price was chargeable by 1% stamp duty. Equally PW1 admitted that she did not know that the purchase price was inclusive of 18% of VAT.

Further PW1 when shown exhibit P7 she said according to that exhibit, the defendant had paid Tsh. 285,000,000.00 leaving a balance of Tsh. 145,000,000.00. PW1 admitted that the MOU does not provide consequences of failure to deliver the buses nor payment of interest but that was orally agreed and based on the bank interest regardless of whether it was stated in the MOU or not.

Under re-examination by David Ndossi, learned advocate, PW1 told the court that the MOU was between herself and Donald Simagunga and the loan facility was prepared by CRDB. PW1 told the court that she claims Tsh. 145,000,000.00 and Tsh. 30,000,000.00 as interest. That marked the end of the plaintiff's testimony.

The defendants' first witness was Mr. Donald Xavery Simagunga who testified as DW1. DW1 through his written statement which was adopted as his testimony in chief told the court that he is a business man and the General Manager of the 1st Defendant. DW1 told the Court that his main activities are administration, sale of HIGHER buses, products, spares and after sale service, looking for customers and supervision of its products to

the point of sale. DW1 acknowledged knowing the plaintiff and one George Yesse Mirikaria (the husband of the Plaintiff) and the suit filed against him. It was further testimony of DW1 that before signing the MOU which he recognizes and pray that if forms part of his defence, he was approached by George Yesse Mrikaria for purchase on credit two HIGHER buses for reason that he was financially incapable of paying full purchase price of the buses. DW1 went on to tell the court that when he received the request he forwarded to the manufacturer of HIGHER buses and the same was positively responded by the manufacturer on condition that the borrower must own buses of the same nature and operates business of transportation for more than two years and shall pay 60.21% as an advance payment. That upon consensus of the terms DW1 as the representative of the 1st Defendant executed a Memorandum of Understanding (MOU) with the plaintiff. According to DW1, the 1st Defendant performed its obligations by importing the buses as agreed on condition of prove of ownerships of buses and business license and as security to the borrower that she could be in a position to repay the loan. DW1 requested the court that the content of exhibit P1 form part of his defence and tendered Bill of Lading dated 10th November 2016 which was admitted as exhibit D1 of the imported buses in the name of George Yesse Mrikaria.

Further testimony of DW1 was that DW1 thereafter realized that the plaintiff has fraudulently misrepresented herself to have business of bus transportation something she knew was not true for failure to supply proof. Upon that information forwarded to the manufacturer, the manufacturer decided to cancel the delivery of the buses to the plaintiff and requested her to pay the remaining balance first, which she failed. The plaintiff, in the circumstances, claimed for refund of the money through her husband George Yesse Mrikaria bank accounts. The 1st Defendant agreed to refund the money upon the sale of the buses. DW1 went on to tell the court that notwithstanding that the buses were not sold, DW1 managed to refund the plaintiff through the account number 01J2027296500 CRDB Bank in the name of George Yesse Mrikaria by depositing Tsh. 215,000,000.00 on 20th June 2017, on 29th July 2017 through account number 3008111376687 Equity Bank DW1 deposited Tsh.70, 000,000.00, on 21st September 2017 on the same account number with Equity Bank DW1 deposited Tsh. 50,000,000.00 and on 20th September 2016 DW1 paid Tsh. 20,000,000.00 in cash. According to DW1, up to September 2017 the total of Tsh.355, 000,000.00 had been refunded out of Tsh.400, 000,000.00 received from the plaintiff. DW1 tendered swift confirmation dated 20th June 2017 of Tsh.215, 000,000.00 in evidence as exhibit D2. Another exhibit tendered is

personal application for fund transfer of Tsh.50, 000,000.00 which was admitted in evidence as exhibit D3. Another document tendered in evidence is application for fund transfer dated 29th July 2017 of Tsh.70, 000,000.00 which was admitted as exhibit D4. So, according to DW1, the balance which remain unpaid is Tshs.45,000,000.00 which he says they are ready to pay minus 1% being legal and management fees.

