

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**COMMERCIAL CASE NO 86 OF 2018**

**ALIOS FINANCE TANZANIA LIMITED.....PLAINTIFF**

**Versus**

**PRO TRANS LIMITED COMPANY.....1<sup>st</sup> DEFENDANT**

**ANVERALI GULAM HUSSEIN DAHYA.....2<sup>nd</sup> DEFENDANT**

**AKBER KERMALI.....3<sup>rd</sup> DEFENDANT**

**HUSSEIN KERMALI.....4<sup>th</sup> DEFENDANT**

**OCCEAN CITY TRAILERS**

**MANUFACTURING (T) LTD.....5<sup>th</sup> DEFENDANT**

**Date of Last Order:16/06/2021**

**Date of Judgment: 16/07/2021**

**JUDGEMENT**

**MAGOIGA, J.**

The plaintiff, ALOIS FINANCE TANZANIA LIMITED by a way of plaint instituted the instant suit against the above-named defendants jointly and severally praying for judgement and decree in the following orders, namely:-

- (a) An order for the payment of United States Dollars Three Hundred Eight-Nine Thousand, Seven Hundred Forty-Eight and Forty-Eight Cents (USD 389,748.48) being the specific damages suffered by



the plaintiff out of the vehicle leasing agreement as per below break down: -

- (i) An order for the payment of United States Dollars Three Hundred Fifty- Six Thousand, Four Hundred Forty-Three and Twelve Cents (USD 356,443.12) being the installments remains unpaid by the defendants;
  - (ii) An order for the payment of United States Dollars Twenty-Two Thousand Nine Hundred and Twenty-Five and Twenty Cents (USD 22,925.20) being recovery and parking fees of the leased Trailers;
  - (iii) An order for the payment of United States Dollars Ten Thousand Three Hundred and Eighty and Sixteen Cents (USD 10,380.16) being the late fees for the unpaid installments;
- (b) Interest on (a) above at the Commercial rate of 25% from the date when the debt become due to the date of judgment;
  - (c) Interest on decretal sum from the date of judgment to the date of full settlement of the outstanding debt;



- (d) An order compelling the 1<sup>st</sup> defendant to disclose the whereabouts of remaining one trailer and surrender the same to the plaintiff;
- (e) Payment of General Damages
- (f) Costs of the suits; and
- (g) Any other relief that this honorable court may deemed fit and just to grant.

Upon being served with the plaint, 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> the defendants filed a joint written statement of defence, which was later amended on 21<sup>st</sup> October, 2019 with a view of raising counter claim but none was filed and instead disputed the whole claims by the plaintiff and called them as unrealistic and unjustifiable and as such called the court to dismiss the instant suit with costs.

The facts as to the genesis of this suit are imperative to be stated. It is alleged and not disputed that the plaintiff and 1<sup>st</sup> defendant on diver dates between January 2016 and December 2016 entered into Vehicle Leasing Agreement whereof the plaintiff was obliged to provide Lease Finance Facility for purchasing assets to be used by the 1<sup>st</sup> defendant in her transportation business particularized as follows:



- (a) On 19<sup>th</sup> January 2016 Lease Finance facility of USD.300,000.00 and Vehicle Leasing Agreement No.TZ14CB0760 for purchase of 10 flatbed Trailers and afterwards leasing the same to the 1<sup>st</sup> defendant for consideration of USD.10,744.43 monthly for 36 months until the facility amount is cleared.
- (b) On 7<sup>th</sup> December, 2016 the plaintiff offered another Lease Finance Agreement of USD.150,000.00 and Vehicle Leasing Agreement No.TZ16CCB0550 for purchase of 5 flatbed trailers and after wards leasing the same to the 1<sup>st</sup> defendant in consideration of USD.5,305.84 for 36 months.

Further facts are that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants executed personal guarantees while the 5<sup>th</sup> Defendant executed Corporate Guarantee agreed to be bound by agreements between the plaintiff and the 1<sup>st</sup> defendant for the repayment of the whole amount as per the agreement plus interest or costs arising thereof.

