

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**COMMERCIAL CASE NO. 132 OF 2020**

**STARLINGER & CO GESELLSCHAFT m.b. h. ....PLAINTIFF**

**VERSUS**

**TECHPACKTANZANIA LIMITED ..... DEFENDANT**

**Date of Last Order: 24/03/2021**

**Date of Judgement: 30/03/2021**

**DEFAULT JUDGEMENT**

**MAGOIGA, J.**

This is a default judgement. The plaintiff, STARLINGER & CO GESELLSCHAFT m.b.h. by way of plaint instituted the instant suit against the defendant praying for judgement and decree in the following orders, namely:

- a. An order that the defendant releases and bears costs for relocation of the machines back into possession on the plaintiff;
- b. Payment of EUR.756,384.51 equivalent to TZS.2,066,472,849.17 being the amount that the defendant failed to remit to the plaintiff for machines delivered in accordance with the hire purchase agreement;

- c. Payment of interest at commercial rate prevailing at the date of judgement, or at such rate as the honourable court may deem fit and just, accruing and computed from the date of judgement of this suit;
- d. Payment of general damages amounting to TZS.500,000,000/= as general compensation of any cost, loss or liability incurred by the plaintiff due to defendant's actions and in pursuit to recover the machines;
- e. For costs of this suit, and
- f. Any other relief(s) that the honourable court may deem fit and just to grant.

The facts of this case as depicted from the plaint are that, on 19<sup>th</sup> July, 2014 parties herein above entered into Hire Purchase Agreement for hiring with an option to purchase machines worth EUR.927,300 equivalent to TZS.2,534,186,779.04 as per the terms and conditions issued by the plaintiff and accepted by the defendant. Among the terms in the purchase Order Confirmation MA 237548 was that the value was to be remitted by the defendant in 12 equal installments over a period of 3 years at 8%



interest per annum. Further facts were that the machines were duly received in good conditions, installed and used by the defendant.

It was further alleged that on 23<sup>rd</sup> February, 2017 parties amended the repayment schedule where it was agreed for more monthly installments with lowered interest rate for deferred payment at the rate of 6%, but despite noble gesture stated above the defendant failed to remit multiple installments to tune of EUR.756,384.51 from the price of the machine of EUR.927,300.00 necessitating the plaintiff to terminate the contracts. On 25<sup>th</sup> November, 2019 the plaintiff issued a notice of intention to repossess the machines but which exercise was in vain, hence,, this suit for reliefs as claimed in the plaint.

The plaintiff at all material time has been enjoying the legal services of Mr. Anwar Katakweba, learned Advocate. On the other hands, the defendant has been enjoying the legal services of Mr. Sheheder Wali, learned advocate.

In order to understand why this is a default judgement , I find it apposite albeit in brief to know the history of what happened. The record is clear and loud that, on 15<sup>th</sup> December, 2020 the Court ordered service of 

summons to defendant to file written statement of defence. On 18<sup>th</sup> February, 2021 when the matter was called on for mention, the learned counsel for plaintiff informed this court that the plaintiff served the defendant on 18<sup>th</sup> December, 2020 but no written statement of defence has been filed and prayed that they be allowed to prove their suit as provided under Rule 22 of the High Court (Commercial Court) procedure Rules, 2012 as amended by G.N. 107 of 2019.

Mr. Wali, the learned advocate for the defendant admitted that, truly her client was served on 18/12/2020 and no defence has been filed since then. Equally, Mr. Wali admitted that, no extension of time was ever made to file written statement of defence as per the rule 20 (2) of the Rule but orally prayed for extension of time to file to defence on reasons that the company (his client) as of now had no physical address in Tanzania, and by the time the client went into their office it was closed. Mr. Katakebwa, learned advocate for the plaintiff resists the prayer and urged the court to be guided by the provisions of Rule 22 of the Rules as amended which require a defendant to file written statement of defence within 21 days or apply for extension of time to file defence within 7 days after elapse of the 21 days. According to Mr. Katakebwa, this was not done in this suit. 

This court declined to heed to the oral prayer for reasons advanced were not what one would expect from the defendant. This court instead granted the prayer of Mr. Katekabwa to prove his client's case under the provisions of Rule 22 of the Rules, hence, this default judgement.

In this suit, no doubt the plaintiff complied with the requirement as stipulated under Rule 22(1) of the High Court (Commercial Division) Procedural Rules, 2012 G.N.250 as amended by G.N. 107 of 2019. The said Rule provides as follows:

**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 interpreting the above Rule in the case of A-ONE PRODUCTS AND BOTTLERS LIMITED v. TECHLONG PACKAGING MACHINERY LIMITED

AND ANOTHER, COMMERCIAL CASE NO.105 OF 2017 held that as of now following the amendment of Rule 22 by G.N.107 of 2019 a party who wishes or desires to enjoy and be granted default judgment must prove the following three co-existing ingredients, namely:

- i. Proof of service to the defendant but who has failed to file written statement of defence.
- 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)**

In the above cited case, the court went on to insist that, "affidavit in proof of the claim must be self-explanatory proving all claims in the plaint in the same way a contested suit was/is to be proved and all documentary evidence must be authenticated in accordance with the law."

