

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
[COMMERCIAL DIVISION]**

AT DAR ES SALAAM

COMMERCIAL CASE NO. 89 OF 2020

**LAKE STEEL AND ALLIED PRODUCTS LIMITED PLAINTIFF
*VERSUS***

MOHAMMEDI BUILDERS LTD DEFENDANT

JUDGMENT

11th and 18th October, 2021

KISANYA, J.:

The plaintiff and the defendant are companies incorporated and operating business in Tanzania. While the plaintiff carries on the business of manufacturing and selling of steel bars and allied products, the defendant carries on the business of building construction. In this suit, the plaintiff prays for the judgment against the defendant as follows:

- (i) Payment of Tshs. 315,200,000 being payment for the Steel Bars supplied by the Plaintiff to the Defendant.
- (ii) Payment of Tshs. 8, 063,167.67 being interest on the above said amount in prayer (i) at Commercial rate of 20% per annum from 26th June, 2020 to 31 August, 2020.
- (iii) Payment of Tshs. 240,000.00 being Bank Charges incurred by the Plaintiff.

- (iv) Payment of Interest on item (i),(ii) and (iii) above at commercial rate of 20% from the date of filing to the date of judgment.
- (v) Payment of Interest at the Court interest rate of 7% per annum on the decretal sum from the date of judgment to the date of full and final judgment.
- (vi) General damages.
- (vii) Costs of this suit
- (viii) Any other reliefs as this Honorable Court may deem fit and just to grant.

The genesis of this matter is an allegation of breach of contract to supply construction materials. It was contended in the plaint that, on diverse dates, between the 27th day of May, 2020 and the 26th day of June, 2020, the plaintiff, at the defendant's request supplied to the latter steel bars of different sizes worth TZS. 315,200,000/=.

It is alleged further that, on different dates and time, the defendant made partial payment via cheques, and in the process of effecting the said payments into plaintiff's accounts, maintained at Canara Bank (cheques worth TZS. 38,500,000/=) and NCBA Bank Tanzania Limited (cheques worth TZS. 126,948,000/=), they were altogether dishonoured for "insufficient

funds to drawer". According to the plaintiff, the dishonoured cheques subjected her to bank charges to the tune of TZS. 240,000/=.

The plaintiff's stated further that the defendant neglected, ignored or refused to pay the outstanding amount despite the reminders from the plaintiff. It was also pleaded that the defendant's refusal to pay the outstanding amount denied the plaintiff the right to use the said money in her business endeavours. Therefore, the plaintiff claims for TZS. 8,063,167.67, being an interest on the outstanding amount at commercial rate of 20% per annum from the 26th day of June, 2020 to the 31st day of August, 2020.

From the foregoing, the plaintiff decided to file this suit against the defendant.

Upon being served, the defendant filed a written statement of defence. She denied all the appellant's claims. The defendant went on to aver that, there was no supply agreement executed between her and the plaintiff.

During the final pre-trial conference, parties proposed the following issues which were adopted by the Court for determination of this matter:

1. Whether at the request of the defendant, the plaintiff supplied construction materials.

2. Whether the defendant breached the contract by failure to pay for materials supplied.
3. Whether the defendant is indebted to the tune of TZS 315,200,000/=.
4. Whether the plaintiff has suffered damage as a result of defendant's breach of contract.
5. What relief are the parties entitled to.

At the hearing of this case, the plaintiff enjoyed the legal services of Mr. Kobas Odhiambo, learned advocate, while the defendant was represented by Mr. Nixon Tugara, learned advocate.

The plaintiff called two witnesses namely, Jane Yusto Bisaya (**PW1**) and Kamlesh Dalwadi (**PW2**), an Accountant (receivables) and the General Manager, respectively. Their respective witness statements filed under rule 49(1) of the **High Court (Commercial Division) Procedure Rules**, GN No. 250 of 2012 (as amended) were admitted as part of their evidence in chief. Apart from the testimony of PW1 and PW2, the plaintiff tendered in evidence ten (10) exhibits.

