IN THE HIGH COURT OF UNITED REPUBLIC OF THE TANZANIA

(COMMERCIAL DIVISION)

AT DAR-ES-SALAAM

COMMERCIAL CASE No.140 OF 2019

CHINESE-TANZANIA JOINT
SHIPPING LINE (SINOTASHIP).....PLAINTIFF

VERSUS

KARAKA ENTERPRISES LTD.....DEFENDANT

Date of Last Order: 29th September 21
Date -Judgement: 1st December 21

JUDGEMENT

NANGELA, J:,

The Plaintiff, a legal entity carrying on the business of shipping and local agency in the United Republic of Tanzania as agents of COSCO Shipping Lines Co. Ltd, (hereinafter referred to as COSCO), is suing the Defendant, a company registered and carrying out business of clearing and forwarding in accordance with the laws of the United Republic of Tanzania. The basis of the Plaintiff's suit is an alleged breach of two contracts which the two parties signed on 31st March 2018.

According to the facts, one of the contracts signed involved transportation of Dump Trucks from Dar-es-

Salaam Port to the agreed port of destination, while the other contract involved containers in which transported consignments were stored.

From their transactions, the Plaintiff claims from the Defendant payment of a total of United States Dollars, *Thirty Four Thousand One Hundred and Twenty Nine* (US$ 34,129.00) as demurrage charges arising from the Defendant's failure to return, within the prescribed time, a Container No. COSU 6207890180. Besides, the Plaintiff claims, as well for payment of US$ 55,607.00, which arises from the Defendant's failure to deliver to the consignee in the port of destination, one Big Dump Truck. The Plaintiff is also claiming for general damages, and interest on the decretal amount and costs of the suit. In total, therefore, the Plaintiff is claiming for USD ($) 89,736.00.

At the hearing of this suit, the Plaintiff enjoyed the legal services of Captain Ibrahim Mbiu Bendera, Learned Advocate. Initially, the Defendant was represented by Mr. Hosea Chamba, Learned Advocate, but he later withdrew from representing the Defendant. As such, one of the Defendants's Directors, Ms. Janeth Kalashani, appeared for the Defendant and was the only witness for the Defence.

In the course of the hearing, the Plaintiff called two (2) witnesses who had earlier filed their witness statements in Court. The two witnesses were Mr Herman

Ernest Sarwatt, whom I will later refer to as PW-1, and Ms Eva Murani Tirukazile, whom I will refer as PW-2. The Plaintiff did also submit to the Court a total of eight (8) exhibits (Exh.P-1, to P-8) to prove its case. The Defendant had only one witness, its Director, Ms Kalashani whom I shall refer to hereafter as DW-1, and submitted a total of three (3) exhibits (**Exh.D-1** to **D-3**) to support its case. At the end of the hearing, both parties filed closing submissions which I will also consider as I dispose of this matter. I will briefly summarise the testimony of the witnesses before I tackle the issues one by one.

Initially, when this Court convened for its final pre-trial conference it settled for three agreed issues which I will here below address. The drawn issues were, namely:

1. *Whether the Defendant is liable to pay the Plaintiff demurrages due to the Defendant's failure to return Container No. COSU 6207890180 and for non-delivery of one Dump Truck to its consignee within the prescribed time.*
2. *Whether, the Container No. COSU 6207890180 was returned to its owner and if not, whether the Defendant is liable to the Plaintiff for its non-return or loss.*
3. *To what relief are the parties entitled.*

Before tackling each of the issues listed here above, I find it apposite to give a summary of the testimony and evidence offered by the witnesses called by each of the parties.

In his testimony, PW-1 established that, the parties had concluded two contracts (**Exh.P-1**). In one of those contracts the Defendant was required to transport transit containers to Zambia, Rwanda, Congo and Burundi, while under the 2nd agreement, the Defendant was to transport 20 Dump Trucks and 10 big Dump Trucks (to Likasi in the DR-Congo), as well as 10 (small Dump Trucks) to Kapulo in DR-Congo. It was PW-1's testimony that, the agreement governing the transport of containers had allowed for payment of 70% of the agreed payments to the Defendant upon the signing ceremony while the 30% was to be paid after the return of the empty containers to the Plaintiff.

According to PW-1, the Defendant was paid for the containers and, that; the Plaintiff also paid some of the transporters to return the empty containers as they could not be paid by the Defendant. However, PW-1 did not tell the Court how much was paid and for which containers. It was the testimony of PW-1 (and also PW-2), however, that, one Container No. COSU 6207890180 was not returned to the Plaintiff within prescribed time. As such the failure has warranted a claim of USD ($) 35,129.00 as specific loss arising from the daily increase of demurrage

charges at a rate of USD ($) 80.00 per day up to the time of filing the suit for failure to return the empty container.

On cross-examination, PW-1 told the Court that, as the Defendant failed to return the respective container, the delay attracted demurrages and, since such were not settled, the 30% payment amount withheld by the Plaintiff was used to settle such charges. He also told the Court that, the 30% retained amount was also used to pay for the transporters who returned the container as they were not paid by the Defendant. **Exhibit P.7** was tendered and among others, it does show some payments made to transporters and the clearance of demurrage charges. He testified, therefore, that, nothing was left of the 30% balance.

However, PW-1 did testify that, when the Plaintiff engaged the transporters to return the containers to the Plaintiff, the Defendant was not involved in that arrangement. What he claimed was that, the Defendant was not available despite several communications by e-mail, calls and physical visit to the Defendant's office, and that, the transporters used to knock at the Plaintiff's office claiming to be paid.

