

**IN THE HIGH COURT OF TANZANIA  
(COMMERCIAL DIVISION)  
AT DAR ES SALAAM.**

**COMMERCIAL CASE NO. 107 OF 2021**

**GAPCO TANZANIA LIMITED.....PLAINTIFF.**

**VERSUS**

**CITI BANK TANZANIA LIMITED.....DEFENDANT.**

**JUDGMENT.**

**Date of Last Order: 11/07/2022.**

**Date of Judgment : 29/8/2022.**

**MARUMA J.**

The Plaintiff **GAPCO TANZANIA LIMITED** a legal entity incorporated under the laws of Tanzania is carrying on the business of petroleum products and the Defendant CITIBANK TANZANIA LIMITED is dealing in banking entered into a dispute resulted from the breached of terms of the Letter of Credit (the LC) by debiting a total of USD 816,335 from the Plaintiff's account number 100792029 at CITIBANK bearing the names GAPCO TANZANIA LTD.

The Plaintiff's claims against the Defendant are:

- i. A declaration that the Defendant breached the terms of the

Letter of credit by debiting a total of USD 816,335 from the Plaintiff's account number 100792029 at CITIBANK bearing the names **GAPCO TANZANIA LTD** in honouring the letter of credit numbered 5279600195 without being issued with the signed commercial invoice as required under the Letter of credit.

- ii. A declaration that the Defendant is liable to refund a total of USD 816,335 negligently debited from the Plaintiff's account number 100792029 at CITIBANK plus the interest thereon.
- iii. Interest
- iv. Costs of this suit.

Parties herein were represented by Mr. Ramadhani Karume, Advocate for the Plaintiff and Mr. Gaspal Mwanyika, Advocate assisted by advocates Mr. Pascal Mwanyika and Miss Haisa Rumanyika for the Defendant.

To determine this suit, the Court framed two issues to wit:

1. Whether there is a breach of the terms of the LC, UCP 600 and documentary credits and guarantees standby letters of credit on complying presentation.

2. If the above issue is answered is negative or positive what are the reliefs entitled to the parties.

The background of issues in controversial were laid down by the counsel representing the parties herein in their opening statement provided under Rule 48 of the High Court (Commercial Division Procedures) Rules of 2012. The brief facts and issues of the dispute was arisen from security for purchase of 500 metric tons of petroleum oil worth USD 816,335.00 which had to be supplied to the Plaintiff by the beneficiary named Alkemistry BNCC. The letter of credit with no. 52726000195 amounting 816,335.00 USD was issued on 1<sup>st</sup> March 2021 with the terms among them, the documents required to be obliged by the Defendant in making payment to the beneficiary. The required documents include a letter of credit upon presentation of signed commercial invoice which could either be email/ hard copy certificate of origin either original or copy, certificate of quality issue on arrival on ships composite quality at d -sport Dar es salaam issued by independent Inspector which could be photocopy email or hard copy. In circumstance where the above documents are not available then the bank was instructed under the letter

of credit to make payment against presentation of Signed Commercial Invoice (email pdf/fax copy acceptable) and Seller's Letter of Indemnity.

On the execution of the supplier arrangement, there were ups and down occurred between the Plaintiff and ALCHEMIST ENERGY TRADING DMCC "the beneficiary of the Letter of credit" which included the failure of delivery of the goods between the agreed dates of 3<sup>rd</sup> and 5<sup>th</sup> days of March, 2021 and postponement of the delivery date to 14<sup>th</sup> March 2021, which was equally not honored despite of further extension of the time of delivery of the goods between 15<sup>th</sup> and 17<sup>th</sup> May, 2021, which led to the termination of the supply contract. It was alleged that the Plaintiff took effort to alert the Defendant and stop her to honor the payment under the letter of credit and throughout this dealing the Defendant had not issued the signed commercial invoice which shall only been issued with seller letter of indemnity and provisional invoice.

On 13<sup>th</sup> July 2021 while the Defendant knowingly the terms of payment under filed 46A of the letter of credit negligently debited a total amount of USD 816,335 from the Plaintiff account No.100792029 at City Bank Tanzania Limited bearing the name of Gapco Tanzania Limited. This has resulted to a cause of huge loss to the Plaintiff's business as has yet

received the consignment subject to the letter of credit from the beneficiary.