In their witness statements, PW1 and PW2 told the Court that on diverse dates, the plaintiff received the purchase orders in which the defendant requisitioned supplies of steel bars. They deposed further that the

defendant's orders were made by way of Local Purchase Order (LPO) and that the plaintiff supplied the steel bars as per defendant's purchase orders. They relied on the consignment notes (CN) and delivery notes (DN). PW1 and PW2 testified further that, upon supplying the required construction materials, the plaintiff raised the requisite invoices and caused them to reach the defendant, accordingly, as shown hereunder: -

- (a) Tax Invoice No. 446 dated the 27th day of May, 2020 involving TZS. 29,250,000/= originating from the defendant's purchase order dated the 27th day of May, 2020; with LPO No. 337 dated the 29th day of May, 2020, CN No. LS/2020/446 and DN No. 1369. (Exhibit **P2**).
- (b) Tax Invoice No. 484 dated the 6th day of June, 2020 involving TZS. 57,100,000/= originating from the defendant's LPO No. 3581, with CN No. LS/2020/484 and DN No. 1407 as per Exhibit **P3** tendered in evidence by PW1.
- (c) Tax Invoice No. 485 involving TZS.57,350,000/= originating from LPO No. 3581, with CN No. LS/2020/485 and DN No. 1406 (all dated the 6th day of June, 2020). This is pursuant to Exhibit **P4** tendered in evidence by PW1.
- (d) Tax Invoice No. 553 dated the 26th day of June 2020 involving TZS.57,000,000/= originating from LPO No. 3589, with CN No.

LS/2020/553 and DN No. 1439 as per Exhibit **P5** tendered in evidence by PW1.

(e) Tax Invoice No. 554 dated the 26th day of June, 2020 involving TZS.57,200,000/= originating from LPO No. 3587, with CN No. LS/2020/554 and DN No. 1460 as per Exhibit **P6** tendered in evidence by PW1.

(f) Tax Invoice No. 555 dated the 26th day of June 2020 involving TZS.57,300,000/= originating from LPO No. 3588, with CN No. LS/2020/555 and DN No. 459 as per Exhibit **P7** tendered in evidence by PW1.

In view of the above, PW1 and PW2 adduced that the outstanding amount not paid by the defendant was TZS. 315,200,000/= as indicated in the ledger account (Exhibit **P1**). They went to depose that on various dates and time the defendant made partial payment via cheques, and in the process of effecting the said payments into plaintiff's accounts, maintained by Canara Bank and NCBA Bank Tanzania Limited they were altogether dishonoured for "insufficient funds to drawer". PW1 tendered 10 copies of cheques that were deposited at Canada Bank (Exhibit **P8** collectively) and 17 cheques that were deposited at NCBA Bank Ltd (Exhibit **P9** collectively).

It was PW1 and PW2's further testimony that, the defendant's failure to pay the outstanding amount denied the plaintiff to use the same in her

business endeavours. They therefore claimed TZS. 8,063,166.67 being interest on commercial rate of 20% per annum from the 26th day of June, 2020 to the 31st day of August, 2020.

According to the testimony of PW1 and PW2 that the defendant had also subjected the plaintiff to inordinate embarrassment and inconveniences in failing to meet her financial obligations to her creditors and that she failed to implement her projects for want of capital and hence, the basis of general damages and punitive damages. PW1 and PW2 went on to adduce that, while the case was pending, the defendant paid TZS. 160,000,000/=, that being the case, then, the settled outstanding amount, lately, to be TZS. 155, 224,000/=.

On cross-examination, PW1 stated the LPOs were received from the defendant and that she is the one who prepared the tax invoices, CN, DN and Demand Letter (Exhibit **P10**) on behalf of the plaintiff. She testified further that the dishonoured cheques (Exhibits **P8** and **P9**) from the defendant were received by the plaintiff and presented to the respective bank's on different dates. PW1 reiterated her evidence in chief that the outstanding amount which the defendant owes the plaintiff is TZS. 155, 224,000/=.

Upon being cross-examined, PW2 stated that, it was the defendant who was charged with the duty to collect the goods at the plaintiff's premises. He admitted that the plaintiff had not tendered evidence to prove that the dishonoured cheques subjected the plaintiff to pay charges of TZS. 240,000/=. PW1 also acknowledged the defendant to have paid TZS. 160,000,000/= during the pendency of this case, consequently leading to the outstanding amount to be TZS. 155,224,000/=. He testified that the sale agreement was to the effect that failure to pay on time attracts interest of 20%, and that the plaintiff had secured loan from the bank.