Under cross examination by Mr. Selemani Almas, learned advocate, DW1 told the court that he recognizes the MOU and the terms contained therein and that it contains 17 clauses which were about selling of the two buses. DW1 told the court that the buses did not come within the agreed period and the Bill of Lading shows that the buses were brought under the name of George Yesse Mrikaria upon the direction of the plaintiff. DW1 told the court that he paid Susan Tsh.20,000,000.00 cash in front of George Yesse Mirikaria who was a witness to MOU. DW1 further told the court that the plaintiff needed a license in order to operate the buses. When pressed with questions DW1 told the court that when the plaintiff failed to meet the conditions they agreed for refund whereby DW1 has refunded Tsh355,000,000.00 out of Tsh.400,000,000.00 which include Tsh.20,000,000.00 which was paid in cash. DW1 told the court that he

disputes the claim of the plaintiff because she does not tell the truth and that the figure stated in the plaint are not true. The money paid to George Mrikaria accounts were upon the instructions of the plaintiff and further told the court that the claim of Tsh.145, 000,000.00 is not true, but the truth is that DW1 has paid Tsh.355,000,000.00. Further testimony of DW1 was that even the refund was orally agreed between parties.

DW1 told the court that no interest was to be claimed and the claim of the plaintiff that the 2nd Defendant was to pay her Tsh. 30,000,000.00 is a fabricated lie and there was no time frame within which to refund. Further DW1 denied the claim of fluctuation rate and interest but admitted to be entitled to Tsh.45,000,000.00 only minus 1% of the legal and administration charges.

Under Re-examination DW1 told the court that he is only indebted to the plaintiff for Tsh.41,000,000.0 because Tsh.1,000,000.00 was paid to lawyers. According to DW1, when the plaintiff instituted this case he stopped paying the balance of Tsh.45,000,000.00. DW1 told the court that the plaintiff and George Mirikaria are husband and wife, a fact that the plaintiff acknowledges that relationship. DW1 insisted that he complied with all the wishes of the plaintiff and the agreed amount was

Tsh.400,000,000.00 minus expenses and it was due to their failure to meet conditions that the order was cancelled and a refund was the only available options for the parties.

The next witness for defence was PENDO DONALD XAVERY who testified as DW2. DW2 through her witness statement which was adopted in by this Court as her testimony in chief told the Court that she is the marketing manager of the 1st defendant since 2005. As marketing manager of the 1st defendant her duties are administration, and marketing activities. Basically, the rest of the testimony of DW2 was more the same of DW1, which I find no need to repeat for avoidance of making judgement long unnecessary. DW2 tendered no exhibit.

Under cross examination, DW2 told the Court that she did not have evidence to show that Dar Lux Company has any relationship with SIMAGUNGA Company Limited. DW2 insisted the money in dispute was paid by DW1 and admitted not knowing the plaintiff and Dr. George Yesse Mrikaria in person but through the MOU which was in office.

In re-examination, DW2 told the court that Dr. George Yesse Mrikaria and plaintiff are husband and wife.

The next witness for defence was IBRAHIM MAKIZA who testified as DW3. DW3 under oath and through his witness statement adopted as his testimony in chief told the Court that he is the branch manager of Equity Bank, Mwenge branch within Kinondoni district. According to DW3, his duties are administration, custodian of bank records, to supervise the operations of all banking business and to collect deposit and allow withdraws from customers.

DW3 told the Court that he knows DW1 and that he holds bank accounts in his branch with numbers 3001111137817 and a signatory of account number 3008211258275 in the name of Dar Lux Company Limited. DW3 confirmed the story of DW1 on transfer of monies into the account of Dr. George Yesse Mrikaria as testified by DW1. DW3 confirmed that all transactions of money were received by beneficiary on the dates shown.

DW3 was not cross examined nor re-examined by the learned counsel for parties.

On that note, Mr. Jamal, learned counsel for defendant, prayed to recall DW1 under the provisions of section 147(4) of the Tanzania Evidence Act, [Cap 6 R.E.2002], which prayer was granted with no objection. DW1 under oath when recalled testified how he deposited the refunds to the accounts

of Dr. George Yesse Mrikaria within CRDB Bank and Equity Bank and in proof of the payments, DW1 tendered in evidence exhibits D2 of TZS.215,000,000.00, D3 of TZS.50,000,000.00 and D4 of TZS.70,000,000.00. Further testimony of DW1 was that another amount of Tsh.20,000,000.00 was paid in cash to both plaintiff and Dr. George Yesse Mrikaria on 20th September, 2016. DW1 prayed that the contents of P1 be considered alongside their defence.

