

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 153 OF 2018

BETWEEN

TANZANIA PORTLAND CEMENT COMPANY LIMITED.....PLAINTIF

VERSUS

ZHENG RUI GROUP LIMITED.....DEFENDANT

Last Order: 04th Mar, 2020

Date of Judgment: 25th Mar, 2020

DEFAULT JUDGEMENT

FIKIRINI, J.

The plaintiff and defendant are both limited liability companies incorporated under the Companies Act, No. 12 of 2012, carrying out different businesses. The plaintiff dealing with production and supply of Twiga cement brand and the defendant as one of its customer. The plaintiff and the defendant entered into credit agreement on 14th September, 2017, for purchase and supply of cement on credit worth Tzs. 96,000,000/= . The defendant failed to honour its obligation which amounted to fundamental breach of contract and consequently the plaintiff claims suffered damages amounting to Tzs. 96,000,000.00/= and other costs.

The plaintiff instituted a suit against the defendant for the payment of Tzs. 96,000,000.00 (Tanzania Shillings Ninety Six Million only) being outstanding costs for cement branded Twiga supplied to the defendant plus the accruing interest and cost of the suit.

Mr. Mulamuzi Patrick Byabusha, represented the plaintiff and he informed the Court that despite several demands the defendant neglected or refused to settle the outstanding balance of Tzs. 96,000,000/= and hence filing of this suit seeking the following orders:

1. That the defendant be ordered to pay an outstanding sum of Tzs. 96,000,000/= to the plaintiff being value of tonnage of cement.
2. That the defendant be condemned to pay the plaintiff an interest at commercial rate.
3. That the defendant be ordered to pay the plaintiff an interest at Court rate from the date of filing this suit to the date of full settlement.
4. To pay Costs of the suit; and
5. Any other relief(s) this Court may deem just to grant

The defendant was duly issued with notice by the Deputy Registrar and later a substituted service was done but all proved futile and hence this application for default judgment. The plaintiff's claim was supported by an affidavit deposed one

Neema Mungure, plaintiff's Principal Officer. In the affidavit deponed the following annexures were annexed TW001- a copy of the credit agreement dated 14th September, 2017; TW0002-a demand notice dated 10th April, 2018; TW0003- copy of notices issued by this Court; and TW004- a copy of substituted service by publication notice. Relying on the affidavit and its annexures the plaintiff was praying for this Court to enter default judgment in its favour.

I have closely examined the affidavit deponed in support of the default judgment prayed, and find it lacking to warrant grant of the reliefs sought. The following are my reasons: **One**, the copies of summons to appear and answer claim under Order V Rule 1 (a) of the Civil Procedure Code, Cap. 33 R.E. 2002 (the CPC) marked "TW003", besides being uncertified copy, was in my view not a sufficient proof that the defendant was duly served. Proof of service by way of an affidavit either from the Court process server or an officer of the plaintiff or respective law firm is required. In this instant that was missing or not annexed as required.

Two, going by the Court record, the plaintiff's counsel on 16th July, 2019, applied for substituted service, the application which was granted. Instead of annexing copies of the newspapers which carried the publication, a copy of the substituted service by publication annexed as "TW004" was annexed. Having annexure "TW004" does not prove that the publication was in actual fact carried out. The averment in paragraph 6 of the affidavit in support only illustrate on the notice to

publish and not the name of the newspaper, date and page where the publication was placed as well as the copies of the newspapers proving that there was indeed a publication carried out annexed to the affidavit.

Three, there was no proof that the demand notice “TW002” dated 10th April, 2018 with reference no. ELCA/DMD/TWIGA/2018/02, from Eagle Law Chambers Advocates, ever reached the defendant.

Four, all suit and applications are governed by the law and rules of procedure in place. For default judgment to be entered in favour of the plaintiff/claimant that party must prove her case in particularly complying to the Tanzania Evidence Act, Cap. 6 R.E. 2002 (the Evidence Act) and of recent the Electronic Transactions Act, 2015 (the Electronic Act) has factored a lot in proof by way of documents generated through other means. It has to thus be remembered that seeking a relief by way of a default judgment is thus no exception. The same amount of undertaking is required only that there will be no adverse party contesting the case. Sections 65, 66, 67, 78, 79 related to documentary evidence and section 110, 111 and 112 on burden of proof; of the Evidence Act are importantly be observed.

In the case of **Tarime Goodwil Foundation Health Services Hurumia Watoto v The Liquidator Prosperity Life Care Insurance Tanzania Limited, Commercial Case No. 12 of 2012**, the Court underscored that during the hearing

parties are expected to bring evidence to support what they have pleaded. The plaintiff though pleaded breach of contract, but has failed completely to prove that there was breach of contract as alleged. Despite there being a copy of the credit agreement, which will not be considered for being uncertified copy and no explanation was given as to the whereabouts of the original, the “TW001” in itself was not sufficient to prove there was breach of contract for failure to supply cement. No invoices, delivery notes, gate passes or the like were supplied to prove that there was cement required to be supplied and was indeed supplied but not paid for. The “TW001” therefore is a mere document without any support to the claim.

Additionally, annexures “TW002” does not say much except from demanding payment for the stated amount for the supply of tonnage of cement, without even giving out the exact amount supplied and possibly dates when the supply was made which should be known to the plaintiff. The plaintiff has though on the balance of probabilities to prove their case and not leave it for the Court to speculate.

Ordinarily the plaintiff would have been entitled to compensation under section 73 (1) of the Law of the Contract Act, Cap 345 R.E 2002 (the Law of Contract) for any loss naturally arising from the breach of contract. In the case of **City Council of Dar es Salaam v Jaji Mohammed (1968) HCD 287**, the Court held:

“damages are compensatory in nature from direct consequences of the act of the party who breached the contract, and must be specifically pleaded and proved”.

In the present case since the plaintiff has failed to prove her claim, this Court cannot grant the relief sought by way of default judgment.

In passing, the Court has observed none compliance to Rule 22 (1) of the the High Court (Commercial Division) Rules of 2012, as amended by GN. No. 2019, which provide as follows:

*“where any party required to file a written statement of defence fails to do so within the specified period or where such period has been extended in accordance with sub rule (2) of rule 19 within the period of such extension, the court shall upon proof of service **and on application by the plaintiff in Form No 1 set out in the schedule to these Rules enter judgment in favour of the plaintiff**”.* **(Emphasized is mine)**

Filing of Form No. 1 is separate from filing the affidavit in support of the claim. Parties should therefore strictly observe that. In the present suit Form No. 1 catered as an affidavit as well which is not correct. Compliance to filing of Form No.1 should be as stipulated in the First Schedule to the Rules.

In light of the above, I find the plaintiff has failed to prove her claim to warrant this Court to enter a default judgment prayed in her favour. The suit is dismissed with no order as to costs. It is so ordered.



A handwritten signature in black ink, appearing to read "P.S. FIKIRINI", with a long horizontal line extending to the right.

P.S. FIKIRINI

JUDGE

25th MARCH, 2020