In her defence, the defendant called one witness who tendered no exhibit. In his witness statement, Musafa Hassanali (**DW1**), a Principal officer of the defendant, testified that there was no any agreement for the supply of steel bars that was executed between the plaintiff and the defendant from November 2018 up to August, 2019. He testified further that the outstanding amount in respect of steel bars supplied to the defendant was not TZS. 315,200,000/=. He testified that the defendant's record shows that TZS. 160,000,000/= had been paid to plaintiff.

On cross-examination, DW1 admitted that the defendant was purchasing construction materials from the plaintiff since 2018. He also confirmed that construction materials were supplied by the plaintiff upon receiving the defendant's order. Upon being further cross-examined, DW1

admitted that the defendant had not paid in full on what was purchased from the plaintiff. He also admitted that the outstanding amount is TZS. 155,224,000/= and contended that the defendant was ready to pay the same.

So far, that was the brief evidence adduced by both sides. The ball now is with the Court, to analyze and evaluate the evidence and respond to the mutually agreed issues. I am alive to the principle that a person who alleges existence of certain fact has the burden of proving that fact. This is pursuant to section 111 and 112 of **the Evidence Act** [Cap. 6, R.E. 2019]. It is also worth noting that the balance of proof in civil cases is on the balance of probabilities. The said two principles will govern the Court in determining the issues pertaining to this case.

Starting with the first issue, the Court is called upon to determine whether at the request of the defendant, the plaintiff supplied construction materials. In view of the evidence on record, the plaintiff has managed to prove that it is the defendant who ordered for the building materials. PW1 tendered in evidence the local purchase orders (LPOs) which were duly signed by the defendant's authorized officers. The same were admitted in evidence as Exhibits P2(c), P3(c), P4(c), P5(c), P6(c) and P7(c). The defendant's sole witness (**DW1**) admitted in his evidence on cross-examination, that the construction materials were supplied by the plaintiff at

the request of the defendant. Therefore, the first issue is answered in affirmative.

On the second issue, the Court is moved to decide whether the defendant breached the contract by failure to pay for materials supplied. It is in evidence that the construction materials ordered by the defendant were delivered or supplied to her. Apart from the testimony of PW1 and PW2, this fact is proved by the delivery notes which were signed by the defendant to acknowledge receipt of the construction materials (Exhibits P2(d), P3(d), P4(d), P5(d), P6(d) and P7(d)). Therefore, pursuant to section 3(2) of **the Sales of Goods Act** [Cap. 214, R.E. 2019], there was a binding contract to sale of goods between the plaintiff and the defendant. And according to section 37 of **the Law of Contract Act** [Cap. 315, R.E. 2019], both parties were required to comply with their respective obligations, unless the performance is dispensed with or excused by the law.

In that regard, the defendant was duty bound to pay for the supplied construction materials. According to PW1 and PW2, the defendant was issued with tax invoices (Exhibits P2(b), P3(b), P4(b), P5(b), P6(b) and P7(b)) which directed her to pay within 45 days. It is the testimony of PW1 and PW2 that, the defendant defaulted, failed or neglected to pay. This is also evidenced by the fact that the defendant paid part of the outstanding amount by cheques which were dishonoured due to insufficient fund in the

defendant's account. Again, the defendant, through DW1, admitted that the construction materials supplied to the defendant had not been paid in full. Therefore, the second issue is answered in affirmative as well.

Next issue for consideration is the issue whether the defendant is indebted to the tune of TZS. 315, 200,000/=. I think this issue should not detain this Court. According to PW1 and PW2 and the tax invoices, the outstanding amount as of the 15th day of September, 2020 when the case was filed in this Court, was TZS. 315, 200,000/=. Indeed, the defendant DW1 admitted that the materials supplied to defendant were valued at TZS. 315,224,000/=. It is also common ground that while the case was pending in Court, the defendant paid TZS. 160,000,000/=. The defendant (DW1) admitted that the outstanding amount to be TZS. 155,224,000/=. In that regard, the Court finds, in response to the third issue, that, the defendant is indebted to the tune of TZS. 155,200,000/= which was sufficiently proved by the plaintiff and as well admitted by the defendant.

