

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY**

CIVIL CASE NO. 138 OF 2021

**ASIAFRICA INTERNATIONAL LOGISTICS AND
TRADING COMPANY LIMITEDPLAINTIFF**

VERSUS

MBUYULA COAL MINING LIMITED DEFENDANT

RAJESH H. WILLIAM..... DEFENDANT

IDD KAJUNADEFENDANT

JUDGMENT

21st February & 17th March 2023

MKWIZU, J;

The plaintiff and the defendants had on 8th June 2019 entered into an agreement in which the defendants hired from the plaintiff three Dump Trucks and three excavators for the purpose of excavating, mining, and transporting coal at the defendant's coal mines located at Mbuyula Village in Mbinga District within Songea Region. Each of the Dump Track was hired at 300 USD per day and the excavator was hired at the agreed price of 150 USD per day payable after a month period of use that would have ended on 10 /7/2019. The plaint avers further that, the defendant successfully handled the tracks and excavators on 10/6/2019 ready for the business.

Unfortunately, the defendants defaulted to make good payments as agreed despite of the several invoices by the plaintiff necessitating the issuance of a notice of termination of the contract by the plaintiff under

clauses 2 and 4 of the contract served to the defendants on 29/7/2019 hence this suit by the plaintiff claiming for the following reliefs:

- a) *Payment of Tsh 170,573,493/= one hundred seventy-three thousand four hundred ninety-three costs for the hired excavators and dump trucks*
- b) *Interest on the principal sum at a bank rate of 25% per annum from 10th July to the judgment date*
- c) *Compensation and general damage to the tune of 100,000,000 resulting from breach of business contract.*
- d) *Interest on the decretal sum at the court's rate of 12% per annual from the date of judgment till full and final payment.*
- e) *Costs of the suit.*

The suit was however ordered to proceed *ex-parte* after the failure of the defendants to appear in the mediation under Order VIII Rule 29 of the CPC, (CAP 33 RE 2019) hence this *ex-parte* judgment. The plaintiff at all material times enjoyed the legal services of Deriki Kahigi, a learned advocate.

In proof of her case, the plaintiff called a total of two witnesses. PW1 is one, Hamisi Shabani Sarungi, the Managing Director of the plaintiff's company who under oath and through his witness statement adopted on 21/2/2023 as part of his evidence in chief told the court that, on 8th June 2019 the plaintiff's company entered into and executed a business contract with the 1st defendant's company at the instance of the 2nd and 3rd defendant, 1st defendant's directors with which the defendant's company hired from the plaintiff, three Dump Trucks and four Excavators for excavation, mining, and transportation of coal at their coal mining at

Mbuyula village in Mbinga- Songea and that the contracture charges for each Dump Truck were 150 USD and 300 USD per each excavator per day payable after 30 days of contractual operation, which is Tsh 170,573,493/= via the plaintiff's Bank Account No 3390460012 maintained at KCB Bank Tanzania.

It was PW1's further testimony that immediately after the contract, the three executors and three trucks were taken by Defendant to the mining site leaving behind one excavator at Plaintiff's Yard without any notice to plaintiff contrary to the contract. And despite several invoices and demands by the plaintiff, the defendant failed and /or neglected to pay the amount due which as of 10th July 2019 stood at Tsh. 170,573,493/= charges for the hired equipment for the period of 30 days of the operation of the contract at issue, that is 10th June 2019 to 10/7/2019.

That on 30/7/2019, the defendant left unattended at the mining site Mbuyula Songea all the hired trucks and executors which the plaintiff picked and recovered in possession at his own costs. By this act, PW1 said, the defendants were in breach of the terms of the Equipment hiring contract entered by the parties herein. In proof of the above facts, PW1 tendered the following exhibits namely, the Equipment hiring contract dated 8/6/2019 between Asafrica International Logistics and Trading Company Limited and Mbuyula Coal Mining limited as exhibit P1. Copies of invoices Nos INV00013 dated 2/7/2019, INV00014 dated 2/7/2019, INV00012 dated 2/7/2019; INV00016 dated 10/7/2019; INV00015 dated 10/7/2019; INV00015 dated 10/7/2019; INV00017 dated 15/7/2019; INV00017 dated 15/7/2019; INV00018 dated 15/7/2019; INV00020 dated 24/7/2019; INV00021 dated 24/7/2019; INV00024

dated 30/7/2019; INV00025 dated 30/7/2019 and original copy of City Urgent Mail delivery Note No. 47042 dated 01/8/2019 as exhibit P2 collectively. He lastly urged the court to enter judgment and decree against the defendant as prayed in the plaint.