He maintained, that, the Plaintiff used the 30% amount retained to off-set the charges; although the amount could not be paid in full as it was huge and the excess is what the Plaintiff is now claiming from the

Defendant. As I said, **Exhs.P-3** and **P.7** were tendered in Court to establish that fact.

As for her part, PW-2 testified that, the Defendant failed to deliver one big dump truck to its consignee and owes the Plaintiff USD ($) 55,607.00 as demurrages. She also testified that, the Defendant failed to return one container to the Plaintiff despite having been fully paid for the assignment as per the contract signed between the two parties.

PW-2 testified, therefore, that, the non-delivery of the dump truck and the non-return of the container (No. COSU 62078901180) made the Plaintiff to demand from the Defendant payment of USD ($) 89,736.00, as demurrages. In winding up the Plaintiff's case, final submissions were filed by the Plaintiff. In the submissions, the Plaintiff contended that, the Container was being used in maritime transport of goods to consignees.

As for the defence case, DW-1 (Ms Kalashani) admitted in her defence, and during cross-examination that, to date, one container which is partly a subject of this suit has not been returned. Nevertheless, it was DW-1's testimony in chief, as well that, the Defendant was able to transport and return 16 containers to the Plaintiff but, as already noted earlier, she admitted that one container on transit has not been returned. She however laid blames on the Plaintiff for all that. According to her

testimony, DW-1 stated that, the Plaintiff had deliberately refused to pay the Defendant a balance of USD ($) 45,959.43. DW-1 tendered in Court as exhibit an invoice which the Defendant had raised with the Plaintiff valued at USD ($) 45,959.43. The Invoice was admitted as Exh.D-2.

It was a further testimony of DW-1 that, due to such non-payment of the dues, the Defendant failed to pay the transporters hired to return the container, and as a result, one of them decided to withhold one container, the subject of this suit, as he claims for payments of outstanding dues. DW-1 testified that the Defendant has suffered economic hardship as the Defendant run out of cash to pay the transporters having been subjected to economic hardship.

DW-1 testified, as well, that, the Plaintiff coercively took from the Defendant business licences and other company documents in a bid to assure delivery of the Dump Truck, and that, to date, the Plaintiff has never returned such documents. In particular, DW-1 told this Court that, the documents taken by the Plaintiff were original copies of the following:

- The Defendant's TIN
- Certificate of incorporation
- VAT Certificate
- TAFA Certificate, and
- SUMATRA-Certificate.

According to DW-1, since the Plaintiff refused to return these documents, the Defendant has been unable to renew its operational business licence for a third year now as the procedures would require that the originals be presented, which originals are withheld by the Plaintiff. She told this Court that, whenever the Defendant attempted to approach the Plaintiff, the latter would not allow or grant access to the Defendant. This means that she has been put out of business for the past three years now.

In view of the above, DW-1 testified that, the Plaintiff is not entitled to be paid the amount claimed as demurrages resulting from the non-return of the container, the subject of this suit. The reasons assigned to that were that, it was the Plaintiff who frustrated the contract as the latter failed to pay the Defendant 30% balance claimed by the Defendant as per Exh.P-2. Moreover, DW-1 also based her reasoning on the coercive taking of the Defendant's business licences and other documents, an act which she claimed to have paralysed the operations of the Defendant, as the latter failed to renew her licences and failed to operate her business.

On cross-examination, however, DW-1 was asked whether the Defendant brought any counterclaim. Her response was to the effect that, she could not afford for the payments which would have been involved. Further, DW-1 stated that, the Defendant cannot be liable for the

loss or charges in respect of the said container because that container is still under the custody of the transporter who demands to be aid having delivered the cargoes successfully.

It was also the Defendant's closing submission that the Plaintiff failed to honour the contracts to wit, that, the Plaintiff failed to pay 30% of the contract in order to enable the Defendant to execute its contractual obligations, one being that of retuning empty containers to the Plaintiff without demurrages. The Defendant maintained that, there was no justification whatsoever, regarding why the Plaintiff should not have paid the Defendant the 30% having delivered the consignment. The Defendant submitted that, had the Defendant been paid the 30% on demand, the container would have been returned.

Finally, the Defendant submitted that, since she suffered loss in hands of the Plaintiff, as she failed to renew her business licences and certificates taken by the Plaintiff, she is entitled to be given her certificates and be generally compensated for damages and the costs so far incurred.

From such disclosures, three issues were framed by the Court and agreed by the parties, the first issue being:

> Whether the Defendant is liable to pay the Plaintiff demurrages due to the Defendant's

failure to return Container No. COSU 6207890180 and for non-delivery of one Dump Truck to its consignee within the prescribed time.

Looking at the facts and the evidence as adduced by the respective witnesses for the parties, there is no dispute that the Plaintiff had a business relationship with the Defendant governed by **Exh.P.1**, (*Container Clearing and Forwarding & Road Transport Agreement.* The testimonies of PW-1, PW-2 and DW-1 as well as **Exh.P-1**, were all to that effect. In their testimonies, PW-1, PW-2 and, even DW-1, do not dispute the fact that in the course of executing the contracts one container was not returned. What seems to be contentious between the parties is who is to blame for that and who should shoulder the liability whatsoever.

In his closing submissions, the learned counsel for the Plaintiff has tried to convince this Court that the Defendant should be liable. Three reasons have been given: *first,* is that, in her defence, the Defendant admits that one container has not been delivered to date. The *second* reason is that, the Defendant failed to challenge the fact that she was paid 100% for the transportation of both the missing container and the undelivered Dump Truck. *The final* or *third* reason given is that, since the Defendant failed to meet her obligations, there is no counter claim in her statement of defence.