Under cross examination, DW1 insisted that Tshs.20,000,000.00 was paid to George by himself in cash. DW1 was shown exhibits D2, D3 and D4 and said that the money was transferred into the beneficiary accounts and it was in accordance to the instruction of the plaintiff to deposit into the account of Dr.George Yesse Mrikaria who was instructed to make a follow-up of the refund. DW1 pressed with questions admitted that the money was for business but denied to have stayed with for bad intention. According to DW1 the money was for buying buses but the buyer failed to pay and a refund was orally agreed.

Under cross examination by Mr. Kiangio, learned advocate, DW1 told the Court that the plaintiff was to buy the buses on loan upon meeting all the conditions of the manufacturer. In the instant suit, DW1 told the Court that

the plaintiff has no bus business, transportation licence and had no other security for them to be given the buses without paying the whole priced amount. It was this state of affair, a refund was orally agreed. DW1 categorically disputed the claim of Tshs.100,000,000.00 claimed as fabricated and the claim of interest as well. DW1 went to tell the Court that Dar Lux Limited and Simagunga Company Limited are sister companies and DW1 is the shareholder and director to both companies.

Under re-examination by Mr. Jamal, DW1 told the Court that the Tshs.20,000,000.00 million paid to Dr.George Yesse Mrikaria was paid under the instructions of the plaintiff and it was on emergency request. As to the terms of exhibit P1, it was the testimony of DW1 that plaintiff is the one who failed to meet the conditions of loan purchase of the buses. This marked the end of the defence case.

To this end, the learned advocates for parties' prayed under Rule 66(1) of the Commercial Court Rules to file closing written submission in support of their respective stances. Their prayer was granted. I have an opportunity to read their respective written final submissions. I am very grateful for their respective and insightful inputs and I recommend them. In the course of

determining the merits of this suit will consider and give them the weight they deserve.

At this point, upon hearing both sides' testimonies, it is worthy to note that there are some of the facts which are not in dispute in this suit. These undisputed facts will assist this court to do justice to parties in this suit. These are; **One**, there is no dispute that from the pleadings of the parties, in particular, the written statement of defence and in the witness statement of DW1, there is clear admission of liability of Tshs. 41,000,000.00 by the defendant to be indebted to the plaintiff. **Two,** there is equally no dispute that Dr. George Yesse Mrikaria (who unfortunately was not called to testify) for PW1 and DW1 respective testimonies was the one who was assigned to make a follow-up of the refund and was actually the one who was paid the money not in dispute. Also, it is helpful to mention and note that this suit revolves around the breach of contract which was raised by both parties.

Therefore, the first issue that was framed for determination of this suit was whether the defendant breached the terms of the Memorandum of Understanding. According to the evidence and allegations of the plaintiff, who was the sole witness was that the defendant failed to deliver the buses within agreed period of time (90 days from the date of payment of

Tshs.400,000,000.00), never sought an extension of time from the plaintiff to deliver at later date than agreed, refused to refund the monies paid as advance purchase price for over twenty months and that the defendant have refused to pay the exchange rate fluctuation.

On the other hand, the defendants' defence was that they never breached the terms of the MOU but it was the plaintiff who failed to pay full purchase price. And further that, conditions for loan that were imposed by the manufacturer such as giving security and licence of the operative bus business was not met as given by the plaintiff.

I have considered the respective testimonies of the parties, the evidence tendered by both parties and the final written submissions, and I am of the considered opinion that in this suit the defendant breached the terms of the MOU. The reasons am having this stance are not far to fetch. **One,** the two units buses in their specifications were to be delivered within 90 days from the date of deposit. The date of deposit was 5th December,2015. In this regard, therefore, the two units were to be in the yard of the Distributor's showroom at Plot No. 84 Tegeta Wazo Industrial area on 5th March 2016. This was not done and it cannot be something else but breach of the terms of the MOU. **Two,** the defendants' defence was that the manufacturer put

some conditions which were not met by the plaintiff. These are that no loan purchase unless and until the plaintiff pay cash, brings the cards of the other buses she posses, licence and the insurance. I have gone through the entire MOU nowhere such terms were stipulated in the documents. Such defence, to my opinion was calculated deliberately to bring in terms from a third part, who was not a privy to the MOU or deliberately trying to create new terms not specifically provided for in the MOU. This kind of defence was brought out of context and is not acceptable and is far from convincing this Court otherwise. **Three,** the bill of lading tendered as exhibit D1 is dated 10th November, 2016 which is more than 8 months from the date of breach or delivery as agreed. This is yet another indication that the defendant breached the terms of the MOU by failure to deliver the buses on dates agreed and in way affecting the whole transaction or undertaking in question. The terms of MOU and on how were the buses to be registered to safeguard their interests were clear but same were not adhered to by the defendants in this suit.