Guided by the above stance and after going through the plaint, it can be gathered that, the gist of this suit is on non-performance of contract on the part of the defendant for failure to pay for machines supplied and received as agreed in the Hire Purchase Agreements and Confirmation Order. It is



stated in the plaint and in the affidavit in proof of the claim that failure to pay the money for the machines given the amount that stand unpaid is to the tune of EUR.756,384.51. In the circumstances, the plaintiff prays that this court be pleased to order for repossession and at the costs of the defendant and relocate the machines to the plaintiff as result of breach to honour the terms and conditions of both Hire Purchase Agreement and Order Confirmation No.MA237548. The plaintiff further claims for payment of EUR.756,386.51 equivalent to TZS.2,066,472,849.17 being the amount that the defendant failed to remit to the plaintiff for machine delivered in accordance with the Hire Purchase Agreement. Also the plaintiff claim interest at prevailing commercial rate computed from the date of judgement of this suit, payment of general damages, costs and any other reliefs the court may deem fit and just to grant per annum from the date when the debt became due to the date of judgement. Pursuant to the Hire Purchase Agreement, Order Confirmation No.MA237548, certificate of commissioning, and termination of the Hire and Purchasing Agreement dated 19/07/2014 and notice of intention to repossess the machines as exhibited in exhibits P1, P2,P3, P4, P5, and P6 all show the whole



transaction was intended for commercial purposes and there is clear breach of contract on the part of the defendant.

Further, guided by the court's interpretation of Rule 22(1) herein above, there is no dispute in this suit that the plaintiff has proved that the defendant was duly served but failed to file written statement of defence. The defendant not only failed to file written statement of defence but equally failed to make an application for extension of time within which to file defence in accordance to the requirement of Rule 20 (2). More so, it is not in dispute that the plaintiff has filed Form No.1 and affidavit in proof of the claim. Therefore, no dispute as well that the three ingredients which entitled one to get a default judgement co-exist in this suit.

However, since the affidavit was intended to prove the claim, then the issue I am enjoined to consider is whether in the circumstances, the plaintiff has proved his case to the standard required in civil cases. I have had an opportunity to go through the affidavit in proof of the claim and **Exhibits P1 to 6** annexed thereto with a very keen legal eye and mind and I am satisfied that the plaintiff has been able to prove his claim as required by the law and, hence, is entitled to default judgment as prayed in the plaint. The reasons am taking this instance are not far to fetch; **One,**

there is no dispute that the two parties herein had a business relationship prior to the institution of this suit as vividly evidenced in exhibit P1 which is loud and clear on the fact. The said exhibit was dully signed by the plaintiff and defendant. **Two**, the gist of this suit is a breach of Hire Purchase Agreement and Order Confirmation No.MA237548 by the defendant for failure to pay for products supplied in time as agreed. The plaintiff in proof of this issue tendered statement of account showing the money due. The said exhibits were received and signed by the defendant. In the circumstances, the plaintiff have been able to prove before this court that she supplied the goods and the defendant received them, hence, for that reason the defendant is/was in law and fact in breach of Hire Purchase Agreement and Order of Confiormation dully entered by the parties. So, failure to perform her obligation as agreed, this court hereby declares the defendant to be in breach of contract. **Three** the affidavit in proof of claim when read together with Form No 1, the plaint, affidavit and exhibits tendered before this court, and the demand notices gives a clear picture of what transpired in this suit.

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



1. Declaration that the defendant is in breach of the Hire Purchase Agreement and Order Confirmation entered between the plaintiff and herself.
2. That, the defendant is ordered to pay to the plaintiff a sum of EUR.756,384.51 equivalent to TZS.2,066,472.17 being an outstanding amount that the defendant failed to pay to remit to the plaintiff within one month from the date of this judgement.
3. That in case the defendant failed to pay the said money as adjudged in item (2) above in one installment to the plaintiff immediately, the plaintiff is entitled to repossess the machines at costs of the defendant and relocate them to herself.
4. The defendant is ordered to pay the plaintiff interest on the above sum at a rate of 25% per annum, from the due date of debt to the date of this default judgement.
5. The defendant is also ordered to pay the plaintiff commercial interest on decretal amount at a rate of 18% from the date of this default judgement till when the decree is fully satisfied in case of failure to pay the same within one month.

6. The defendant is ordered to pay general damages to the tune of  
5,000,000/=

7. That, the defendant is ordered to pay costs of this suit.

In terms of Rule 22(2) (a) and (b) of the rules, I further order that the decree in this suit shall not be executed unless the decree holder has, within a period of ten (10) days from the date of the default judgment, published a copy of the decree in at least two newspapers of wide circulation in the country and after the period of twenty one (21) from the date of expiry of the said ten (10) days has elapsed.

It is so ordered.

Dated at Dar es Salaam this 30<sup>th</sup> day of March, 2021.



A handwritten signature in blue ink, appearing to read "S.M. Magoiga".

**S.M. MAGOIGA**

**JUDGE**

**30/03/2021**