However, as observed from the Defendant's evidence, much as there is admission that the relevant container was not returned, the Defendant seems to shift the blame on the Plaintiff. In particular, and as regards the missing container, the Defendant evidence was that, the container is still withheld by one of her transporter because the Defendant failed to pay owing to the Plaintiff's failure to pay the Defendant a total of USD ($) 45,959.43. She submitted in Court, **Exh.D-3** which the Plaintiff never disputed.

In fact, what the Defendant is saying is that, the Plaintiff had contributed to the delay to return the container. In other words, the Defendant is stating that, the Plaintiff had breached the contract as well. As such, she is arguing that the demurrage claims in respect of the delayed return of the container should not be paid because, had the Plaintiff paid the retained amount (equal to 30% balance) as per **Exh.D-3**, the Defendant would have paid the transporter who withheld the container and the same would have been returned.

To be able to pronounce whether the Defendant is liable or not, one has to go back to the parties' contract as it guided the parties relations on matters of liability and the extent of liability. Liability on the part of the Defendant as the **"C & F & Transport Agent"** is provided for under clauses 8.1 of the contact, **Exh.P-1**. According to Clauses 8.1 and 8.3 of **Exh.P-1**, the

following is well stated as liability that may ensue in respect of loss or delayed return of containers:

> "8.1 The C &F Agent & Transporter shall:
> 8.1 Be liable and fully indemnify SINOTASHIP for...loss of SINOTASHIP Containers ...whilst in the C & F Agent & Transporter's care, custody, possession and/or control..."
> 8.2....
> 8.3 Indemnify SINOTASHIP, and be fully liable for any reasonable amount of direct costs incurred as a direct result of the late delivery or 'misdelivery' of empty or full containers where it is due to the Transporter's negligence, wilful misconduct or error (including direct costs to get misdelivered containers delivered to the correct destination)..."

From the above clauses and, taking into account the admission of DW-1 that, the disputed container **No. COSU 6207890180** is yet to be returned, it is clear that, the Defendant's failure to return the respective container attracts what clauses 8.1, and 8.3 of **Exh.P-1** provide. However, as the agreement indicates, there is a limit to liability on the part of the Defendant. According to the proviso to Clause 8 of **Exh.P-1**, it is stated, at the 2nd paragraph that:

> "The C & F Agent & Transporter's liability under this agreement, **shall at all times be limited to USD 40,000** for anyone conveyance, alternatively to C & F Agent & Transporter's maximum liability insurance cover available at the

time of the claim, whichever is the greater."

In her claims in respect of the container No. COSU 6207890180, the Plaintiff is claiming for **USD 34,129.00** as demurrage charges for non-return of the Container. As noted earlier, the Plaintiff submitted **Exh.P.3** and **Exh.P7** which provides details in respect of what was paid to the Plaintiff and demurrage charges that accrued due to late return of empty containers. It means, therefore, the above amount is well below the limit provided for under the proviso to Clause 8 to the **Exh.P.1**.

However, before one concludes whether the Defendant will be solely liable or not, there is still a specific question that needs to be considered. That specific question is in relation to the DW-1's testimony that, the Plaintiff contributed to the failure on the part of the Defendant to discharge her obligations smoothly due to the latter's failure to honour its obligation to pay the invoices (**Exh.D-3**) which invoices the Defendant had brought to the attention of the Plaintiff for clearance.

Essentially, if one closely follows the testimony of DW-1, what she seems to assert is that the Plaintiff 'frustrated the contract', when she failed to pay the Defendant USD ($) 45,959.43 which represented the 30% retained amount for the contract relating to the transport of containers. She also stated that the Defendant's business was further frustrated by the fact that the

Plaintiff took from the Defendant important business licences, hence, sending the Defendant into a non-operational state of affairs.

From such Defendant's assertions, there are at least four basic questions that have cropped-up in my mind calling for discussion. **The first is**: can it be said that by not honouring the invoices (**Exh.D-3**) the Plaintiff frustrated the possible execution of the Defendant's contractual obligations? **The second is**: can it be said that by not honouring the invoices (**Exh.D-3**) the Plaintiff was equally in breach of the contract? **The third question is**: if the answer to the second question will be in the affirmative, should this court brush it aside or consider them as part of the Defendant's defence? **The fourth question** is: was it not appropriate that such matters should be raised as counter-claims and if so, were they and if not, what is the effect? I will deal with these questions hereunder.

As regards the **first question**, the key to it hinges on whether or not the Defendant is banking on the doctrine of frustration to save her neck, and if so, whether on the basis of the facts of this case there was a 'frustration of the contract'. The doctrine of frustration of contract is well-known principle under the common law. In the case of **Felix Rutazengelera vs. Co-Operative and Rural Development Bank** [1996] T.L.R 382, the Court of Appeal of Tanzania made it clear that, that

principle has not been abolished in this country, even if the Law of Contract Act, Cap 345 appears not to cover all aspects of the law of contract.