There comes the fourth issue, as to whether the plaintiff has suffered damage as a result of defendant's breach of contract. In view of the findings in the second and third issues, the defendant wrongfully neglected or failed to pay for the materials according to the time specified in the tax invoices. Thus, as deposed by PW1 and PW2, the plaintiff suffered damage on the outstanding amount not paid by the defendant. She was denied the right to

use the said money in the profit-making endeavours. I therefore, hold the fourth issue in affirmative.

The last issue is on the relief(s) to which the parties are entitled to. I propose to start with the prayer for payment of TZS. 315,200,000/= being payment for the steel bars supplied by the plaintiff to the defendant. The bottom line is the fact that, the plaintiff has proved her case on the balance of probabilities. Upon finding that the outstanding amount against defendant to be TZS. 155,200,000/=, I hereby enter judgment for the plaintiff and order the defendant to pay the Plaintiff a sum of TZS. 155,200,000/=, being the outstanding amount for the supplied construction materials.

The Plaintiff is also claiming for payment of TZS. 8,063,166.67 being interest on the outstanding amount at commercial rate of 20% per annum from the 26th day of June, 2020 to the 31st day of August, 2020. It is my considered view that this prayer is in form of special damages. The law is settled that special damages must be strictly proved. Looking at the evidence of PW1 and PW2, I hold the view that the plaintiff has not proved the basis of interest claimed. No evidence was adduced to prove that parties had agreed that interest at commercial rate of 20% from the due date would be charged in case of default or delay to pay the outstanding amount. That fact is also not reflected in the tax invoices issued by the plaintiff to the defendant. Therefore, I find no basis of granting this prayer.

The plaintiff claimed further for TZS. 240,000/= being bank charges incurred by her on the dishonoured cheques. As indicated earlier, the said cheques were alleged to have been issued by the defendant to effect partly payment for the material supplied to her. It is also my considered view that, the relief sought is in terms of special damages and therefore, requires them to be proved. However, neither PW1 nor PW2 proved that the dishonoured cheques caused the plaintiff to incur bank charges to the tune of TZS. 240,000/=. No documentary or electronic evidence was tendered in evidence to prove the bank charges alleged to have been paid by the plaintiff. In the circumstances, I would, as hereby do, reject this prayer.

The Court was also invited to grant general damages. In law, general damages are awarded in the circumstances where it is not possible to assess or value the injuries suffered in a monetary term. There is no doubt, as deposed by PW1 and PW2 that, the Plaintiff has been deprived of the right to use and making profit from the said money for more than a year (from the 31st day of August, 2020). PW1 and PW2 adduced further that the plaintiff was subjected to various embarrassment and inconveniences in failure to meet her financial obligations and to implement other projects. It is also obvious that the plaintiff was forced by the circumstances to institute the case at hand. I am therefore convinced that the Plaintiff suffered injuries

and thus, entitled to general damages. In the result, I find it just to award the plaintiff TZS. 5,000,000/= as general damages.

With respect to interest, I award an interest on the decretal sum (TZS.155,200,000/=) at the rate of 20 % from the date of filing to the date of judgment and further interests at court's rate (7% per annum) from the date of judgment to the date of full and final satisfaction of this judgement.

The other prayer is costs of this suit. It is trite law that costs follow the event in the suit. That being the position, the defendant is hereby ordered to pay costs of this suit to the plaintiff.

In sum, therefore, I hereby decree as follows:

1. The defendant shall pay the plaintiff TZS. 155,200,000/=, being the outstanding amount for the construction materials supplied to her;
2. The defendant shall pay the plaintiff TZS. 5,000,000/= as general damages;
3. The defendant shall pay the plaintiff Interest on the decretal sum (TZS.155, 200,000/=) at the rate of 20 % per annum from the date of filing the case to the date of judgment;

4. The defendant shall pay the plaintiff Interest on decretal sum at the rate at court's rate 7% per annum from the date of judgment until the amount is satisfied; and
5. The defendant shall pay the plaintiff costs of the suit.

It is so ordered.

DATED at DAR ES SALAAM this 18th day of October, 2021.




E. S. Kisanya
JUDGE