

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

COMMERCIAL CASE No. 107 OF 2019

BETWEEN

EAST AFRICAN DEVELOPMENT BANK.....PLAINTIFF

VERSUS

NYAKIRANG'ANI CONSTRUCTION LIMITED.....DEFENDANT

JUDGMENT

Date of last Order: 28/5/2021

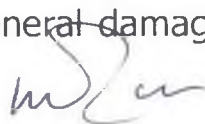
Date of Ruling: 28/7/2021

MRUMA, J.

The Plaintiff commenced this suit against the Defendant vide a Plaint dated 23rd August 2019 and presented for filing in this Court on 12th September, 2019 seeking for the following orders:

- a) Payment of USD 202,036.53 being;
 - i. Rental arrears amounting to USD 104,477.85
 - ii. Interest on Rental arrears USD 71,496.72;
 - iii. Default interest accrued USD 19,983.15;
 - iv. Purchase options (100%) USD 6,078.81

The plaintiff is also claiming for general damages, interest and costs of the case.



It is the Plaintiff's case that on or about the 12th June 2008; she entered into a Lease Agreement (herein after "the Agreement") with the Defendant for the lease of the following equipment;

- i. One new Caterpillar track type Tractor D6G;
- ii. One Brand new Lebherr Hydraulic Excavator;
- iii. One new JCB Back hoe loader and;
- iv. One JCB Hydraulic Roller.

Before signing the said Agreement, the Defendant procured and submitted to the Plaintiff Proforma invoices from suppliers of the leased equipment namely Mantrac Tanzania Limited, Mining and Agriculture & Construction Services Limited and Maha Equipment and Construction Limited. The defendant had no problem with any of the selected suppliers On or about 6th October, 2008, the parties signed and executed an addendum to the Agreement. The said addendum inter alia provided for the modality by which payments of rentals would be effected. According to the Plaintiff the amount payable under the lease was USD **644,000.00** and the Defendant had promised to pay a down-payment of **USD 96,000.00** and thereafter pay **USD 14,156.16** per month for the period of 47 months from the date of delivery. That upon the execution of the Agreement the Plaintiff purchased the said equipment.

Further it is the Plaintiff's case that during execution of the said agreement the Defendant constantly breached the terms thereof by failing to pay the agreed installments. The Plaintiff states that by 19th October 2010 the Defendant had defaulted to pay the installments to the tune of USD 53,831.75 and by 28th March 2014 the outstanding amount against the



Defendant was USD 301,069.99. On or around 2nd June 2014, the Defendant committed itself to settle the said amount by November 2014 but it didn't. On 25th July, 2014 the Plaintiff in terms of the agreement demanded delivery of the leased equipment on or before 31st July, 2014.

Upon receiving the Plaintiff's demand notice which was dated 16th September, 2014, the Defendant promised to settle the amount by 20th December 2014 but it on that date paid USD 10,000.00 only. It is further contention of the plaintiff that the Defendant continued to default despite repeated demands by the Plaintiff to the extent that at the time of filing the suit the outstanding amount interests and purchase option inclusive was at the tune of USD 202,036.53 which the Plaintiff is now claiming.

The Defendant entered appearance and filed a statement of defence dated 29th June, 2020 denying liability. She averred that, the claim made by the Plaintiff against her is baseless and unfounded because the Plaintiff didn't supply the equipment and machines as agreed in the Lease Agreement therefore it is the Plaintiff who is in breach of the Agreement. The defendant states that the plaintiff totally failed to discharge her obligations under the Agreement and did paralyse any attempt to settle it in terms of payments and supply of machines thereto.

At the hearing of the case, the Plaintiff through her sole witness Donald Parmena Sumary (PW1) reiterated the entire content of her pleadings in the Plaint save that he added that the machinery were received and that is why the Defendant were paying for them. Further that, in all correspondences between the parties, the Defendant didn't raise any complaint that the equipment was not delivered to her but to the contrary she was making

promises to pay the outstanding amount which she didn't pay. This according to the plaintiff is an admission that the machines were supplied as per the agreement.

The Defendant's case was supported by the witness statement evidence of Ally Ahmad Salim its Principal Officer who also reiterated the averments in the statement of defence and basically relied on the statement and documents filed in support of the defence. He was not, however, called for cross-examination on the ground that he could not be reached through his mobile phone.

Mr. Kusarika, learned counsel for the Defendant, first sought for an adjournment so that he could track and bring this witness for cross-examination. Later on he changed his mind and requested court to accept the evidence and give it lesser weight as required by the High (Court Commercial Division) Procedure Rules.

Rule 56 (2) of the said Rules obliges a party who rely on witness statement to produce the witness for cross-examination. Under that rule where a party fails to produce a witness for cross-examination court has two options: One court can opt to strike out the statement and two; it can accept it and give it lesser weight. In the present case as stated in my pervious ruling, for the interest of justice I will exercise the second option.

At the final pre-trial conference parties agreed on four issues to be deliberated and determined by the court. The issues are:

1. Whether the Plaintiff supplied the Machines to the Defendant as per Lease Agreement;

2. Whether the Defendant is indebted to the Plaintiff in terms of rental arrears an interest;
3. If the answer to the 2nd issue is in affirmative to what extent is the indebtedness and;
4. To what reliefs are the parties entitled.