This was followed by the opening statement by Mr. Nyika who denied the Plaintiff's claims against the Defendant and argued that the payment by the Defendant was made against the compliance presentation under field 47A.8 of the letter of credit which permitted the Defendant to pay against the provisional invoice if at the time of utilisation of the LC the quantity of the goods were not known. The counsel stated that there are three scenarios which the payments can be made, one is what have been referred by the Plaintiff. The other scenario is if filed 47A.8 and other incidents as required under filed 46A if those documents are not available then payment can be done through the use deed of indemnity. For the purpose of this case the payment was made in terms of filed 47A on the basis that at the time utilisation the arrival quantity was not known.

To argue the case each party called one witness. Ms. Getrude Mpangile, the Relationship Manager of GAPCO (PW1) from the Plaintiff's side who supported her testimony by documentary evidence include the letter of credit No. 5272600195 (exhibit P1), provisional invoice SORD0000125 (exhibit P2 collectively), set of emails correspondences

(exhibit P3 collectively), document dated 17<sup>th</sup> July 2021 as the transaction between Defendant and the Plaintiff Advice Report (exhibit P4) and customs and practice document as (exhibit P5). On the other side, Mr. Michael Mungure, head of treasury and trade at City Bank ( DW1) testified against the Plaintiff's claims supported by documentary evidence include remittance letter dated 4<sup>th</sup> March 2021 (exhibit D1), Document Arrival Notice dated 5<sup>th</sup> March 2021(exhibit D2), a list of emails dated 3<sup>rd</sup> November 2021 (exhibit D3), copy of the amendment of the LC dated 21<sup>st</sup> April 2021(exhibit D4), Statement of transaction details dated 13<sup>th</sup> July 2021(exhibit D5), A copy of Shipping and Supply contract for Tender No. PBPA/PPP/PMS/C3-KJO/02/2021 for supply of more gas for the months of February(exhibit D6), A copy of the letter of credit issued Numbered 5271600140 accompanied with provisional invoice dated 17<sup>th</sup> January 2019(exhibit D7) and copies of email correspondences between the Plaintiff and the Defendant(exhibit D8).

Addressing on the first issue whether there is a breach of the terms of the LC, UCP 600 and documentary credits and guarantees standby letters of credit on complying presentation. It was the evidence of PW1 that following the Letter of Credit issued on 1<sup>st</sup> March 2021 (exhibit P1),

the rights and obligations of the Plaintiff and the Defendant were governed by the latest version of the Uniform Customs and Practice for Documentary Credit refers thereafter as UCP 600 (exhibit P5). PW1 under paragraph 9 of her witness statement testified that on 13<sup>th</sup> July 2021 Defendant debited a total of USD 816,335 from the Plaintiffs account number 100792029 at CITIBANK bearing the names of GAPCO TANZANIA LTD in honouring the letter of credit numbered 5279600195 using presentation of provisional invoice and the letter of indemnity against a non-complying presentation of documents contrary to Field 46A of the letter of credit (Exhibit P-1). According to the Plaintiff, the Defendant to make to make payment under field 46A, it requires presentation of Signed Commercial Invoice (email pdf/fax copy acceptable) certificate of origin (copy/photocopy), certificate of quality issued on arrival on ships tank composite quality at disport Dar es salaam issued by independent inspector (copy/photocopy/email pdf/fax copy acceptable) and Certificate of quantity issued on vessels arrival, quantity at Dar es salaam issued by independent inspector copy/photocopy/email pdf/fax copy acceptable). In a situation where the above documents are not available then the bank was instructed to make payment upon presentation of Signed Commercial Invoice (email pdf/fax copy acceptable) and Seller's Letter of Indemnity

as stated in paragraph 6 of her witness statement.

Contesting this evidence, the Defendant by the evidence of DW1 testified that the payment made under the LC to the Alchemist were correctly made against a compliant presentation of the documents as provided for under Field 47A8. DW1 under paragraph 21 of his statement clarified that field 47A8 allows payment to be made against a provisional invoice, in the circumstances if the arrival quantity and or price is unknown thus why, on 3<sup>rd</sup> March 2021 the beneficiary, Alchemist presented documents to the confirming bank (CEP) including a provisional invoice with provisional price and quantity instead of commercial invoice because the arrival quantity and the price of to be supplied under the supply contract (Exhibit D7) at the time of Alchemist utilization of the LC on 5<sup>th</sup> March 2021 the ship had not arrived at the port of Dar es Salaam and the arrival quantity envisaged in field 47A8 was not known.