In the totality of the above reasons, this Court unreservedly hereby find and hold that the defendants were in breach of the terms of the MOU to the extent explained above.

The next (or rather the second) issue for determination was what sum of money have the defendant paid to the plaintiff as a refund to the purchase price of the 2 Higher buses. The plaintiff in this issue claims the amount Tshs.145,000,000.00 as balance of unpaid refund money to the date of filing of this suit. The defendant admits that unpaid money to date is Tshs.45,000,000.00. minus Tshs.4,000,000.00 out of Tshs.400,000,000.00 received as purchase price. The defendants have been able to prove by documentary evidence payment of refund to the tune of Tshs. 335,000,000.00 by the contents of exhibits D2, D3 and D4. This was equally supported by the testimonies of D3- the branch manager of Equity Bank whose testimony was not even challenged by the plaintiff's advocates. Failure to cross examined DW3 was clear indication that his testimony was nothing but truth. The only contentious amount is Tshs. 20,000,000.00 that was allegedly paid in cash. I have carefully considered the testimonies of both sides and in particular, starting from the pleadings. It is worth to note that in our country is a trite law that parties' are bound by their peladings for very good reasons to avoid surprises and evasion. This point was emphasized in the cases of JAMES FUNKE GWAGILO v. ATTORNEY GENERAL [2004] TLR 161 (CAT),JOHN BYOMBALIRWA v. AGENCY MARITME INTERNATIONAL (T) LTD [1983] TLR 1 (CAT) AND PAULINA

SAMSON NDAWAVYA v. THERESIA THOMAS MADAHA, CIVIL APPEAL NO.45 OF 2017 (MWANZA) CAT (Unreported) in which the Court underscored the import of the pleadings to avoid surprises and change of the case at the detriment of the other party to the suit. The defendants in their defence, in particular, in paragraph 10 of the written statement of defence stated categorically the amount of money they had refunded and that it was paid to the named accounts of Mr. George Yesse Mrikaria including the Tshs. 20 Million paid in cash. The reply to WSD by the plaintiff did not specifically disprove these facts apart from saying that they are disputed for want of proof. Here one would expect the plaintiff to bring in evidence bank statements of Dr. George Yesse Mrikaria to disproof these facts. This was not done. Not only that but also that the said Dr. George Yesse Mrikaria, who is the husband of PW1, however, material witness to this case was, was not called for unexplained reasons on the part of the plaintiff. Failure to call material witness, adverse inference has to be drawn against you. Dr. George Yesse Mrikaria was imperative witness in this case. In the case of AZIZ ABDALAH v. REPUBLIC [1991] TLR 71 (CAT) it was held **that the general and well known rules is that, the prosecution is under prima facie duty to call those witnesses who, from the their connection with the transaction in question, are able to testify on**

material facts. If such witnesses are within reach but are not called without sufficient reasons being shown, the Court may draw an inference adverse to the prosecution.

Guided by the above case law, I am inclined to find that this is a befitting case to draw adverse inference for plaintiff's failure to call Dr. George Yesse Mrikaria who was material witness to the whole transaction. Equally important to note as well is that in the absence of any evidence to the contrary, the defendant have been able to prove that Tshs.20 million was paid to Dr. George Yesse Mrikaira and it has to be added to the 335 earlier proved. In regard to this, therefore, it is the finding and holding of this Court that the amount of money so far refunded is Tshs. 355,000,000,00 as amply proved by the defendants.

That said and done, this Court as well enter judgement on adminssion on Tshs. 45,000,000.00 minus Tshs.4,000,000.00 not at issue between parties. The claim of Tshs.145,000,000.00 stand to fail for reasons stated above.

The holding of issue number two above automatically answer issue number 3 which was couched that to what extent (if any) are the defendants indebted to the plaintiff on account of the purchase price. This issue will not

detain this Court much. The amount for the reasons shown above is Tshs. 41,000,000.00.