The parties subsequently filed submissions which I have considered alongside the evidence adduced.

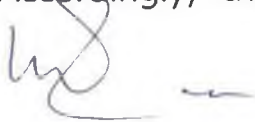
In relation to the first issue, I note from the documents produced by the Plaintiff, a document entitled "Lease Agreement" (Exhibit P1) entered into between the parties herein, that parties signed the said agreement on 12th June, 2008. It is therefore clear that parties herein entered into a Lease Agreement. (exhibit P1).

The said Agreement provides for the terms and conditions that govern it and what was agreed between the parties. The Agreement states in part B of the preamble that the lessee, i.e. the Defendant had requested the Lessor i.e. the Plaintiff to purchase and lease to her a new Caterpillar Track type Tractor D6G, and Brand New Liebherr Hydraulic Excavator, a brand new JCB Back Hoe Loader and a JCB Hydraulic Roller (called the Equipment). The lessor agreed to purchase and lease to the lessee the said equipment. Also as part of Exhibit P1, the Plaintiff produced four Motor Vehicle Registration Cards. I further note that one Caterpillar Backhoe Loader, one Caterpillar Compactor, One Liebherr Excavator and a Caterpillar Tractor Model D6G11 were procured. All these machines were registered in the joint names of the parties. The Defendant didn't lead any evidence to challenge the Plaintiff's claim that she delivered the above mentioned items to her. The fact that

they were registered in the names of the parties suggest that they were intended to be jointly owned by them.

Lease Agreements are Agreements between the Lessor and the Lessee which allows for the conveyance of the property to the tenant (i.e. Lessee) under the contract. It confers usage and control rights to the lessee for the duration of the lease. The ownership of the leased items remains of the lessor. The lessee has an option to buy the equipment at the end of the Agreement if all installments are being paid. However, it is not a contract of sale but contract of bailment as the lessee merely has an option to buy the equipment and although the lessee has the right of using the equipment, he is not the legal owner during the term of the agreement, the ownership of the goods remain with the owner i.e. the Lessor. That is what was agreed in the parties agreement (exhibit P1).

From the evidence adduced in this case and particularly the four motor vehicle registration cards, there can be no doubt that all the equipment was registered in the joint names of the Plaintiff and the Defendant. This reflects condition 22.0 of the Agreement which give the Defendant an option to purchase the leased equipment. Because the Defendant does not dispute the contents of the Agreement and the motor vehicle registration cards (Exhibit P1), coupled with the fact that all along she was paying as per the said agreement I find and hold that the Plaintiff supplied the machines to the Defendant as agreed in Agreement. Accordingly, the first issue is answered in the affirmative.

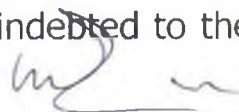


The next issue is whether the Defendant is indebted to the Plaintiff in terms of rental arrears and interest.

According to the Agreement (Exhibit P1), the lease amount was USD 644,000.00 excluding VAT. The first rental payment of USD 96,600.00 was payable upfront and monthly installments of USD 14, 156.16 net of taxes the actual sum which was to be determined after delivery of the equipment. In the evidence of PW1, the defendant paid the first rental of USD 96,000.00 and continued to pay the subsequent installments though with difficulties, It is further evidence of PW1 that at the time of filing this suit the Defendant was in rentals arrears to the tune of USD 104,447.88.

The Defendant does not deny to be in rental arrears with the Plaintiff. In its letter to the Plaintiff dated 21st September, 2015 she impliedly admitted to be in arrears and gave reasons for its failure to liquidate the outstanding amount as being failure by the Government to pay it for the government works it executed.

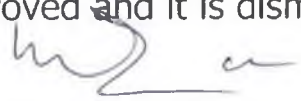
As correctly submitted by the counsel for the Plaintiff, there is ample evidence to the effect that the defendant has been all along promising to pay the outstanding amount which is an acknowledgment to its indebtedness to the Defendant. For instance in its letter dated 28th November 2014 addressed to the Plaintiff, the Defendant requested to settle the outstanding balance of two months period which was expected to end by 31st January, 2015 as they were expecting some payments from the Government. It is the evidence of PW1 that, that promise was not fulfilled. The Defendant didn't lead any evidence to show that she paid all the outstanding rentals and that at the time this case was instituted she was not indebted to the Plaintiff. I



therefore answer the second issue in affirmative, that is to say the Defendant is indebted to the Plaintiff in terms of rental arrears and interest. The question that arises is to what extent is she indebted to the Plaintiff.

There is no dispute that, by 19th October, 2015 the outstanding amount of rental arrears was at USD 127,477.85, Penalties stood at USD 57,728.65 and purchase option of USD 6,078.81 which made the total outstanding payable to be USD 191,285.31 (See the Defendant letter with reference number DAR/PS/I6F/703/II which was admitted as part of Exhibit P1). The Defendant admitted indebtedness to that extent in her letter dated 21 September, 2015 (also admitted as part of Exhibit P1) in which she was responding to the Plaintiff's letter referred to above. At the date of filing the case the Plaintiff was claiming USD 104, 477.85 as rental arrears which means some payments were done to reduce the outstanding amount from USD 127, 477.85 which were being claimed in October, 2015 to USD 104,477.85 due at the time of filing this suit. No evidence was offered to challenge this amount. This court therefore finds that the Plaintiff is entitled to the claim of USD 104, 477.85 as rental arrears as claimed in the plaint.

