IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM.

COMMERCIAL CASE NO.78 OF 2019

MOHAMED ENTERPRISES (TANZANIA) LIMITED ..... PLAINTIFF.

VERSUS

CIPA SAS ..... DEFENDANT.

Date of Last Order: 03/03/2020.

Date of Judgement: 20/03/2020.

DEFAULT JUDGEMENT.

MAGOIGA, J.

This is a default judgement as result of breach of contract. The plaintiff, MOHAMED ENTERPRISES (T) LIMITED by way of plaint instituted the instant suit against the above named defendant praying for judgement and decree in the following orders, namely:

a. The defendant pay the plaintiff USD.60,800.00 being the difference in price the plaintiff incurred after selling the Sesame seeds under the agreed price due to breach of the contract by the defendant as per para 3 herein above;

b. The defendant pay the plaintiff interest on the principal amount at the rate of 25% per annum from the date of breach till the date of judgement;

c. The defendant pay the plaintiff interest on the decretal amount at the Court's rate of 11% per annum from the date of judgement till when payment is made in full.

d. General damages to be assessed by the Court.

e. The defendant pay the costs of and incidental to the suit

f. Any other relief(s) that the Honourable Court may deem fit.

The plaintiff is enjoying the legal services of Ms. Neema Mahunga, in-house legal counsel of the plaintiff.

The facts of this suit as gathered from the plaint are that defendant sent the plaintiff a supply order no. AF15001317 dated 20th August 2015 through an email for the supply of Tanzania South Sesame seeds weighing 304,000 kilogrammes at the cost of USD1.18 per kilogramme, with specifications of being TZ SOUTH (WHITISH) new crop 16 FCL 20' purity 98%, full machined cleaned, moisture; 7%max oil content 50% minimum, admixture 1% Maximum. In the same order it was agreed that Sesame seeds invoice to be issued in the name of the defendant and to be shipped

to Beijing China and that payment would be in cash against production of documents when Sesame seeds were loaded onto the ship. Further facts were that the plaintiff complied with the documentary requirement emailed by the defendant by 04th September, 2015. The defendant appointed SGS for certificate of quality and weight who issued certificate no DA15- 00888 confirming Sesame seeds matched the agreed specifications. Further it was agreed that Sesame seeds were to be inspected by the defendant's appointed inspector who would give his approval on the quality and specifications at the plaintiff's warehouse and supervise the clearing process, weighing and packaging of Sesame seeds before it was loaded into a container for shipment to China. The appointed inspector approved the quality and specifications of the Sesame seeds after which the plaintiff started the clearing process as scheduled in the presence of the defendant's inspector as agreed. The bagging of the consignment in 50 kilogrammes in the container was done in the presence of the defendant's inspector ready for shipping into vessel KOTA NIPAH as per booking reference no. PIL/T/15/NPH066/52 were equally done.

Further facts went on that despite the approval by the defendant's inspector; the plaintiff received an email dated 22nd September, 2015 from

the defendant canceling the order on the reason that Sesame seed were having black/brown grain in high percentage a fact which was disputed by the plaintiff because Sesame seeds were approved by defendant's inspector as agreed and ordered. The plaintiff replied to that email of cancellation by holding the defendant responsible for all consequences that would result from the cancellation of the order and demanded to sell Sesame seeds against the defendant with a difference of USD.100 per metric tone. As consequences, the plaintiff failed to sell the consignment at the price different of USD. 100 and instead the goods were sold at the price difference of USD.200.

Facts went on that despite several demands for payment of the difference in price; the defendant has refused and/or neglected to heed to the plaintiff's demands, hence this suit for orders sought in the plaint.

The defendant who resides outside Tanzania with her office in Paris, France, normal service was not possible and as such the learned counsel for plaintiff prayed that she be allowed to effect service by courier and by email under the provisions of Order V Rules 17 and 29 of the CPC [Cap 33 R.E.2002]. The Court granted the prayers and the learned counsel for plaintiff in compliance with the court's order, filed in this court an affidavit

in proof of service as ordered. The affidavit submitted was supported by both delivery reports to the defendant by way of courier and email showing the defendant was dully served 11th September, 2019 and 21st October, 2019 respectively. It is upon this background, this Court on strength of such proof of service granted the plaintiff's prayer to prove her case by way of filing Form number 1 accompanied with affidavit in proof of the claim as provided under Rule 22 (1) as amended by G.N. 107 of 2019, paving way for this default judgement.