More facts went on that, the plaintiff fulfilled her part under the Agreements as specified by purchasing trailers from Ocean City Manufacturing Company Limited and subsequently leased them to the 1<sup>st</sup> defendant. However, it was further alleged that the 1<sup>st</sup> defendant defaulted to pay the consideration as

agreed and in December, 2017 requested for restructuring of the payment terms and the plaintiff in good faith accepted on condition that the 1<sup>st</sup> defendant pay USD.15,000.00 on or before 29<sup>th</sup> December,2017 and further payments of USD.26,000.00 on or before 5<sup>th</sup> January, 2018 but the same was in vain.

It was alleged that in the course, the plaintiff discovered that the 1<sup>st</sup> defendant bank statement which led to the grant of the facility was tampered with and further communication between the parties' led the 1<sup>st</sup> defendant to return and consent to sale of the trailers as per current valuation to recover the amount due. The exercise revealed that the trailers which were one year old were not in good condition. The 2<sup>nd</sup> to 5<sup>th</sup> defendants have as well failed to honour their legal obligations, hence this suit claiming reliefs as contained in the plaint.

On the other hand, the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants apart from admitting 1<sup>st</sup> defendant entered into lease agreements and the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendant guaranteed the same, alleged that the plaintiff's claims are unrealistic and unjustifiable and are contrary to her demand notice letter dated 8<sup>th</sup> December, 2017. Further, 1<sup>st</sup> defendants denied to have tampered with the bank statement and alleged that the 15 trailers were un-



contractually and wrongfully seized actuated with bad malice on the part of the plaintiff resulting into loss on the part of the 1<sup>st</sup> defendant, hence, according to the defendants allowing the suit will amount to allowing her to benefit from her own wrongs.

The 2<sup>nd</sup> defendant was struck out of this suit following failure of the plaintiff to make services despite been allowed to serve him by way of publication.

At Final Pretrial Conference held on 18<sup>th</sup> March, 2021 four issues were framed and agreed between parties and recorded for the determination of this suit, namely:

1. Whether there was a vehicle leasing agreement between the plaintiff and the defendants
2. Whether the defendants breached the said vehicle leasing agreement
3. Whether the plaintiff has legal claims against the defendants after repossession and selling of disputed properties (the 15 flatbed trailers) if yes, to what extent
4. What reliefs are the parties entitled.



At all material time the plaintiff was enjoying the legal services of Ms. Winjaneth Lema, learned counsel while the defendants enjoyed the legal service of Mr. Deogratias Ringia Learned counsel.

In order to prove her case, the plaintiff called only one witness, one **YOHANE FOCUS SUNGUYA** hereinafter to be referred as PW1. Under oath and through his witness statement dully adopted as his testimony in chief, PW1 told the court that he is a Recovery Manager of the plaintiff, hence, conversant with the matter before the court. He went on to tell the court that sometimes in 19<sup>th</sup> January 2016, the plaintiff offered a Lease Finance Facility of USD 300,000 to the 1<sup>st</sup> defendant. Subsequently on the same day, the plaintiff and the 1<sup>st</sup> defendant concluded a Vehicle Leasing Agreement No. TZS14CB0760 in which the said amount was used to finance and purchase 10 flatbed trailers and leasing the same to the 1<sup>st</sup> defendant.

According to PW1, it was stated that, on 7<sup>th</sup> December, 2016, the plaintiff further offered a Lease Finance Facility of USD 150,000/= to the 1<sup>st</sup> defendant, subsequently on the same day, the plaintiff and 1<sup>st</sup> defendant concluded a vehicle leasing agreement No.TZS16CB0550 in which the said facility amount was employed in financing the purchase of 10 flatbed trailers.



PW1 further told the court that under the finance facility agreement 5 trailers were purchased from 5<sup>th</sup> defendant as per agreements. In the circumstances, the 1<sup>st</sup> defendant was obliged to pay monthly installments of USD 5, 305.84 for 36 months.

PW1 went on to testify that, on 7<sup>th</sup> September, 2016 and 19<sup>th</sup> January, 2016 the 1<sup>st</sup> defendant was guaranteed by the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants. Despite several follow up by the plaintiff requesting for the payment as agreed yet the 1<sup>st</sup> defendant failed to adhere to the given conditions.

PW1 told the court that the 1<sup>st</sup> defendant tried severally to tamper with bank statements after series of default in paying the monthly installments and upon tampering of these bank statements the plaintiff declined to restructure the payment terms of the agreement.