The Plaintiff is also claiming USD 71,496.72 as interest on Rental arrears. No evidence was led to show how this figure (i.e. USD 71,496.72) was arrived at. I note from the Lease Agreement document (part of Exhibit P1) that it provided for an implicit interest at the rate of 10.12% per annum. This implies that there must be a base over which such interest is calculated. Such base has not been disclosed in this case. Accordingly I find that the claim interest on rental arrears had not been proved and it is dismissed.



The Plaintiff is further claiming a default interest of USD 19,983.15. It is clear from the parties agreement that the Lease Agreement carried a default clause. Clause 14.0 of the Agreement covers events of default and Clause 15.0 covers remedies. Under Clause 15.0 (b), the Agreement (Exhibit P1) provides:

"In the event of default by the lessee as herein contained, the lessee shall pay to the lessor all expenses (including legal cost on full indemnity basis), incurred by or on behalf of the lessor in ascertaining the whereabouts or taking possession of, preserving, insuring and storing the Equipment and any of any legal proceedings by or on behalf of the lessor to enforce the provisions of this Lease Agreement"

I have thoroughly read clause 15.0 of the Agreement and I am unable to find anywhere in that clause where default interest is payable. On the other hand it would appear that interest on rentals due but not promptly paid is covered under Clause 3.0 of the agreement under the head "Rentals", where it is provided under Clause 3 (c) that:

"Without prejudice to the lessor's right to distrain for the rentals as it deems fit, the lessee shall be charged interest on any rentals or any other payment accrued and due but not promptly settled at the rate of 0.5% per month from the due date until it is fully paid"

As stated while dealing with interest on rental arrears claimed, there is no evidence laying the basis of how the claimed amount of USD was arrived at. How many months had the lessee defaulted and what was the amount due? Since no basis has been laid as to how that figure was arrived at, I find that the claim under this head has not been substantiated and I dismiss it.

The Plaintiff is claiming for interest on the decretal sum at the rate of 10% from the date of filing the suit to the date of judgment and thereafter at the court rate to the date of final settlement of the decree. Section 29 of the Civil Procedure Code [Cap 33 RE 2019] vests discretionary powers in court to order interest to be paid upon the date of judgment and states that "every judgment debt shall carry interest at the rate prescribed from the date of the delivery of the judgment until the same shall be satisfied.

I have no problem with the second part of the provision of section 29 which subjects judgment debts to interest at the rate "prescribed", although I am not aware of any rate prescribed so far, The practice of the court has been to award 7% per annum where the currency involved is Tanzania Shillings. In the present case the currency involved is United State of America Dollars which is among the powerful currency in the world economy. Awarding an interest rate of 7% per cent which is awardable in shillings will not be realistic. I think an interest of 2% per annum from the date of judgment to the date of settlement of the decretal sum will be appropriate in the circumstances of this case.

Regarding interest from the date of filing the suit to the date of judgment, The Plaintiff didn't specify whether the interest is claimed on the day to day, monthly or annual (i.e. per annum) basis. Because of that alone,

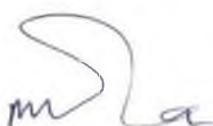
he claimed interest that is where I find some problems. is denied. This court cannot make an order without being clear on which base the same shall be calculated.

Finally, the Plaintiff is claiming for general damages. General damages are those damages which cannot be mathematically assessed at the date of trial. To succeed in general damages a party who claims it must satisfy the court that he/she suffered damages that cannot be mathematically estimated. For instance personal injuries or pains suffering and loss of amenity etc. In the case at hand there is no iota of evidence to suggest that the Plaintiff's bank suffered any such injuries. I therefore decline to award general damages in this case.

In summary, therefore judgment is entered for the Plaintiff and against the Defendant as follows:

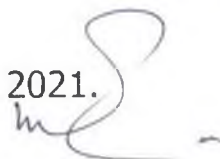
- i. The Defendant shall pay to the Plaintiff USD 104,477.85;
- ii. The decretal amount shall carry court's interest at the rate of 2% per annum from the date of judgment till payment of the decreed sum in full.
- iii. The Plaintiff is awarded costs of the case which shall be taxed by the Taxing Officer.

Order accordingly.


A.R. Mruma,

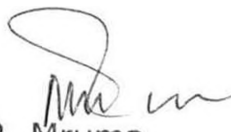
Judge.

Dated at Dar es Salaam this 28th Day of July, 2021.



Judgement delivered this 28th day of July, 2021 in presence of Mr. Gabriel Simon Mnyele Advocate for the plaintiff and Mr. Kusarika, Advocate for the defendant.




A.R. Mruma,
Judge.

Dated at Dar es Salaam this 28th Day of July, 2021.