In proving the claim, the plaintiff on 2nd March 2020 filed in this Court, Form 1 accompanied by the affidavit of, one, Ritesh Dineshkumar Darji who is the project manager of the plaintiff. I have carefully gone through the affidavit and the exhibits annexed in proof of the claim and I am satisfied that the plaintiff has discharged his legal burden required in civil cases. In essence this suit revolves around breach of contract on the part of the defendant for unjustifiably cancelling the order which the plaintiff has performed substantial part of the contract at the detriment of the plaintiff.

Having carefully gone through the affidavit in proof of the claim and exhibits 1-9 in this suit, I find this suit proved to the standard required in

civil cases. This Court faced with similar situation in the cases of NITRO EXPLOSIVE (T) LIMITED v. TANZANITE ONE MINING LIMITED, COMMERCIAL CASE NO.118 OF 2018 (HC) DSM (Unreported) AND A-ONE PRODUCTS AND BOTTLERS LIMITED v. TECHLONG PACKAGING MACHINERY LIMITED AND ANOTHER, COMMERCIAL CASE NO 105 OF 2017 (HC) DSM (Unreported) in the interpretation of Rule 22 (1) as amended, held that for the plaintiff to enjoy fruits of justice under Rule 22, the following cumulative ingredients must be proved, namely;

(a) Proof of the service to the defendant but who has failed to file written statement of defence.

(b) The plaintiff must make an application in the prescribed Form No. 1 to the First Schedule to the Rules.

(c) That the said application in Form No.1 **must be accompanied by an affidavit in proof of the claim (emphasis and underline mine).**

In the instant suit, there is no dispute that the plaintiff was served in accordance with the law. However, no written statement of defence has been so far filed nor any application for extension to file one. Equally it is not in dispute that the plaintiff has made an application in prescribed Form

No. 1 and same was accompanied with the affidavit in proof of the claim. In the totality of the above, this Court having carefully gone through the affidavit and exhibits 1-9 thereto I am satisfied that the plaintiff has been able to prove all his claims as prayed in the plaint. In the circumstances, am inclined to enter default judgment in favour of the plaintiff as prayed in the plaint. The reasons am taking this stance are not far to fetch in this suit; **one,** plaintiff performance of the contract as agreed and specified was at all material time supervised by the agent of the defendant and inspector appointed by the defendant at all stages and to say that there is unnamed customer (third party) who raised an issue of brown and black colour of the seeds to justify cancellation of the order was and cannot be accepted in the circumstances. The defendant is in law stopped, under the principle or doctrine of estoppels at this stage to cancel the order. **Two,** the issue of colour was first raised in the cancellation email but all other emails from the order to the commercial invoice and SGS as agent has never raised such a concern. It is, therefore, the considered opinion of this Court that same was raised at the detriment of the plaintiff. The defendant cannot in the circumstances be justified to do so. **Three,** had the colour been one of the condition it could have featured in one of the emails and the last email

sent on 4th September, 2015 was insisting on lab results which were according to specifications.

Consequently, therefore, in terms of Rule 22 (1) of the Rules as amended by G.N. No. 107 of 2019, I hereby enter judgement for the plaintiff and decree as follows:

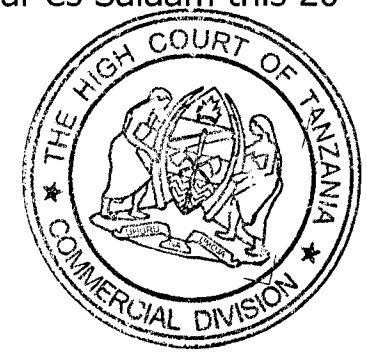
a. The defendant pay the plaintiff USD.60,800.00 being the difference in price the plaintiff incurred after selling the Sesame seeds under the agreed price due to breach of the contract by the defendant as per para 3 herein above;
b. The defendant pay the plaintiff interest on the principal amount at the rate of 25% per annum from the date of breach till the date of judgement;
c. The defendant pay the plaintiff interest on the decretal amount at the Court's rate of 11% per annum from the date of judgement till when payment is made in full.
d. The defendant to pay the plaintiff USD.10,000.00 being general damages for breach of contract on terms not anticipated and out of the terms of the contract by the parties and as such causing inconvenience to the plaintiff.

e. The defendant to pay the costs of and incidental to the suit.

In terms of Rule 22 (2) (a) of the Rules as amended by G.N. 107 of 2019, I further order that the decree in this suit shall not b executed unless the decree holder has, within a period of ten(10) days from the date of the judgement, serve by email and courier or DHL a copy of the decree to the defendant and a period of twenty one days (21) from the date of expiry of the said ten (10) days has elapsed.

It is so ordered.

Date at Dar es Salaam this 20th day of March, 2020.



S.M. MAGOIGA

JUDGE

20/03/2020.