Following the 1<sup>st</sup> defendant defaults, the plaintiff remained with no other option but to demand the return of all leased assets. The plaintiff further went on saying that the defendant rejected and neglected the plaintiff's request hence the plaintiff engaged the service of Bilo Star Debt Collector Co Ltd to collect, value and put to sale said trailers.





PW1 further informed the court that, despite the fact that, trailers were in bad conditions the sale of the said trailers for the better price did not manage to pay the whole debt as total debt is USD 389, 797.79, the less amount recovered is USD 121,033.87 and total outstanding debt is USD 255,763.93.

In proof of case for the plaintiff, PW1 tendered in evidence in the following exhibits, namely: -

1. Vehicle Leasing Agreement and Lease Finance Facility offer letter dated 19/01/2016 collectively admitted in evidence as **exhibit P1 a-b.**
2. Vehicle Leasing Agreement dated 17/12/2016 admitted in evidence as **exhibit P2.**
3. The letter of Corporate Guarantee by Ocean City Trailers and letter of personal guarantee of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants collectively admitted in evidence and marked as **exhibit P3a-b.**
4. Statement of acceptance dated 11/2/2016 and 13/01/2017 admitted in evidence as **exhibit P4 a-q.**
5. Three (3) emails correspondence between parties over payment of debt collectively admitted as evidence as **exhibit P5 a-c.**



6. Two valuation reports and the letter stating the status report of possessed of leased properties to the 1<sup>st</sup> defendant are admitted as **exhibit P6 a-c.**
7. Affidavit to verifying emails, letter attached, Auctioneer report, two certificates of sale collectively admitted in evidence as **exhibits P7 a-k.**
8. Debt statement of 9/09/2019 admitted in evidence as **exhibit P8.**

Under cross examination by Mr. Ringia, learned counsel, PW1 told the court that, he is the Recovery Manager of the plaintiff and that there was no consent during disposition of trailers. PW1 went to tell the court that, investigation was done by Bilo Star Debt Collectors Limited and he was not there. According to PW1 the trailers were in bad condition.


When further cross examined, PW1 replied that the advertisement was done at the instance of the plaintiff and it seems the trailers were in good running condition. He further told the court that the trailers were not sold or undersold by value and the trailers were able to fetch only Tshs. PW1 went on saying that they could not be able to realize all the money, as the total debt was USD 346,000/= and the amount recovered was Tshs.131,000,000.00



Under re-examination by Ms. Lema, PW1 told the court that, Billo Star was tasked for repossession of trailers and the valuation was done by the registered valuer and they still claim for 225,700 USD and no consent was needed for repossession.

This marked the end of hearing of the plaintiff case and same was accordingly marked closed.

On the other hand, the defendants called two witnesses. The first witness was Directors of the 1<sup>st</sup> defendant Company, one, **HUSSEIN AKBER KERMALI** to be referred herein after as DW1. DW1 through his witness statement adopted as his testimony in chief, in this suit told the court that on two different occasions 1<sup>st</sup> defendant entered into two Lease Finance Facility agreements with the plaintiff, whereby 1<sup>st</sup> defendant was to make payments in installments as agreed. The 1<sup>st</sup> defendant in the course, experienced financial instability due to well known hardship of the business since the end of 2016 but made several deposits. In the circumstances, the 1<sup>st</sup> defendant approached the plaintiff to restructure the installments. DW1 further informed the court that the plaintiff never responds and they are unwilling to negotiate.



DW1 further testimony was that, despite the fact that, the trailers were wrongful seized and repossessed by the plaintiff since September 2017, but still the 1<sup>st</sup> defendant made several deposits which were acknowledged.

DW1 strongly denied the allegations that, the 1<sup>st</sup> defendant tempered with bank statements and called them as untrue and unjustifiable and they have never been summoned for the said allegations by the Police Force Department or any other authority for that matter, as such no investigation was ever made before that wild conclusion made by the plaintiff.