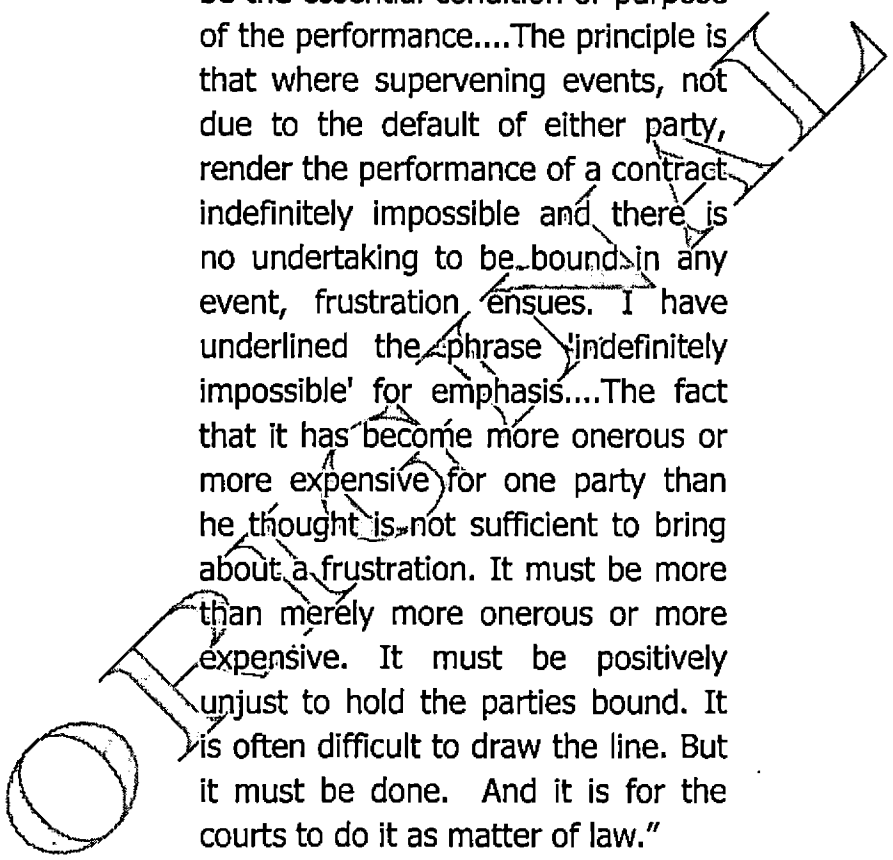
In essence, what the doctrine entails is that, where events occur, that make the performance of the contract impossible, and, these frustrating events are not the fault of either party, then, the contract is brought to an end with neither party at fault. Under our Law of Contract Act, Cap.345 R.E 2019, this doctrine is contained in section 56 (2) of. The respective provision states as follows:

> "A contract to do an act which after the contract is made becomes impossible, becomes void when the act becomes impossible."

But when can one invoke the defence of frustration? The answer to this question is readily available in the case of **M/S Kanyarwe Building Contractor vs. The Attorney General and Another** [1985] T.L.R 161. In that case, this Court (Mwalusanya J, as he then was) observed that:

> "our courts do not readily invoke the doctrine of frustration unless it is shown that the contract as originally conceived, bears little or no resemblance to the new state of things. It is not sufficient merely to show that conditions have changed so that one party is in a more onerous position, financially or personally. It should be shown that it is now impossible to perform the contract not merely more difficult or

> expensive ... [Frustration] is a sort of shorthand: it means that a contract has ceased to bind the parties because the common basis on which by mutual understanding it was based has failed. It would be more accurate to say, not that the contract has been frustrated, but that there has been a failure of what in the contemplation of both parties would be the essential condition or purpose of the performance....The principle is that where supervening events, not due to the default of either party, render the performance of a contract indefinitely impossible and there is no undertaking to be bound in any event, frustration ensues. I have underlined the phrase 'indefinitely impossible' for emphasis....The fact that it has become more onerous or more expensive for one party than he thought is not sufficient to bring about a frustration. It must be more than merely more onerous or more expensive. It must be positively unjust to hold the parties bound. It is often difficult to draw the line. But it must be done. And it is for the courts to do it as matter of law."



Looking at the facts of this case and what DW-1 has raised as frustrating circumstances, do these warrant invoking the doctrine of frustration? In my view, the response is in the negative. As it may be noted, what is being raised here by DW-1 was not impossibility to perform the contract but rather some difficult

circumstances that pushed the Defendant into an awkward economic position, the circumstances themselves having in them the Plaintiff's hand.

As per the decision of this Court in the above cited case of **M/s Kanyarwe** (supra), it is not sufficient merely to show that conditions have changed so that one party is in a more onerous position, financially or personally to warrant invoking the doctrine of frustration. Instead, there must be supervening events, not due to the default of either party, which renders the performance of a contract indefinitely impossible and thus making it clear that, in any event, no party is to be bound.

In the Indian case of **Sri Amuruvi Perumal Devasthanam vs K.R. Sabapathi Pillai And Anr.** A.I.R [1962] Mad 132, the Court, while considering section 56 of the Indian Contract Act (which is somewhat in *parimateria* to our section 56 of Law of Contract Cap.345 R.E 2019), was of the view that:

> "It must be borne in mind, however, that S.56 lays down a rule of positive law and does not leave the matter to be determined according to the intentions of the parties.... It is also settled that the theory of frustration or impossibility of performance of a contract cannot be applied to cases of commercial transactions. In other words, the impossibility referred to in S. 56 is not commercial impossibility. In his

> treatise on "*Impossibility of performance*", 1941 Edn. Roy Grenville McElory states at p. 194 under the heading "Commercial Impossibility is not frustration": "So far as existing authorities go, no change in economic conditions, however serious, and however deeply it may affect the contract, can by itself amount to impossibility such as to avoid it. There is no implied condition as to 'commercial' impossibility. It is false and misleading, therefore, to use the term 'frustration' to describe such a situation."

From the above understanding, therefore, it is clear to me, that, even if the Defendant in this case was trying to rely on the doctrine of frustration, she cannot invoke that doctrine as her defence. This is due to the fact that, there was no frustration of the contract or applicability of the doctrine of frustration as the Defendant or as DW-1 would want this Court to believe. That being said, was there any other reasons that would have made the Defendant unable to fulfil her obligations under the contract?

In the case of **Mohamed Idrissa Mohammed vs. Hashim Ayoub Jaku** [1993] T.L.R 280, the Court of Appeal held that:

> "where a party to the contract has no good reason not to fulfil an agreement, he must be forced to

> perform his part, for an agreement must be adhered to and fulfilled."