DW1 also testified that the Plaintiff did not dispute the documents presented sent to her by the Defendant through an email on 16<sup>th</sup> March 2021 (exhibit 6) apart of being informed by the Defendant. The Plaintiff was also informed that the Defendant would remit 1005 of the documents amount as per terms of the LC and UCP 600. Moreover, PW1 during cross examination adduced the evidence that they became aware of the

documents (Exhibit P2) after the dispute arose. Although she admitted that Mr. Marshal Msuya who handled the position and responsible for approval of LC by that time was aware of what was going on but the information in the mail do not specifically show which documents as the Defendant identified them in Court to be (exhibit D3). However, PW1 insisted that by the time of utilization of LC, the quantity and price were known but the ship was not arrived and there was no delivery.

Evaluating the evidence and arguments adduced on compliance presentation under field 46A and 47A.8 in exhibits P1 reads *mutatis mutandis* with exhibit D7 in regard of the payment in dispute which I wish to produce as follows;

*Filed 46A "...(Document required)*

- 1. Signed commercial invoice,*
- 2. Certificate of quality issued on arrival on ship tank composite quality at disport Dar es Salaam issued by Independent Inspector.*
- 3. Certificate of quantity issued on vessels arrival quantity at Dar es Salaam by Independent Inspector.*
- 4. Certificate of origin.*

*In the event the above mentioned documents are not available at the time of LC utilization, then payment is to be made against presentation of:*

*A. Commercial Invoice*

*B. Seller's letter of indemnity issued by the beneficiary*

*47A.8 ...In case arrival quantity and or the price is not is not known at the time of LC utilization, the beneficiary is allowed to present a provisional invoice under this LC with provisional price and provisional quantity.*

*In the event a provisional invoice is raised, the letter of credit should be available at two stages, that provisional payment at 60 calendar days from the first day of delivery Laycan (first day of delivery laycan to count as day one) based on provisional invoice and differential payment against final invoice shall be paid on the fifth bank working day after presentation of final commercial invoice at the nominated bank within LC..."*

As indicated above, I agree that there are two scenarios for payments to be made in utilization of the LC as argued by the Defendant and confirmed by the Plaintiff. The question to be answered from the two

scenarios is whether the Defendant was complied with compliance presentation so not to amount the breached of the LC terms.

As couched by the Defendant that presentation of documents made for the payment was in compliance of field 47A.8 as the quantity and/or price of the were not known by the time of utilisation. Relating this evidence with above terms in the LC. It is the finding of this Court that the provision used is applied only where there is the quantity and/ or the price is not known. Also, the letter of credit should be available at two stages. One provisional payment at 60 calendars days from the first day of delivery and two the differential payment against final invoice after presentation of final commercial invoice at the nominated bank.

In the present case there is no dispute that the Defendant confirmed that by the time the beneficiary was utilising the LC, the ship was not arrived at Dar es salaam port as indicated in paragraph 23 of DW1 witness statement. The condition which needs to be complied with under field 47A.8. Hence since the ship was not arrived at Dar es salaam port the argument that price or quantity were unknown cannot only be a basis of compliance presentation. The scenario could be full complied with if the ship would be arrived at Dar es Salaam port. This is also supported by the

Article 14 of the Uniform Customs and Practice for Documentary Credits 2007 Revision (UCP) exhibit P5 on standard for examination of documents which requires the confirming bank and the issuing bank must examine a presentation to determine whether or not the document appears on their face to constitute a complying presentation.

Looking at the present case this duty was not carefully exercised by both confirming bank and issuing bank regardless of the argument raised by the Defendant that they sent an email to the Plaintiff on 16<sup>th</sup> March 2021 to confirm that. As per article 14 this was not a duty of the Plaintiff as also admitted by DW1 during his cross examination.

Moreover, I perused and find the documents presented to the confirming bank as evidenced in (exhibit D7) a letter of credit attached with provisional invoice and import letter of credit showing transaction status to be of processed without presentation of transport documents subject to article 19,20,21,22,23,24, or 25 which must be made by the beneficiary or on his behalf. The beneficiary did not attach either of them as required under article 14 (c) of the UCP. Nevertheless, the Defendant's argument that the LC is irrevocable and the Plaintiff never produced any document to indicate that the beneficiary had consented to the

cancelation of the LC. All these are baseless based on the presence of non-compliance of mandatory requirements and responsibilities of the parties into an agreement.