DW1 told the court that, out of USD.531,000.00, they managed to pay USD.132,750.00 and USD.102,994.43 leaving unpaid balance of USD.295,255.57

In disproving the plaintiff case, DW1 informed the court that, sometimes in June 2019 they learned that the plaintiff herein has sold the trailers which were wrongful and forceful seized through an alleged auction which was undervalued and without the defendant's consent. He further told the court that, the valuation was concluded in January 2018, the trailer would cover the debt in full and generated a surplus amount hence on behalf of 1<sup>st</sup>, 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> defendants prayed that the suit be dismissed with costs.



In disprove of case for the plaintiff's case, DW1 tendered in evidence in the following exhibits, namely: -

1. 16 Bank deposit receipt admitted in evidence as exhibit D1 a-p
2. Valuation report By East Africa assessors admitted in evidence as exhibit D2

Under cross examination by Ms. Lema Learned Advocate, DW1 told the court that, up to now, they have paid USD 102,994.43 and down payment of 132,750.00 was paid by cheques and all cheques were honored.

DW1 further informed the court that, the business started to go wrong in 2017. The valuation was done 9/01/2018 and was done by East Africa Assessors and was signed by the Director, the valuation shows the value was USD 325,868.19 for fifteen vehicle trailers. DW1 admitted that, he was told about another valuation report in 2019 though he was not given a copy. DW1 Further told the court that, he doesn't know how much was realized after sale. DW1 concluded that according to him, he admit the amount of USD.63,880 and not the value in the report.



Under re examination DW1 told the court that, the total amount for all trailers as per valuation were TZS 277,000,000/= however the two-valuation reports were done by unprofessional valuers of immovable properties.

The second witness for defence is, one, **ISMAIL MUSA YUSUFU** to be referred herein after as DW2. DW2 through his witness statement adopted as his testimony in chief in this suit told the court that, he is the supervisor of the workshop section and was present on several occasions when several street men came in the name of the plaintiff and forceful entered in their company premises and took possession of trailers without any order causing distress and loss to both the company and customer out of delays in transportation of the customers' cargo to various destinations.

DW2 went on to tell the court that, the incident was repeatedly done and at one point in time, they interfered with truck in transit and seized the same aiming to take off trailers with a cargo, this led to a police complaint against them by the Port Authority against them at Buguruni Police station.

It was DW2 testimony that, despite the fact that, on several occasion they had tried to plead with the plaintiff to act reasonable but they were still



rude, arrogant and forceful in taking away the trucks with trailers until they managed to repossess both trailers in September 2017.

Under cross examination by Ms. Lema Advocate, DW2 told the court that, they went to Police to report because the plaintiff was rude though no evidence of police report thereto.

Parties learned advocates prayed and were granted leave to file their respective final closing submissions under the provisions of Rule 66 (1) of this Court's Rules. I have read closing submission by learned advocates very carefully and I hereby truly commend them for the valuable input in this matter. In my deliberations, therefore, I will take into account their closing submission where necessary and give the same the weight they deserve.

Having gone through the evidence of the respective parties and closing submissions the remaining noble task of this court now, is to determine the merits and demerits of the instant suit.

Basing on pleadings, testimonies of the parties, respective witnesses, I noted down non-contentious issues which in a way will assist this court in deciding this suit fairly and justly in the course of answering the framed issues. These are: **One**, there is no dispute that there was an agreement between plaintiff



and defendants in which the 1<sup>st</sup> defendant was financed with Lease Finance Facility for 15 Flatbed trailers from the plaintiff in 2016 and 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> defendants executed personal guarantees while 5<sup>th</sup> defendant executed corporate guarantee. **Two**, the 15 flatbed trailers were repossessed by the plaintiff following failure to deposit the installments as per agreed contract and later on sold by the plaintiff.

With the above note, and coming back to the instant suit, therefore, I now turn to issues and test how they are answered by the evidence on record. The first issue was couched that, **whether there was an agreement between the parties**. Since this issue was alleged and not disputed by the defendants in their respective written statement of defence, then, it will not take much time of the court and without much ado same is, therefore, answered in an affirmative that, there was an agreement entered between the parties in 2016 as evidenced by exhibits P1a-b and P2.