PW2 is one Faraji Yahya Ramadhani, operation Manager of the plaintiff company who recounted that, on 10, June 2019, he was informed by the Managing Director of the Plaintiff company, one HAMISI SHABAN SARUNGI(PW1), that the company had entered into the business contract with the Defendants and that the Defendants hired from the Plaintiff company, 3 DUMP TRUCKS, and 4 EXCAVATORS for the purpose of excavating, mining and transportation of coal at the Defendant's coal mining located at Mbuyula village in Mbiga district within Songea Region on the contractual charges of USD 150 for each hired dump truck and 300 USD for each hired excavator per day.

This witness stated that acting under the instruction of the Managing Director, (PW1), he went to the Plaintiff's yard, at Mwenge, Dar es Salaam, where the excavators and dump trucks were kept and released to Defendants, 3 dump trucks and 4 excavators whereby the defendant with their drivers, took 3 excavators and 3 dump trucks to Mbiga, Songea, leaving one excavator at the Plaintiff company yard without assigning a reason for not picking the remained excavator.

It was PW2's further evidence that he again later learned through the plaintiff's Managing director (PW1), that, the Defendants had defaulted and refused to pay to Plaintiff, all the contractual charges of the hired excavators and dump trucks pursuant to the contract.

He was then instructed by PW1, to collect all the hired equipment from Mbinga Songea, at the defendant's site. He said, he traveled to Songea on 30/7/2019 where he found the Trucks and excavators left unattended by the defendants, at the defendant's mining site and managed to collect them at the plaintiff's costs, and brought them back to Dar es Salaam.

Three issues were framed before the commencement of the hearing.

- i. Whether there was a business contract between the plaintiff and the defendant
- ii. Whether the defendants breached the contract
- iii. To what relief the parties are entitled?

The plaintiff's evidence presented in court affirms the first issue. The PW1 and PW2's evidence is to the effect that there was entered a valid contract between the plaintiff and the first defendant for the hire of the four Excavators and four Dump Trucks signed by the parties on 8/6/2019 - exhibit P1.

The second issue requires this court to investigate whether there is a breach of the said contract by the defendant. PW1 has strongly testified that the defendant was supposed to pay a total of Tsh. 170,573,493/= as a 30 day charges for the use of the hired equipment which was charged at 150 USD for each of the Dump Trucks and 300 USD for each hired excavator per day, the payment which became due on 10th July 2019 from the beginning of the contract on 10/6/2019 the obligation which the defendant has to date neglected/ and /or refused to honor.

The important issue is whether the defendants acted as alleged and if yes, whether their acts amount to a breach of any of the agreed terms

in the contract. I have carefully examined the agreement by the parties herein dated 8/6/2019 (Exhibit P1). Clauses 2, 4, and 5 states in clear terms the amount charged, time, and mode of payment. I quote for convenience:

1. "That the owner supplies and the Hirer hires the Equipment upon and subject to covenants hereunder: -

(i) Charges payable for the Dump truck (HOWO TIPPERS) shall be One Hundred and Fifty United States Dollars (150 USD) per Twelve working hours a day.)

(ii) Charges payable for the EXCAVATORS shall be Three Hundred United States dollars (300 USD) per Twelve working hours.

(iii) The Owner, aside from Twelve (12) working hours a day as agreed, avails to the Hirer One extra hour for relocation of equipment which shall not be charged.

(iv) That, parties herein mutually agree that, for any overtime consumed during the performance of this agreement, payments thereto shall be under negotiation and approval of the parties.

2. That, at any material time this agreement is in force, where the equipment is used by the Hirer for operation outside the mine (for transportation purposes), the Hirer shall pay the Owner a sum of Tanzania Shillings One Hundred Seventy Thousand only (Tshs. 170,000/-) per each trip.