Now, were there, therefore, good reasons regarding why the defendant did not discharge her obligation under the agreement?

A response to the above brings me to the scrutiny of the rest of questions I raised earlier on and the evidence availed to the Court. **The second was**: can it be said that by not honouring the invoices (**Exh.D-3**) the Plaintiff was equally in breach of the contract?

Admittedly, it is settled law, as once stated in the case of **Vitus Lyamkuyu vs. Imalaseko Investment,** Civil Case No.169 of 2013 (unreported) (citing the cases of **Nakana Trading Co. Limited vs. Coffee Marketing Board** [1990 - 1994] 1 EA 448 cited in **Legend Aviation (Pty) Limited t/a King Shaka Aviation vs. Whirlwind Aviation Limited**, Commercial Case No. 61 of 2013 High Court Commercial Division (unreported), that:

> "A breach occurs in contract when one **or** both **parties** fail to fulfil the obligations imposed by the terms....."

According to DW-1, the Defendant raised **Exh.P-3**, with the Plaintiff but the latter did not honour them. DW-1 had stated that, she was expecting to use that amount to pay transporters of the containers, including the container which is the subject of this case. In his

testimony, however, PW-1 stated that the Defendant was paid 100% of the amount she was supposed to be paid under the contract.

I have revisited the testimony of PW-1. While he stated in chief that the Defendant was 100% paid, his evidence is somewhat contradictory. I find it to be so, because, at one point, PW-1 stated that the contract had stipulated for payment of 70% at the time of signing and 30% of the remaining balance upon returning of the containers. He tendered **Exh.P-3** which is an account detailed ledger in respect of the Defendant.

According to **Exh.P-3**, out of 18 containers indicated thereon, full payment of both 70% and the 30% was in respect of four containers only. The rest indicated that 30% balance was unpaid. The containers indicated in **Exh.P-3**, for which 30% retention balance was yet to be paid, were the same, as those for which an invoice, **Exh.D-3** was raised by the Defendant (except one No. COSU6174958040 which was not indicated in the ledger **(Exh.P-3)**). PW-1 testified, however, that, the payments in respect of the container in dispute were fully paid. Indeed, it is true, as per **Exh.P-3**, that in respect of the container in dispute, the 30% balance was paid. But, Exhibit D-3 shows that the invoice was raised not for just one container and the amount which remained as balance was to a tune of USD ($) 45,959.43. In the testimonies of

both PW-1 and PW-2, nowhere was it mentioned that invoices raised by the Defendant were disputed.

What the PW-1 stated while under cross-examination was that, because some containers had incurred demurrage charges, the Plaintiff had used the 30% to offset the demurrage amount and also to pay for transporters she had engaged to return some of the Containers. Pw-1 told this Court that had it not be so, the demurrage charges for the unreturned containers would have been too huge to pay. However, as per the contract between the parties (**Exh.P-1**), the obligation to return the empty containers was of the Defendant.

Moreover, when Dw-1 testified in Court, she told this Court that, the Defendant was not involved in that Plaintiff's arrangement with transporters and, further that, the Plaintiff frustrated her business for not paying the Defendant the 30% balance as agreed, which the Defendant had expected to utilise, to pay the transporter who withheld the container in dispute. Taking those circumstances, can it be said that the Plaintiff was equally in breach of the contract?

As I stated earlier here above, breach of contract can be occasioned as well, due to failure of both parties to fulfil their obligations. On the part of the Plaintiff, the evidence does show (see **Exh.P.1** and **Exh.D.3**) that, the Plaintiff was duty bound to pay the Defendant the

balance of 30% for transported containers within 14 days of their return.

In particular, according to **Clause 9.6** of the contract (**Exh.P.1**), it was an agreed payment term under the contract that, invoices raised were to be honoured within 14 days of the return of containers unless disputed. If there was any dispute it was in respect of the one missing container, the subject of this suit but not the rest. Indeed, as I pointed out here above, **Exhibit D-3** was not raised just for one container as the amount was cumulative of the remaining 30% balance, in tune of **USD ($) 45,959.43.**

As I stated earlier, the Plaintiff did not raise any objection against **Exh.D-3** and did not provide reasonable explanations regarding why the amount raised by the Defendant under **Exh.D-3** was not paid. What was provided by PW-1 on cross-examination was that, the balance of 30% was used to pay for demurrage charges and transporters of empty containers. Even so, the Defendant, who had the duty to return the containers, was not, as per the testimony of DW-1, involved in such arrangement. In my view, the Plaintiff ought to as well honour its obligations, failure of which amounts to breach of the same contract. It follows, therefore, that, the Plaintiff was also in breach of the contract.

From the above finding, there comes **the third question** which I had raised and which was: if the

answer to the second question will be in the affirmative, should this Court brush aside that fact or consider it as part of the Defendant's defence? As it may be noted, in her testimony, DW-1 testified that, the Defendant was to have utilised the amount she had raised in the invoice (**Exh.D-3**) to pay for transporters who were to return the empty containers. She also stated that, while other containers were returned the only remaining one, and which is the subject of this claim, was withheld by a transporter after the Plaintiff failed to honour **Exh.D-3**.

The above testimony of DW-1 and the fact that nowhere the Plaintiff disputed that **Exh.D-3** was not honoured when the Defendant raised it to the attention of the Plaintiff for payment, brings to my mind a discussion regarding the principle of "duty to rescue", (as espoused under the American contract law) or the doctrine of "mitigation of damages" as prevalently understood under the common law.