The Plaintiff's argument, that the Defendant did breach term 46A of the LC as the price and quantity was known. I support this argument based on the LC (exhibit P1) which shows under field 45A the quantity of Mogas was 1520 MT also exhibit P2 a letter of indemnity and commercial invoice and provisional invoice as presented by the beneficiary to the Plaintiff on 3rd March 2021. Thus, in the presence of that quantity, the documents to be presented should be as per field 46A. This was also admitted by DW1 while he was cross examined on the understanding of the provisional invoice, which applies when the arrival quantity is unknown and the quantity can also be increased or decreased.

In addition to the above, it is also very strange that though the beneficiary presented the provisional invoice, the Defendant accepted the payment of the full LC amount, which was USD 816,335. This is contrary to the alleged field 47A.8 which provides two stages of payments that provisional payment at 60 calendars days from the first day of delivery and the differential payment against final invoice after presentation of

final commercial invoice at the nominated bank. This was also admitted by DW1 when he was cross examined that there was no final payment because there was no delivery. All these observations are contrary to the principle of law of contract which requires parties into an agreement to be bound by their terms as provided under **section 37(1) of the Law of Contract Act, Cap. 345 R.E 2019**, (“LCA”) that;

*“ ....Parties to a contract must perform their respective promises, unless such performance is dispensed with or excused under the provisions of the LCA or and other written law....”*

Also, as stated in case of **Simon Kichele Chacha vs Aveline M. Kilaue**, Civil Appeal No. 160 of 2018 (Unreported). The Court, at page 8, stated:

*“...It is a settled law that parties are bound by the agreements they freely entered into, and this is the cardinal principle of the law of contract....”*

Taking into account the role of the Court into contract as guided in the case of **Unilever Tanzania Ltd v. Benedict Mkasa trading as BEMA Enterprises**, Civil Appeal No. 41 of 2009. The Court of Appeal discussed on restriction for the courts to change those clauses which the

parties have agreed between themselves but to enforce those clauses where parties are in dispute.

I therefore, have to observe what the parties have agreed and not otherwise outside the terms in the Letter of Credit issued on 1<sup>st</sup> March 2021(exhibit P1).

Moreover, similar circumstances have been addressed by my learned brother Hon. Magoiga,J in the case of **Total Tanzania Limited vs CITI Bank Tanzania Limited**, Commercial Case No.108 of 2021 which came out with the findings that there was a breached of terms of LC due to the findings similar to this present case of which I concurred with him on those findings and observations made as discussed herein.

Based on the positions as discussed and findings, I have no hesitation to rule out that issue no. 1 is answered in affirmative which moving me to the second issue of what are the reliefs entitled to the parties.

Having found issue no. 1 to be positive, I have no other option to offer rather than awarding the Plaintiff the relief sought based on the breach of LC terms, save for the relief of general damage, which is of the discretion right of this Court. Considering the position of the law as

provided under Part VII of the Law of Contract Act, Cap. 345 of the Revised Edition, 2019. Section 73 (1) thereof provides that,

*"... when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss or damage caused to him by the other party..."*

Taking into consideration the loss suffered by the Plaintiff, as guided above, I proceed to award general damages of USD 200,000.

As for the aforesaid observations and findings, I find the Plaintiff has proved her case on the required standard in civil litigation that is based on balance of probabilities and I hereby proceed to enter judgment and decree against the Defendant and declare as follows:

- a) The Defendant has breached the terms of the Letter of credit by debiting a total of USD 816,335 negligently from the Plaintiff's account number 100792029 at CITIBANK bearing the names GAPCO TANZANIA LTD to honour the letter of credit numbered 5279600195 without being issued with the signed commercial invoice as required under the Letter of credit.
- b) The Defendant is liable to refund a total of USD 816,335 debited from the Plaintiffs account number 100792029 at CITIBANK plus

the interest thereon.

- c) The Defendant to pay interest of USD 816,335 at the rate of 23% per annum from the date of filing the suit to the date of Judgment.
- d) The Defendant to pay general damages to a tune of USD 200,000/=
- e) The Defendant to pay an interest on the decretal amount at the rate of 7% per annum from the date of Judgment till the date of full and final satisfaction of the decree.
- f) The Defendant be ordered to pay costs of this suit.

**Dated at Dar es Salaam this 29<sup>th</sup> day of August 2022.**



**Z.A.Maruma.**

**JUDGE**