The last and usual issue is what reliefs parties are entitled to. The plaintiff, among others, claimed payment of Tshs. 60,000,000.00 as accrued price fluctuation and loss of business on exchange rate as per oral agreement for term of six batches for six months. Honestly, after going through the testimony of PW1 and all documentary evidence, this claim was not proved at all. PW1 told the Court that after the defendants breached the terms of the MOU, she commissioned her husband to make a follow up of the refund, but sadly and unfortunately on her part she never called Dr. Mrikaria to testify. And since the defendant strongly disputed this oral agreement, then it remains unsubstantiated claim in this suit. This limb of claim is akin to fail for want of evidence.

Another claim of the plaintiff was the payment of interests and charges araising from the loan used as purchase price. In proof of this claim PW1 tendered in Court exhibit P3, P4 and P5 to prove that she had a loan from CRDB Bank as such the money was used to purchase the said buses and as such she suffered by paying interest and other charges. The defendants disputed this limb of claim. The plaintiff had legal duty, therefore, to prove

the relationship between the loan and the purchase price. I have given this limb of claim due consideration and I am of the considered opinion that same has to fail. My reasons for taking this stance are not far to fetch. **One,** in exhibit P1 nowhere there is a mention that the purchase price was by the loan from CRDB bank. **Two,** exhibits P4 and P5 proves that money was withdrawn from the account of PW1 and deposited into the account of DW1 and no more or less on interest. **Three,** going by exhibit P3, the purpose of the loan was general -personal loan and not business loan nor loan for purchase of buses. More worse, exhibit P3 was not dated and signed by the parties to authenticate its genuineness. It was not witnessed by the commissioner for oath and as such in law though admitted in evidence is a document that has no evidential value in the eyes of law. Not only that but also it should be noted that even the repayment sources was not said to be the buses business but monthly salary which shows same had nothing to do with the buses business which did not materialize. **Three,** the plaintiff has as well failed to bring any evidence of the interest and charges that she was charged by CRDB Bank. This Court cannot grant prayers which were not substantiated at all.

Apparently, for the reasons stated above, this limb of claim is akin to fail and this Court hereby rejects this relief for want of evidence and it is remote from the bus project, if any.

Another relief which the plaintiff prayed is the payment of interest at the commercial rate of 21% from 1st May 2016 to the date of judgement and full payment. I have given due consideration to this limb of prayer and I am of the considered opinion that the plaintiff is entitled to some interest from the money that was not paid by the defendants despite the breach and even for failure to make a complete refund. On this limb of prayer, this Court hereby grant interest at 14.5% per annum as prayed in the plaint.

Further prayer of the plaintiff was Court's interests at Court interest of 7% in (a) (b) and (c) above per annum from the date of judgement to the date of full and final payment. This limb of relief is hereby granted as prayed for there is evidence on record for breach of the contract on item (a) alone because the other reliefs in (b) and (c) failed.

Yet another claim by the plaintiff was payment of general damages in respect of the breach of the contract as the court deemed fit and just for the pain and suffering, mental anguish, financial stress and loss of investment. The defendant is on record that they breached terms of the

MOU and even when they knew they could not meet the deadline no reasonable explanation was offered for the delay of the buses. This indeed to any businessman/woman will create anxiety and torture. The provisions of section 73 of the Law of Contract Act, [Cap 345 R.E.2002] are very clear that any party who suffers from the breach of any contract is entitled to compensation. For easy of reference the said provision provides that:

Section 73. Where a contract has been broken, the party who suffers by such a breach is entitled to receive, from the party who has broken the contract , compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Guided by the above provision, the plaintiff, in this suit, really deserve some compensation for breach of the contract. This Court is of the opinion that an amount of Tshs. 10,000,000.00 will do justice to this case. I, therefore, grant the plaintiff payment of Tshs. 10,000,000.00 being general damages for breach of contract twice; in the first place for failure to deliver the buses as agreed and in the second place for failure to refund the whole amount without any justifiable reasons at once or at an earlier time possible.

That said and done this suit is allowed to the extent explained above with costs to the plaintiff.

It is so ordered.

Dated at Dar es Salaam this 27th day of March, 2020.

S.M.MAGOIGA

JUDGE

27/03/2020.