As Melvin A. Eisenberg puts it in his article: **The Duty to Rescue in Contract Law**, 71 *Fordham L. Rev.* 648, 672–75 (2002):

> "If in a contractual context, **B** is at risk of incurring a significant loss, and **A** could prevent that loss by an action that would not require **A** to forgo an existing or potential significant bargaining advantage, undertake a significant risk, or incur some other cost that is either

> significant or unreasonable under the circumstances, then, as a matter of fairness, **A** should be under a duty to take that action."

Moreover, in his article "Damages in contract at common law", (1932) 48 L.Q.R. 90-108, page 106, George Washington puts it that:

> "Mitigation of damage in common law is a concept which came into existence during the eighteenth century, when damages for breach of contract became more strictly controlled by the courts: as a system of rules controlling the assessment of damages began to be created, **the Courts showed an active interest in preventing the plaintiff from saddling on the defendant the consequences of his own stupidity, laxity or inertia.** This attitude, however, was for the most part indirectly manifested, and the law of mitigation as we have it to-day is a very recent growth, still in process of adjustment". (Emphasis added).

From the fairness point of view, therefore, the utility of the above doctrine is seen in the course of mitigation of damages a result of the breach of the contract. Its underlying spirit is that, an affected party cannot recover damages for any loss (whether caused by a breach of contract or breach of duty) which could have been avoided by taking reasonable steps.

It follows, as a response to the third question I had raised *suo motu*, that, this Court cannot just brush aside

the evidence of DW-1 and **Exh.D-3.** Going by how events in their business relations unfolded, each party had contributed to the breach of the terms and condition of the contract signed and executed. As such, the Plaintiff is equally to blame, just as the Defendant and must share the losses.

Having stated so, response in respect of **the fourth question** comes into the stage. This was whether it is appropriate to consider **Exh.D-3** and the rest of concerns which DW-1 raised in this case regarding the conduct of the Plaintiff or the Defendant should have raised all that as counter-claims; and, if not raised as counter claim in her Defence, what is the effect?

Essentially, there is no gainsaying that the Defendant could have raised all those matters as counterclaim. While under cross-examination, DW-1 did assert that the Defendant did not raise a counterclaim in her written statement of defence. That being said, it means that such a failure precludes the Defendant from raising the matters as "counter-claims" against Plaintiff in this pending action.

However, as I stated earlier here above, that does not mean that this Court will not take all such matters into account as part of the defence raised by the Defendant or consider the utility of the Exhibits which the Defendant submitted to the Court in defence of her case. In my view, fairness and justice would demand that such

exhibits and the DW-1's testimony be equally considered in the course of rendering verdict to the matters laid before the Court. For instance, was it appropriate to impound the Defendant's business licenses, thus, putting her out of business? I think this was uncalled for.

From the above lengthy deliberations, whilst the first issue is partly responded to in the affirmative, i.e., that the Defendant is liable to the Plaintiff, as per the provision of Clause 8.1 and 8.3 of **Exh.P-1** to pay demurrages charges due to the Defendant's failure to return Container No. COSU 6207890180, for the sake of fairness and justice, based on the parties' contractual context, the Plaintiff should as well be prevented from saddling on the Defendant the consequences of his own, laxity or inertia when the Defendant raised **Exh.D-3** to her attention. Fairness and justice would demand, therefore, both parties share the blame.

The second part of the first issue is in regard to the contract for transportation and delivery of the Dump Trucks. Perhaps it will be apposite to scrutinise the evidence given by each part in respect of the undelivered Dump Truck. In his testimony, PW-1 told this Court that, although the Defendant was fully paid for the job, she failed to deliver one (1) Big Dump Truck to the intended consignee.

PW-1 tendered in Court **Exh.P-2** which contains the *terms and conditions on transporting the dump*

trucks, as well as the *Bill of Lading* and *packing list*, all of which contained the relevant specification concerning the Dump Trucks CBM.

According to the testimony of PW-1, the Defendant did not perform her obligations of delivering the Dump Trucks as per the contract, meaning that the latter breached the contract and was liable to pay USD ($) 55,607.00 as demurrage charges for failure to deliver the One Big Dump Truck to its consignee.

I have looked at the exhibits **Exh.P5** and **Exh.P.6**, which were tendered in Court by the Plaintiff's witnesses. **Exh.P-6**, dated 18th September 2019 and signed by Pw1, as well as **Exh.P-5**, indicate that, a total of USD ($) 28,889 were paid as 70% of the agreed payment for transport of 10 small Dump Trucks. It is indicated that Nine (9) were not delivered to their port of destination and that, **one (1) was still at Tunduma**. However, according to the Plaint filed in this Court, the nine (9) small Dump Trucks which are shown in Exh.P-5 as undelivered seem not to be in dispute between the parties. What is in dispute is one (1) big Dump Truck said to have been left at Custom's bonded warehouse at Tunduma.

Exh.P-5 does not indicate whether the 30% balance was paid to the Defendant. It shows, however, that, the Defendant needs to refund to the Plaintiff a total of USD 55,607.00. As it may be remembered, PW-1 had

earlier told this Court that, according to the agreement for transportation **Exh.P-1**, 70% of the agreed payments to the Defendant were made payable upon the signing ceremony while the 30% balance was to be paid after the delivery of the Dump Trucks to the consignee.

According to paragraph 8 of the Plaint, the Plaintiff alleges that, the controversy surrounding Dump Trucks includes also delayed delivery of the rest owing to the Defendant's failure to assemble them and, with regard to the undelivered; it was due to the Defendant's unwarranted action of writing to the TRA to stop releasing it to the consignee.