This takes me to the 2<sup>nd</sup> issue couched that, **whether the defendants breach the contract?** It is settled legal position that, a breach of contract occurs when one party in a binding agreement fails to perform according to the terms of the contract. Legally each party in a contract is expected to fulfill its obligation under that contract. The provisions of section 37 of the





Law of Contract Act, [Cap 345 R.E 2019] underscore the point. For ease of reference, I produce it hereunder:

Section 37. **"The parties to the contract must perform their**

**respective promises,** unless such performance is

dispensed with or excused under the provision of this

act or by any other law. (Emphasis mine)

Guided by the above legal stance, the next question to be asked by this court is: was there any such failure on the party of the defendant or plaintiff. In order to find out whether there was breach or failure to perform; one should take into consideration the terms of the contract and find out if at all, there was any failure to fulfill any of such terms without any justifiable or lawful excuse.

Back to our suit, carefully examination of the testimony of both parties, and according to the plaintiff testimony, it is loud and clear the 1<sup>st</sup> defendant breached the contract by failure to make good payments in installments as agreed. Let me start with the notice of termination which was not given to the defendants. Going through the exhibit P1, it was un disputed that the



lessor is allowed to terminate the contract without any notice. For ease of reference I will produce part of clause 13 hereunder:

".....the term shall forthwith terminate without any notice" .....

Therefore, the assertion that, the notice of termination was not given to the defendants, is baseless and has no any factual and legal basis because the contract signed by both parties provided that the termination is automatic without any notice and the plaintiff was entitled as well to repossession of the motor vehicle in dispute.

On the above note, it brings us to a conclusion that, the 1<sup>st</sup> defendant allegations that, the plaintiff is the one who breached the contract because no notice of default and notice of termination was given to the defendants and that, the repossession of the said vehicles and trailers were unlawfully, un-contractually and wrongful seized a bare allegation without any support because what the plaintiff did was exercising the term and condition of the agreement as parties freely agreed that in case of default, the plaintiff shall exercise powers to repossess and resale the vehicles in dispute. The notice for twenty-four required was in respect of termination of lease agreement where there is no breach but in case of breach it was not a requirement.



The issue of failure to pay the installments as agreed is/was admitted by the 1<sup>st</sup> and 4<sup>th</sup> defendants in the witness statement of DW1 under paragraph 10, when he stated the amount paid and thus leaving a balance of USD.295,255.57, hence, bringing to one but conclusion that the defendants were in breach of the terms and conditions of the contract. Therefore, issue number two is for the reasons stated above answered in the affirmative that the 1<sup>st</sup> defendant breached the said Vehicle Leased Agreement.

This takes this court to issue number three which was couched thus; **“whether the plaintiff have legal claims against the defendants after the repossession and sale of the disputed properties and to what tune?”** The evidence on record shows vide exhibit P7a-b that the amount realized after sale was TZS.277,000,000.00. which is equivalent to USD.120,539.60 at the rate of TZS.2289 per 1USD. Therefore, if one take the unpaid balance of USD.295,255.57 minus USD.120,539.60 the balance is USD.174,715.97. The other amount said to have been paid were not at all challenged by the plaintiff and as such remained paid and are subject to be deducted from the whole claim.

The last issue is to what reliefs are the parties entitled. Since I have ruled that, the defendants were in breach of the fundamental terms of the



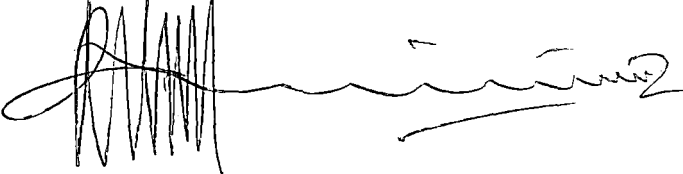
contract by failure to pay the installments as agreed, I find this suit proved to the standard required in civil proceedings against all defendants. That said, I proceed to grant the reliefs as follows:-

- i. I order payment of USD.174,715.97 being the specific damages suffered out of Vehicle Leasing Agreement;
- ii. Payment of interest on (i) above at the commercial rate of 25% from the date when the debt became due to the date of judgement;
- iii. Payment of interest on the decretal sum at court's rate of 7% from the date of judgement to the date of full settlement of the outstanding debt;
- iv. Payment of general damages to the tune of TZS.5,000,000.00
- v. The plaintiff shall have costs of this suit

It is so ordered.

Dated at Dar es Salaam this 16<sup>th</sup> July, 2021.



  
**S. M. MAGOIGA**  
**JUDGE**  
**16/07/2021.**