(i) Upon performance of this mode of operation, the Hirer's liabilities shall be limited to costs for fuel only, and all other costs, expenses, services, and

incidentals thereto in respect of the equipment shall be borne by the Owner.

- 3. That all payments as stipulated under clause 2(i-v) above, and all other payments related to the execution of this agreement between the parties herein, shall be paid to the Owner after a lapse of Thirty (30) days of operation by the Hirer.*
- 4. That all payments arising from this agreement shall be paid to Owners via Account No 3390460012 KCB BANK TANZANIA under the name of ASIAFRICA INTERNATIONAL LOGISTICS AND TRADING COMPANY LIMITED"*

There is no ambiguity in the terms above. And since parties had freely consented to it, each of them was bound to comply.

A careful examination of the entire plaintiff's evidence reveals that the defendants, as per the contract handled the equipment except for one excavator which was left without any notice to the plaintiff, they used the equipment without paying the agreed sum at the end of the agreed period of 30 days. In the absence of any evidence to the contrary, I find the plaintiff's evidence sufficient to establish a breach of the terms of the contract entered into by the parties on 8th June 2019 particularly clauses 2 and 4 by the defendants.

The court on this aspect is guided by section 37 of the Law of Contract Act, [Cap 345 R.E 2019]

"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."

And the principle of the sanctity of the contract where the court is mandated to respect parties' intentions expressed by the terms of their agreement unless it is contrary to public interest and security. The court of appeal in the case of **Simon Kichele Chacha vs Aveline M. Kilawe**, Civil Appeal No. 160 of 2018 [2021] TZCA 43, where it was held: -

*"It is settled law that parties are bound by the agreements they freely entered into, and this is the cardinal principle of the law of contract. That is, there should be the sanctity of the contract as lucidly stated in **Abualy Alibhai Azizi v. Bhatia Brothers Ltd** [2000] T.L.R 288 at page 289 thus: -*

"The principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud (actual or constructive) or misrepresentation, and no principle of a public policy prohibiting enforcement".

The second issue is also affirmed.

The next issue is on the reliefs. Having concluded that the defendants are in breach of the terms of the agreement for failure to pay charges for the hired equipment, I find no reason why the plaintiff should not be awarded the claimed amount of Tsh. 170,573,493/= as specific damages, plus interest at a commercial rate of 20% from the date of filing the suit to the date of judgment.

The issue of general damages is settled. These are awarded at the discretion of the court which is usually exercised by giving reasons after

consideration of evidence in the record. See for instance the cases of **Tanzania Saruji Cooperation vs. African Marble Company Ltd.**, 5 (2004) T.L.R 155, and Anthony **Ngoo and Davis Anthony Ngoo v Kitinda Kimaro**, Civil Appeal No. 25 of 2014) (unreported) to mention just a few.

It is evident from clause one of the party's contracts that the duration of the agreement by the parties was for the period of twelve (12) months from 10th June 2019 when the plaintiff was to generate income from its performance.

However, as explained, the contract was terminated on 29th July 2019 on its second month of survival due to the defendant's failure to pay the agreed sum. Certainly, the defendant's acts had incommoded the plaintiff by frustrating her business expectations, soaking her to unanticipated direct and indirect expenses of recovering the equipment from Songea back to Dar es Salaam. All this justifies general damages claim which is awarded to the tune of 30,000,000/=.

To sum up, the plaintiffs are granted the following reliefs:

- i. Payment of Tsh. 170,573,493/= being the charges for the hired equipment.
- ii. Payment of interest on (i) above at the commercial rate of 20% chargeable from the date of filing the suit to the date of judgment.
- iii. Payment of general damages to the tune of Tsh. 30,000,000. /=-

iv. Payment of interest on the decretal sum at the court's rate of 12% from the date of judgment to the date of full payment.

v. The plaintiffs also awarded the costs of this suit.

It is so ordered.

Dated at DAR ES SALAAM this 17th day of March 2023



**E.Y Mkwizu
JUDGE
17/3/2023**

Court: Right of Appeal explained



**E.Y Mkwizu
JUDGE
17/3/2023**