In his testimony, PW-1 tendered in Court **Exh.P-8A** and **Exh.P-8B** (dated 27/03/2019 and 10/01/ 2019 respectively), indicating that, the Defendant occasioned the whole mess. As such, in his final submissions, it was argued for the Plaintiff, that, since the Dump Truck was a transported cargo, the issue of demurrages resulting from the Defendant's delays to deliver it cannot be escaped.

In her testimony, DW-1 admitted that, one big Dump Truck, which was to be delivered to its rightful consignee in Congo DRC, could not be delivered. However, DW-1's testified that, as regard the delayed transport of the Dump Trucks, that, the same was due to wrong cubic measurement (CBM) specifications. DW-1 testified that, that anomaly not only occasioned delays in delivery of the Dump Trucks which had to be re-

assembled, but did also increase the port handling charges and other incidental costs on the part of the Defendant which have never been refunded.

Furthermore, according to DW-1, the mode of transport which had earlier been agreed to be road haulage had to be changed to railroad haulage due to those changes in the CBM specifications.

DW-1 told this Court that the Plaintiff contributed to the delayed and the non-delivery of the one remaining Dump Truck as well. She asserted that, the Plaintiff had communicated to the Defendant that, the Dump Truck was ending up in the hands of a wrong consignee and, thus, demanded that the Defendant avail PW-1 particulars and identifications documents of the person the Defendant claimed to be the consignee, if at all they are as per the Bill of Lading. To back up that assertion, DW-1 submitted **Exh.D-2**, an e-mail dated 17th May 2019.

DW-1 testified, therefore, that, on the basis of their communications, and with the blessings of the Plaintiff's officer, one Herman Sarwatt, (PW-1) the Defendant called upon the Custom Officials at Tunduma border post to withhold the release of the remaining Dump Truck. She tendered in Court as exhibit, a document which were received as **Exh.D.1**.

From the above narratives, DW-1 testified that, the Plaintiff is not entitled to be paid the amount claimed as demurrages resulting from the non-delivery of the Dump

Truck left at Tunduma Custom's warehouse as per **Exh.D-1**. It was DW-1's testimony that, the same should not be paid because, demurrages are not paid for transit cargoes as nothing is expected to be returned to the shipping line, as opposed to cargoes in container for which demurrages are charged for failure to return empty container. DW-1 reasoned that, once delivered the Dump Trucks were no longer returnable to the Plaintiff and there has been no claim for non-delivery from the consignee.

In her closing submissions, the Defendant submitted that, as per the evidence of PW-1 and PW-2, the Defendant performed her contractual obligations in respect of the Dump Trucks, except one which was surrendered to the Customs authorities (the TRA) due to miscommunication made by the Plaintiff to the Defendant in respect of the rightful consignee.

I have examined the above testimonies by the witnesses for both parties concerning whether the Defendant is liable to pay demurrage charges for the Dump Truck which was left stranded at the Custom's bonded warehouse at Tunduma border. In the first place, no evidence was tendered to show that the Dump Truck is still stranded at Tunduma Customs' warehouse. Although PW-1 stated on cross-examination that it was auctioned by the Customs officials, no evidence was availed to that effect.

I note, however, that, her Written Statement of Defence, the Defendant attached two letters REF.DTCL/CCE/260819/02 dated 26th August 2019 and REF.DTCL/CCE/300719/01 dated 30th July 2019. Although these were not tendered in court, they form part of the pleadings and, in my view; this Court cannot be precluded from referring to them.

The first letter requested for change of the clearing and forwarding agent (CFA) from the Defendant to one Destination Cargo Tanzania Logistics of P. O. Box 32292, DSM in the name of Huruma Mwenga, ID NO.DTCL-012 based in Tunduma, on the ground that the Defendant had not been licensed for the FY-2019 and, that, there was still a dump truck withheld ransom by the Defendant due to the latter's dispute with the Plaintiff. The letter was from Feng Fan Surlu, Likasi, Katanga, Congo, DRC.

The second letter was from the same person, and was addressed to the Commissioner General of the Customs & Excise, TRA, requesting for a waiver of 1/10 of Dump Truck en route to Lubumbashi and which was dumped in Tanzania, TZDL-18-1183763; CFA Karaka Enterprises Ltd.

In her Written Statement of Defence, the Defendant annexed as well a TRA communication to Feng Surlu showing that a request for waiver was granted and the said Feng Surlu was required to accomplish clearance within 14 days of the letter dated 21st August 2019. From

such disclosures, I cannot agree, as submitted earlier in the closing submission of the Plaintiff, that, the remaining Dump Truck is still at Tunduma incurring demurrage charges. As I said earlier, although PW- said it was auctioned, there was no evidence either to that effect.

That fact aside, is the Defendant liable to the Plaintiff for payment of demurrage charges? Although DW-1 stated that there was confusion regarding the true consignee, and that, the Plaintiff had contributed to it; I find it difficult to agree with DW-1's testimony.

First, as it was stated by PW-1, **Exh.D-2** was sent to the Defendant with a view to ensure that, if the Trucks were to be handed over by the Defendant, the latter should be sure of getting some relevant information including the owner or consignee name, including Passports, letters indicating that person was a consignee, letter from Tunduma Customs.

In my view, **Exh.D-2** does not indicate that the Plaintiff directed the Defendant to have the Dump Truck surrendered to the Customs Warehouse, but rather, it requires its delivery to a consignee named in the Bill of Lading.

Second, as per **Exh.P5** and **P.6** which PW-1 had tendered to show the expenditure incurred in respect of the 10 big Dump Trucks under a Bill of Landing (**BL**) **No.EUKOSHTZ1532891**, it is clear that, the **BL, which** was received as part of **Exh.P-2** showed who was a

consignee. Besides, a letter (also part of **Exh.P-2**) sent to the Defendant on 07th June 2018, from one **Feng Fan Sarlu** showed that the Defendant was authorized, on behalf of **Kailjee Construction Zambia Ltd**, to clear the 10X Dump Trucks from the Port of Dar-es-Salaam, and, the trucks were to be delivered to **Feng Fan Sarlu** Plant in Kapulo, Congo D.R.C. and the port of destination was Likasi, Katanga Province, in Congo D.R.C.

As such, there cannot be a point that the Plaintiff had a hand in the delay to deliver the one remaining Dump Truck to its consignee since the Defendant had the **BL** and related documents and, the email sent to the Defendant (**Exh.D-2**), was not authorizing the Defendant to surrender the Dump Truck to the Customs warehouse.

On the contrary, according to **Exh.P.8A** and **Exh.P.8B**, it was the Defendant who, on 10th January 2019 (as per **Exh.P.8B**) requested that the Dump Truck be withheld by the Customs officials as she had "misunderstandings" between the carrier (Defendant) and the consignee.

By way of **Exh.P.8A** (dated 27/03/2019, the Defendant did further write to the Customs officials requesting for a non-release of the Dump Truck as the "payment misunderstandings" between the Defendant and the consignee were yet to be resolved. It was not clear what other payments were being claimed but according to the Plaintiff, payments in respect of

transport of the Dump Trucks was 100% paid to the Defendant as per **Exh.P.5** and **Exh.P6.**

It follows, therefore, that, the Defendant is liable to the Plaintiff and should refund to the Plaintiff a total of **USD 55,607.00** in respect of the Dump Truck which she failed to deliver to its consignee in time.

The second issue was:

> Whether, the Container No. COSU 6207890180 was returned to its owner and if not, whether the Defendant is liable to the Plaintiff for its non-return or loss.

As it was partly made clear when I addressed the first issue herein above, there is no dispute that the respective container No. COSU 6207890180 has not been returned to its owner. As I stated earlier, although the Defendant is liable for having breached the agreement governing the parties' relations, the Plaintiff does equally share the blame for having failed to honour invoices raised and which covered other containers not in dispute in this case. As such, both parties share the blame or the loss and that settles the second issue equally in the same way as I partly did for the 1st issue (on the matter regarding breach of the container related contract and the lost container).

The third and final issue is about *relief(s) which the parties are the parties entitled to.* According to the Plaintiff's prayers number (a), (b) and (c), appearing in the Plaint, the Plaintiff has asked this Court to Order the

Defendant to repair all damages sustained on the container No. COSU 6207890180 and return it to the Defendant. The Plaintiff has as well prayed to be paid USD ($) 34, 129.00 as demurrage charges.

However, as I stated earlier, as far as the non-return of the respective container is concerned, both parties share the blame and thus the loss. This is particularly so because, they were both in breach of the same contract. For that matter, the prayers sought as number (a), (b) and (c), appearing in the Plaint, are hereby declined.

Next is the prayers number (d) in which the Plaintiff seeks to be paid **USD ($) 55,607.00** for failure to promptly complete the transportation of the dump trucks. In my view, as earlier stated here above, the prayer has merits and the Plaintiff has proved it to the required standards. That being the case, the prayer number (d) is hereby granted.

The Plaintiff's prayer number (e) is to the effect that, the Plaintiff be paid interest at commercial rate of 21% per annum from the date of filing this suit, until payment in full. In my view, the bank lending interest rates in Tanzania in 2019, according to the available data from the World Bank, were at 16.9%. For that matter, the Defendant shall be liable to pay interest at a rate of 17% in respect of the amount stated in No.2 above to the Plaintiff from date of filing this suit, until payment in full.

The other prayer made in the Plaint by the Plaintiff is the prayer for general damages. However, in the circumstances of this case, that prayer number (f) (for payment of general damages) is denied. I do so because, it will not, in the circumstances as detailed in this case, serve the interests of justice.

On the other hand, I do find it pertinent to make an order that the Plaintiff should forthwith restore to the Defendant the licences and certificates which the Plaintiff confiscated from the Defendant. As I stated herein, I do not see the reason why such were confiscated by the Plaintiff. Since the Defendant did not raise a counter-claim, I will just end up by making such kind of an order.

Finally is the whether the Plaintiff is entitled to the award of costs that being prayer number (g) in the Plaint. In my view, considering the circumstance of this case wherein I made a finding that the Plaintiff has in part a share of blame, prayer number (g) is hereby denied. The just and appropriate order is that of making each party shall bear own costs.

In the upshot, this case partly succeeds as shown here above and, this Court settles for the following orders, that:

1. Concerning the non-returned container No. COSU 6207890180 and the breach of contract relating to it, this Court makes a finding

that, both the Defendant and the Plaintiff are equally to blame for having breached the contract and must equally share the losses. For that reasons, prayers (a), (b) and (c) contained in the Plaint are hereby denied.

2. The Defendant is liable to pay the Plaintiff **USD ($) 55,607.00** due to the Defendant's failure to promptly complete the transportation of one Big Dump Trucks.
3. The Plaintiff's prayer number (e) which is to the effect that, the Plaintiff be paid interest at commercial rate of 21% per annum from the date of filing this suit, until payment in full is granted but the payable interest shall be at a rate of 17% per annum and not 21% per annum.
4. In the circumstances of this case, that prayer number (f) (for payment of general damages) is denied.
5. Considering the circumstance of this case, wherein I made a finding that the Plaintiff has in part a share of blame, prayer number (g) is

hereby denied. Each party is to bear its own costs.

It is so ordered.

DATED AT DAR-ES-SALAAM ON THIS 1ST DAY OF DECEMBER 2021

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DEO JOHN NANGELA
JUDGE

Right of Appeal explained.